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# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD

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LAW AND THE LAWYERS.

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# THE ALBANY LAW JOURNAL:

A WEEKLY RECORD OF THE LAW AND THE LAWYERS.

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## The Albany Law Journal.

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ALBANY, JANUARY 7, 1888.

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### CURRENT TOPICS.

DOCTORS are not the only professional persons who disagree. For example, here is the *English Law Magazine and Review* calling for a repeal of the relaxation of the rule that one indicted for crime may not testify in his own behalf, because it has made no difference in the number of convictions; while on the other hand, Mr. W. Morton Grinnell in the *Tribune* condemns the narrowness of the common-law rules of evidence because under them Jacob Sharp got off. In regard to the former we may be allowed to suggest that the reason that the number of convictions has not been lessened probably is that the prisoners were all guilty, as usual. The innocent person is rarely indicted. But it would be sufficient to justify the relaxation of the rule if by reason of it one innocent man should be cleared. The new practice certainly does not harm the interests of the government, and it may tend to bring out the truth, either for or against the prisoner. Therefore we urge that the prisoner be allowed to tell his story if he will. Mr. Grinnell's views are not singular in him, because he was educated under the French practice, and naturally he inclines toward the inquisitorial methods of that procedure. We trust that we may never see such rules adopted here. Mr. Grinnell, reviewing the evidence in Sharp's case, advocates compelling the prisoner to testify against himself, in effect; the admission of proof that he has committed other similar crimes at a remote period; the admission of hearsay; and the admission of a witness' conclusions from what some one told him. All this because he thinks Jacob Sharp is guilty but cannot prove it without resort to such methods. This is his view of justice. Out west they have a still more extreme view — lynch law. Of the two we prefer the latter, because there is no hypocritical pretense of legal forms about it, and in some red-handed instances

there may be a certain element of rude justice in it, savoring undoubtedly too much of revenge for civilized and refined communities. But with Mr. Morton's view we have no sympathy, and we fear but little patience. There is one solace however, namely, that he will have to alter the fundamental laws and the instinctive notions of fair play which have ruled the Anglo-Saxon mind for many centuries, before he can procure the conviction of prisoners on compulsory testimony, suspicions, surmises, gossip, rumor, individual presumptions, and other chaff of that sort. Men will not submit to be hanged or imprisoned on any such unsubstantial reasoning.

The opinions of Mr. Justice Miller on trial by jury, which are published in the current number of the *American Law Review*, and from which we published some extracts last week, will be of great interest as coming from one of the weightiest sources in this country. It gives us great pleasure to find that the opinions which we have for years expressed on this topic in this journal are in harmony with those of this eminent jurist. He believes in trial by jury; he does not believe that judges are equally well fitted to try facts; and he believes in a verdict of nine or some such number. It is superfluous to go over this ground again, but we would urge the argument that it is astonishing that there are so few disagreements of juries, and so few verdicts that shock the public sense, and that it would be impossible to collect twelve judges who would agree half so often, or half so often satisfy the general sense. The theory of a one-man jury, or of the same jury in all cases in a given neighborhood, or of a jury known to the parties before hand, is unsafe and impolitic, for reasons which have often been urged. We commend the perusal of Mr. Justice Miller's temperate and well-considered paper to all our profession.

Professor McMaster has stirred up a critic in the current number of the *American Historical Magazine* — Mr. Oliver P. Hubbard, who stoutly contests the historian's assertion, in speaking of the customs of a century ago in this country, that "the treadmill was always going." Mr. Hubbard insists that it

was not going at all, and did not begin to go until a third of a century later, as a criminal punishment. He seems to make out a strong case, and to have the learned professor on the hip. In 1828 Stephen Allen, mayor of New York, by leave of the common council, printed one hundred copies of a pamphlet showing "the plan and discipline of the stepping-mill," which was set up at Bellevue, at the foot of the present East 26th street, and which was visited by such crowds of the curious that it became necessary to deny entrance except on special permits. It must have been about this time that Oliver Wendell Holmes wrote his "Treadmill Song," which seems to us an ironical production, and which Mr. Hubbard takes too seriously when he calls it "soulless." We know, for a reason of our own, that treadmills could not have been very common, even at the later date, because a picture of one is very rare, and the only one we could ever find — that is, of a penal treadmill — was that prefixed to Allen's pamphlet. The cruel punishment was soon abolished. We recommend to Professor Baldwin and the other gentlemen in favor of whipping wife-beaters, that they substitute the treadmill. It might also be poetic justice for tramps.

In the death of Judge Rapallo the people of this State have sustained a loss which must be irreparable for many years. He was one of the only two remaining original members of that court on its organization in 1870. The advantages of his long experience and his minute acquaintance with its decisions, to say nothing of his great natural powers and his vast legal learning, cannot possibly be supplied by any new incumbent. Although the people paid to him and Judge Andrews the extraordinary compliment of a unanimous re-election three years ago, yet it is probable that no judge on the bench was less known to the people by personal association than Judge Rapallo. His reputation was exclusively professional. He lived a retired life, moving and breathing in an atmosphere of judicial investigation. He was not a famous judge, nor before his elevation to the bench was he a remarkably distinguished or well known lawyer, and yet if the opinions of his surviving brethren on that bench could be taken, no doubt they would unanimously and readily pronounce him the ablest of their number. Such, we are inclined to believe, would also be the opinion of the bar, without in any sense underestimating or failing to appreciate the marked learning and accomplishment of his associates. Judge Rapallo had a great brain, sustained by a herculean body, which enabled him to perform enormous labor, and he had such a calm, unemotional, almost stolid way of looking at legal questions, as so many logical propositions to be worked out by unerring revolutions of mental processes, that he was as little liable to bias and as little likely to go wrong as any judge who has lived in our times. He had a robust intellect which delighted to work things out on principle, rather than delve among

precedents to ascertain what other intellects had thought. He was unquestionably a perfectly independent and fearless man, who cared as little for popular opinion and caprice as he did for the shiftings of a weathercock. He was as often as any one, perhaps oftener, a dissenter; possibly somewhat of a judicial iconoclast or agnostic. A tower of strength to our great court, he has fallen in the maturity of his powers and the best of his years, leaving a large gap in our judicial defenses, which it will be impossible at present to fill up. The governor will have a hard task to appoint, the people to elect, a competent successor to this great judge to whose upbuilding such shining gifts of nature and so many toilsome and patient years of experience, reflection and research had gone. We do not envy his successor. The people of this State can never understand how much they have owed to the silent, retired, modest man who has gone forever from the bench from which he diffused learning and dispensed equity for seventeen years.

Senator Evarts has introduced in the Senate bills to increase the salaries of the judges of the United States Circuit and District Courts within this State to nine thousand dollars for the circuit and seven thousand dollars for the district judges, with a memorial from the Bar Association of the city of New York, the proposers and advocates of the bills. The present salaries are six and four thousand dollars, respectively. We heartily commend these measures, and have often urged them in these columns. These magistrates are among the most useful, most honored, and most laborious in the country; the questions before them are of great importance; their business is continually increasing. There can be no room for debate about the inadequacy of the present salaries. Here is a judicious way to spend the surplus income, or a very small part of it. We earnestly hope the bills will prevail.

#### NOTES OF CASES.

*IN Dunham v. City of New Britain, Connecticut*  
 Supreme Court of Errors, May, 1887, a town purchased of plaintiff and his father land on which to construct a reservoir, and the officers of the town, after getting a deed, gave an agreement back allowing plaintiff and his father to use the reservoir for fishing and sailing. The town, acting under legislative authority, in order to prevent the pollution of the water of the reservoir, passed an ordinance prohibiting its use for those purposes. *Held*, valid. The court said: "The use of the waters of the lake for boating, sailing and fishing is not in itself injurious, nor a nuisance, and the agitation of the surface of the water is beneficial, but as a necessary incident to or concomitant of such use, a considerable quantity of impure, and objectionable, and decayed, and decomposing matter, filth and various *excreta* of the human body is, from day to day, de-

posited in the water of said lake. But such deposit has not been and is not at present in sufficient quantities to be appreciable in its effect upon said waters, but the knowledge on the part of the public of such deposit produces disgust, and tends to prevent the use of said waters by the public for domestic purposes. If the germs of infectious or contagious diseases should be deposited at or near the entrance of the supply pipes, such diseases might be communicated to the people of said city using said waters for domestic purposes. Under these circumstances the common council of the city of New Britain, acting pursuant to power given it by the Legislature in 1885 to make such orders and ordinances as it should see fit for the better protection and preservation of the waters of said lake: passed the ordinance set forth in the finding, prohibiting under a penalty, among other things, boating, sailing and fishing on said lake. The passage and enforcement of this ordinance is what has given rise to this suit. It has had the effect to keep the public away from the lake and thus the plaintiff loses the profit of such pleasure resort, and in this manner only the acts of the defendants substantially impair the plaintiff's business and depreciate the value of his property. \* \* \* The ordinance, having for its object the preservation of the public health, and being adapted to that object, and having been authorized by the Legislature, was a proper and valid exercise of the police power of the State; and even if the ordinance was invalid, it is obvious there would have been an adequate remedy at law, so that in either event no error could have been predicated upon a denial of the injunction. *Burnett v. Craig*, 30 Ala. 135; *Garrison v. City of Atlanta*, 68 Ga. 64." Somewhat analogous is *Davenport v. City of Richmond*, 81 Va. 686; S. C., 59 Am. Rep. 694, holding that an ordinance requiring the removal of powder-magazines from a city is valid, although the city had sold the site to the owners for the purpose of erecting such magazines.

A wholesome and admirable doctrine is laid down in *Burgess, etc., of Warren v. Geer*, Pennsylvania Supreme Court, Oct. 8, 1887, where it was held that an ordinance requiring persons canvassing from house to house for the purpose of selling or soliciting orders for books, to take out a license for that purpose, and to pay certain fees therefor, thus putting such persons on the same footing as others holding a mercantile license within the borough, is not unreasonable, as opposed to common right, and is not in conflict with the Constitution of the United States or of Pennsylvania. The court said: "By another provision of the ordinance it is declared that it shall not apply to persons holding mercantile licenses within the borough, nor to persons resident in the county selling their own farm produce. The effect of the ordinance would seem to be to subject persons who would otherwise pay no license for the privilege of doing business within the borough, to the duty of paying something for the

privilege when they undertake to exercise it without incurring the expense of a mercantile license. There is surely nothing unreasonable in such a requirement. It is difficult to understand why one portion of the community which engages in the transaction of business in a municipality should pay a license fee for the privilege of doing so, and another portion should have practically the same privilege without paying for it, simply because the business is done in a different manner. The argument that it is contrary to common right to require a license fee to be paid in the latter case, and therefore such a requirement is void, proves too much, since the same argument is applicable to the law requiring any license fees to be paid in any case. The only question therefore is whether the borough of Warren possesses, either by express grant or necessary implication, the right to enact the ordinance in question. It may well be questioned whether it does not possess the necessary authority under the common-law power incident to all boroughs as public municipal corporations; but however that may be, we are of opinion that the power clearly exists. \* \* \* The general borough law of 1851 (Purd. Dig., p. 202, pl. 58) gives to all boroughs 'the power to make all needful regulations respecting markets and market-days, the hawking and peddling of market produce and other articles in the borough,' etc. The peddling of 'other articles' besides market produce, includes everything which may be disposed of by the method called 'hawking and peddling,' and we cannot say that this does not include canvassing from house to house, and soliciting orders for books."

Still more excellent is the doctrine of *Commonwealth v. Turner*, Massachusetts Sup. Jud. Court, Nov. 28, 1887, where it was held that letting loose a captive fox to be hunted by dogs is punishable under Public Statutes of Massachusetts, chapter 207, section 58, which provides for the punishment of any person who, having an animal in his custody, knowingly and willfully permits it to be subjected to unnecessary torture, suffering or cruelty. The court said: "The evidence tended to prove that the defendant let a fox loose from his custody in the presence of several dogs; that the fox ran into a thick wood and disappeared; that about five minutes afterward the dogs were let loose and pursued the fox, and caught it and tore it in pieces. The jury might have found that the fox was let loose by the defendant to be hunted by the dogs, and that the dogs were procured by him, and were let loose by his direction, in order that they should hunt the fox. The evidence is sufficient to prove these facts. The question is whether these facts constitute or prove the offense described in the statute. It is objected that the statute does not include noxious animals; that there is no evidence that the fox was subjected to unnecessary suffering; and that there is no evidence that it was subjected to any suffering by the defendant, or while it was in the charge or

custody of the defendant. The word 'animal' must be held to include wild and noxious animals, unless the purpose of the statute or the context indicate a limited meaning. There is nothing in the general purpose and intent of the statute that would prevent it from including all animals, within the common meaning of that word. The statute does not define an offense against the rights of property in animals, nor against the rights of the animals that are in a sense protected by it. The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt. It is as obnoxious to the reason of the statute to wantonly torture a wild animal, held in subjection by force, as a tame animal. \* \* \* It is argued that the fox is a noxious animal, which man may lawfully kill; that hunting it with dogs is a proper mode of killing it, and that therefore the suffering inflicted by that mode of killing is not unnecessary, within the meaning of the statute. The statute does not apply to foxes in their natural, free condition, but only when they are in the dominion and custody of man. The right to kill a captive fox does not involve the right to inflict unnecessary suffering upon it in the manner of its death, any more than the right to kill a domestic animal involves the right to inflict unnecessary suffering upon it, or to cruelly kill it. It cannot be said, as matter of law, that throwing a captive fox among dogs, to be mangled and torn by them, is not exposing it to unnecessary suffering."

#### NOTES ON THE SCOTTISH COURT OF SESSION AND ITS PROCEDURE.

*Editor of the Albany Law Journal:*

During a short visit to Scotland last summer I took occasion to look into the Scotch courts. There I saw so much to interest me that I ventured to ask one of the gentlemen whose acquaintance I had the pleasure to make, Mr. Henry Goudy, a prominent advocate, to give me a short sketch of Scotch methods of administering justice. He was good enough to do me this favor, and gave me the following, which I send to you, hoping that it may interest you and your readers as much as it did me. Perhaps also it may cause some self-reproach to our own bar, the bar not only of New York but of other States, to see how much quicker our Scottish brethren deal out justice to their people than we do to ours.

Very truly,

DAVID DUDLEY FIELD.

NEW YORK, Dec. 28, 1887.

#### I. CONSTITUTION OF THE COURT.

THE Court of Session is the supreme civil court in Scotland. According to its present constitution it consists of two divisions of four judges each, who together form the Inner House, and of five judges (*lords ordinary*, as they are called) who form the Outer House.

*Inner House.*—The Inner House is mainly, though not altogether, a court of review—having appellate jurisdiction with regard to judgments of the lords ordinary and of the inferior civil courts, and also with regard to verdicts of juries and directions of judges in jury trials. It also however acts as a court of original jurisdiction (*de la première instance*) in a few special actions, such as actions by *special case*, in which the parties interested, having agreed upon a statement of the facts, refer the matter to the court for opinion and judgment, and actions in which the supreme equitable jurisdiction of the court is invoked by petition. As a common example of this last-named kind of jurisdiction, we may instance an application to the court to remove a public official or a trustee from his office on the ground of improper conduct or incapacity.

The divisions of the Inner House, though called first and second, possess co-ordinate authority, and though a decision given by the one is not necessarily binding on the other, it is generally treated as authoritative to this extent, that before going counter to it the case will be ordered to be reheard either before five or seven judges, or possibly remitted to the whole court.

The first division is presided over by the lord president (who also presides over the whole court), and the second division by the lord justice clerk. Neither of these has more than one voice (*i. e.*, they have no casting vote) in the decision of any case. 48 Geo. III, cap. 151, § 8.

*Three Judges make a Quorum.*—Where the judges of either division are equally divided in opinion they may, in certain cases, call in a fifth judge, or they may order the case to be reheard before seven judges, or the opinion of the whole court may be taken.

*Outer House.*—The Outer House judges are judges of the first instance, and have co-ordinate authority. They preside at trials, and their judgments, if not brought under review of the Inner House within the time prescribed by statute, have the authority of judgments of the court, though of course they do not constitute binding precedents. In the ordinary case it is open to a plaintiff to bring his action before any lord ordinary he pleases, though in order to relieve any pressure of work at the bar of a favorite judge the lord president has statutory authority to transfer cases from one lord ordinary to another—a power which is frequently exercised. There are certain classes of cases however which are appropriated to particular lords ordinary. Thus the junior lord ordinary has, by statute, exclusive jurisdiction in "all summary petitions and applications," and in the bill chamber. To the second junior lord ordinary are appropriated ecclesiastical proceedings of a certain character, or as they are called, *grievous causes*; and the third junior lord ordinary is usually appointed to act in all exchequer causes.

*Bill Chamber.*—Besides the Inner and Outer Houses it is necessary to say a word about what is called the bill chamber of the Court of Session.

The bill chamber is the department of the court in which certain summary or preliminary applications, such as suspensions, interdicts, bankrupts' petitions, and applications for warrants of diligence, are dealt with. It sits during the whole year, and during the vacation it represents the whole court. The bill chamber, says Mr. Mackey, in his excellent work on Court of Session Practice, derived its name from the fact that its original jurisdiction "consisted in the passing *bills* or petitions which were, in the ancient form of practice, necessary before certain summonses, letters of diligence, and letters of advocacy or of suspension, were issued in the name of the sovereign, and sealed with his signet. Such preliminary bills existed at least from the date of the institution of the Court of Session, and probably had been a part of the procedure of the prior courts of the daily council and session of James I. \* \* \* The object of *bills* was that private persons should not be allowed to set in motion the law and the means of execution it provided, until the crown, by the advice of the judges, was satisfied that this was necessary." The summonses for which *bills* were formerly required, as mentioned in the just cited passage, were (1) summonses in which the sovereign had an interest; (2) summonses for which there was no recognized style; and (3) summonses in which the ordinary citation was sought to be dispensed with. Bills were also at one time a necessary preliminary to appeals from inferior courts, but both in this case and in the case of summonses they have long ceased to be requisite. The great bulk of the work now done in the bill chamber consists of bankruptcy procedure, applications for suspensions and interdicts, and for warrants of diligence.

## II. PROCEDURE.

*Competency.*—No action can be brought in the Court of Session where the value of the action does not exceed £25. 13 and 14 Vict., cap. 36, § 18.

*Division of Actions.*—The actions by which rights may be enforced in the Court of Session are of various kinds. The common general division is into *petitory*, *declaratory*, *rescissory* and *possessory*—the classification depending upon the conclusion, or leading conclusion, employed in the summons. Of course many actions contain more than one conclusion, and it is almost invariable, indeed, for a petitory or possessory conclusion to be added to a declaratory to give effect to the right which is to be declared. There are other divisions of actions, such as those into *principal*, and *accessory*, and *ordinary*, and *extraordinary*, but there is nothing peculiar in regard to these requiring notice.

*The Summons.*—The writ by which an ordinary action in the Court of Session is initiated is called a summons, consisting of three parts, viz., formal summons, condescendence and pleas in law. The formal summons is a writ in the sovereign name, and is, in some respects, of antiquated form. Strictly analyzed, it is composed of four parts, viz.: (1) The *address*, which is in the following terms: "Victo-

ria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith: To , messengers-at-arms, our sheriffs in that part specially constituted, greeting." (3) The *designation of parties*—the pursuer and defender, respectively. (8) The *conclusions*, as for instance, to pay a sum of money, or to implement a contract, or to declare some right, or as the case may be. (4) The *will*, by which the messengers-at-arms are directed to cite the defender to appear before the court on a certain day under certification that decree will be given against him if he fail to appear. A warrant to arrest the defender's personal effects in security of payment may also at the option of the pursuer be inserted in the will of the summons in actions with petitory conclusions.

*Condescendence and Pleas in Law.*—To the formal summons, which has just been described, there must be annexed a so-called "condescendence," which contains in substantive propositions (usually in separate articles) the allegations in fact which form the grounds of action. Prior to 1850 the statement of facts was incorporated in the summons proper, but now by statute (18 and 14 Vict., cap. 36, § 1) there must be in every case a separate condescendence. Subjoined to the condescendence there must be a statement of the pleas in law, which consist of a concise note of the legal propositions on which the pursuer founds.

*The Summons.*—In common parlance the three constituent parts just enumerated, viz., the formal summons, the condescendence and the pleas in law, are embraced under the general designation, the summons.

*Signeting.*—After the summons has been prepared it must, to use the technical phrase, "pass the signet," which means that it must be impressed with the signet or seal used for authenticating all letters of diligence in the name of the sovereign. This seal is kept in the Register House by an official appointed for the purpose, and a fee is charged for impressing it. The last page of the formal summons must also be signed by a writer to the signet, in testimony of the fact that it has passed the signet, and a nominal fee of half a crown may be charged (though in practice usually remitted) for such signature.\*

*Citation.*—Upon the summons being signeted it is lodged with the clerk to the lord ordinary before whom the action is to be brought, and the next step is to serve a certified copy of it upon the defender, who is cited to appear in court within a certain period if he have any defenses to propound. Service may be made either by a messenger-at-arms or by registered letter. The days of citation are, in the ordinary case, seven, or where the defender is resident out of Scotland or in any of the islands, fourteen, reckoning from the date of service upon the defender.

*Calling the Summons.*—Upon the expiry of the days of service the pursuer *calls* the summons (or

\* At one time all summonses were required to be prepared by writers to the signet—a privilege of great importance to this powerful corporation of solicitors—but since 1868 this has ceased to be the case.

rather lodges it with the clerk of the process for calling) in court, which means that a brief abstract of the designations of the pursuer and defender, with the name of the pursuer's agent and counsel, and also of the lord ordinary and division to which the cause shall belong (called the *partibus*), is printed and published on the walls of the courthouse. This calling of the cause is the first public intimation of the action being in court.

**Entering Appearance.**—If the action is to be defended the defender *enters appearance*, which he must do within two days after the case has been called. Appearance is entered by the agent of the defender, simply intimating to the clerk that he appears, and giving his own and his counsel's name to be written in the *partibus*.

**Defenses.**—Thereafter defenses, which consist of answers to the pursuer's condescendence (and if a counter case is set up, a separate statement of facts) and pleas in law. The defenses must be lodged within ten days after the calling.

**Printing and Enrolment.**—When the defenses have been lodged it is the duty of the pursuer to have the pleadings printed, and copies of the proof print transmitted to the defender's agent and the lord ordinary. Eight days are allowed for this purpose, and thereafter the case is put out in the lord ordinary's roll for adjustment of the record. The interval between the lodging of the prints and the appearance in the roll must not be less than four nor more than six days.

**Closing Record.**—When the case first comes before the lord ordinary he requires the parties (or their counsel) to adjust the pleadings, and at the same time pronounces an interlocutor *closing the record*. Parties are now at issue upon a concluded statement of their case, and it depends upon the nature of the question between them how the case shall thereafter proceed.

**Proof.**—If the parties are at issue upon pure questions of fact, and there is no point of relevancy raised, the usual course is to order a proof to be taken before the lord ordinary himself. This order is made by the same interlocutor as closes the record, and the day of the proof is then fixed. Sometimes, indeed, disputed facts may be sent to a jury,\* but except in actions of damages a proof is almost invariably the course adopted.† It is in the discretion of the lord ordinary to fix the day for hearing the evidence, and he, of course, has regard to the state of his roll and convenience of other litigants. But as a rule proofs are taken within five or six weeks after the date of closing the record. The evidence at the proof is taken down in short-hand and counsel are heard at the close, and the lord ordinary thereafter either gives judgment at once or takes time to consider.

**Procedure and Debate Rolls.**—Where the question in dispute between the litigants is one of pure law, or where a preliminary plea as to competency or

relevancy is raised, the lord ordinary, when closing the record, orders the case to be enrolled in either the *procedure* or the *debate rolls*. When sent to one or other of these rolls the case will generally be heard, and judgment given within two or three weeks from the date of closing the record.

**Reclaiming.**—After judgment has been given by the lord ordinary it is competent to appeal to the Inner House—either the first or second division, as the case may be. This is done by a single note of appeal called a reclaiming note. The time within which a judgment can be reclaimed against depends upon the kind of judgment pronounced, but in the ordinary case of a final decree disposing of the whole cause on the merits, it is twenty-one days. Supposing the reclaiming note to have been competently presented, the case is sent to the Inner House roll, and is thereafter disposed of. From the date of presenting a reclaiming note till the date when the case is heard in the Inner House, an interval of about two months will, on an average, elapse, though sometimes (and particularly in the second division, where the rolls are not so crowded) it may be less than a month. For summary cases special facilities in the way of procedure exist, and the above-mentioned intervals of time may in their case be much shorter.

**Jury Trials.**—It has been observed above that jury trials are not common in the Court of Session, and the tendency during recent years has been more and more to discourage them. On an average there will not be, it is thought, more than fifty or sixty jury trials altogether in a twelvemonth. Actions for damages for injury however, and a few other actions of a special character, are still appropriated to a jury, unless the parties consent to have them tried before the lord ordinary.

**Issues.**—When the record is being *closed*, as above explained, and it appears that the action must go before a jury, an order for issues is pronounced. Thereupon issues must be lodged within the prescribed period—generally six or eight days—and these are adjusted at the sight of the lord ordinary for the trial of the cause. A day for the trial is subsequently fixed by the lord ordinary, if either party move him for that purpose, and if both parties agree he will preside at the trial. In such case the trial must take place (except on special cause shown) within three weeks of the application to fix it. It is competent however for either party to object to the trial proceeding before the lord ordinary, in which case the matter must be reported to the Inner House, and the division of the court to which the action is marked shall then determine whether the trial shall be before the lord ordinary or at the circuit or jury sittings. In the latter case the process will remain in the Inner House, and an interlocutor will be pronounced fixing the time and place of trial. The so-called jury sittings are held in the spring and autumn vacations.

Such are the prominent features of the procedure in the Court of Session in ordinary actions. Compared with the procedure in the English courts it is thought that there is, on the whole, much greater

\* See below as to jury trial.

† In certain cases, such as those involving pure accountings or a scientific inquiry, a remit may be made to an accountant or man of skill, and his report stands in place of proof.

celerity. The expense also of an action will be found to be considerably less, though litigation in the Scotch court is by no means cheap. The total costs of an ordinary action which has been decided finally in the Inner House, and in which there has been a proof, will rarely be less than £100.

H. G.

**EXECUTORS AND ADMINISTRATORS—PERSONAL DISCRETION—POWER TO SELL.**

NEW JERSEY COURT OF CHANCERY, MAY, 1887.

GIBERSON V. GIBERSON.\*

Executors were directed to sell all of the testator's real estate "at such time and in such manner as they shall think most advisable." Held, not to vest a personal discretion in them, and that therefore an administrator *de bonis non*, appointed on their renunciation could exercise the power.

A. G. Richey, for complainant.

BIRD, V. C. Joseph Giberson by his last will gave all the residue of his estate to his children, to be equally divided amongst them, and then ordered and directed his executors to sell all of the said estate "at such times and in such manner as they shall think most advisable." The executors therein named renounced, and an administrator with the will annexed was appointed. Doubts having been suggested as to his power to sell, this bill is presented.

In my judgment, this case is plainly within the act which confers the same powers of sale upon administrators with the will annexed that the executors had by the will. I cannot perceive that the executors had confided to them any trust or discretion such as is contemplated in the case of *Naundorf v. Schumann*, 14 Stew. Eq. 14, and in other cases. In the case cited the executor had power to dispose of as he should deem best. He might rent it, for he was directed to divide the profits. In this case there is nothing but the power of sale conferred. But it is thought that the discretion contemplated in *Naundorf v. Schumann*, *supra*, is distinctly expressed in the phrase "at such times and in such manner as they shall deem most advisable." I do not see any such force in the expression. I think the executors are directed to sell and nothing more. I think they have no other or greater power, right, trust or discretion than they would have had, had the words quoted been omitted. I think every executor has just so much right, power, trust or discretion when simply authorized to sell. Every such executor can sell at such times and in such manner as he deems most advisable. All will readily acknowledge that he has that much discretion, and that if he does not exercise it wisely the courts will interfere. Nor will any one insist that such admission brings the case within the principle of *Naundorf v. Schumann*. It is only giving practical effect to a wise provision of the statute in a case where the testator has not himself otherwise provided. And if the case I am deciding is not controlled by *Naundorf v. Schumann* certainly it is not by *Lanning v. Sisters of St. Francis*, 8 Stew. Eq. 392. In that case the trust seemed most clearly to be a personal one; the real estate was given to the person named as executor absolutely; besides which his control seemed only to terminate when he saw proper to sell and divide.

In construing the force or extent of such enabling statute, the inquirer will be aided by the views of Chief Justice Beasley as expressed in *Weimar v. Fath*,

\*49 N. J. Eq. 116.

14 Vr. 1, 11, one quotation will suffice: "But the discretion thus appealed to is nothing but the common discretion that is made use of in the transaction of ordinary business."

I think the administrator with the will annexed can convey a good title. I will so advise.

NOTE.—The following cases show what words have been held to confer such a personal discretion on the executor that an administrator *de bonis non* could not execute a testamentary power to sell lands:

As soon after my death as my executor shall deem expedient, \* \* \* either at public or private sale, and on credit or for cash, at his discretion. *Mitchell v. Spence*, 62 Ala. 450.

At such time or times as they or the survivor of them could do it to the best advantage, and either at public or private sale, as they or he might think best. *Lockwood v. Stradley*, 1 Del. Ch. 298.

At such credit and in such manner as is thought most advisable to my executor. *Hall v. Irwin*, 7 Ill. 178; see *Wardwell v. McDowell*, 31 id. 364; *Nicoll v. Scott*, 99 id. 529.

As best calculated, in their opinion, to benefit my family—that is to say, in such parts or parcels, at such time or times, and upon such terms and conditions as they shall judge proper. *Brown v. Hobson*, 3 A. K. Marsh, 380.

To sell and convey such of testator's property as in the executor's judgment would best promote the interest of all concerned. *Tainter v. Clark*, 13 Mete. 220; *S. C., Clark v. Tainter*, 7 Cush. 567; *Dunbar v. Tainter*, id. 574. See also *Putnam v. Story*, 132 Mass. 206.

To be sold at the discretion of the executor. *Montgomery v. Mulken*, Sm. & Marsh. Ch. 426; *S. C.*, 5 Sm. & Marsh. 151. See *King v. Talbot*, 36 Miss. 367.

Shall be sold at the discretion of my executors. *Chambers v. Tulane*, 1 Stook. 146; see *Lanning v. Sisters of St. Francis*, 8 Stew. Eq. 392; *Welland v. Townsend*, 6 id. 399, note; *Brush v. Young*, 4 Dutch. 237.

To sell and convey any or all of the real estate at discretion, and to keep it in repair. *Stoutenburgh v. Moore*, 10 Stew. Eq. 68.

The whole to be disposed of as shall to my executors seem best. *Naundorf v. Schumann*, 14 Stew. Eq. 14.

To sell and convey \* \* \* in their discretion, upon trust, to divide the proceeds among the testator's four children. *Cooke v. Platt*, 51 N. Y. Super. Ct. 56; 98 N. Y. 45; *Mott v. Ackerman*, 92 id. 540; *Bierbaum's case*, 40 Hun. 504; see *Bain v. Mattoon*, 54 N. Y. 663; *Place's case*, 7 N. Y. Leg. Obs. 217.

To sell, grant and convey, \* \* \* or to lease the same for terms of years, as they in their discretion may deem best. *Ross v. Barclay*, 18 Penn. St. 179.

To sell if they thought advisable, and to invest the proceeds for the use of certain beneficiaries. *Waters v. Margerum*, 60 Penn. St. 39.

In such parts and parcels, and at such time or times, and on such terms and in such manner as my said executors, or the survivor of them, shall in their good discretion think fit and most advantageous for the benefit of my estate. *Evans v. Chew*, 8 Phila. 108; 71 Penn. St. 47; see *Moody v. Fulmer*, 3 Graut's Cases, 17.

That the sale shall not be made by any other person than the executor himself. *Drayton v. Grimke*, Ball. Eq. 394.

To sell or lease or dispose of in any way they may think best for my estate. *Armstrong v. Park*, 9 Humph. 196.

If and whenever he may think it advisable for the interest and benefit of my children, to sell any or all of my testator's real estate, and to invest the pro-



ceeds, or such part thereof as he may think right, in other real estate. *Jones v. Fulghum*, 3 Tenn. Ch. 193.

With power to dispose of the same in such manner as to the executor should seem meet for the payment of testator's debts, and for the use and benefit of his daughter, G. B., so long as she should continue insane. *Beasley's case*, 18 Wis. 451; see *Harrup v. Winslet*, 37 Ga. 655.

Devise to testator's widow to be at her disposal, if agreeable to the executors, so long as she should remain a widow, to be sold however if necessary to pay testator's debts, otherwise in remainder to his sons after the widow's death or marriage. Testator died in 1848. Neither of the executors proved the will, and letters cum testamento annexo were issued to the widow in 1851, who as devisee conveyed the premises the same year to G., swearing it was to pay testator's debts, and that the proceeds were so applied. She married again in 1853, and ejectment by the sons against her grantee was sustained. *Banting v. Gummerson*, 24 U. C. Q. B. 287.

The following cases show when a personal discretion is not imposed, and when an administrator *de bonis non* may sell lands under a testamentary power given to the executor:

If and when they or he shall think fit so to do for the purpose of division or distribution. *Wyman v. Carler*, L. R., 12 Eq. 309; see *Yates v. Compton*, 2 P. Wms. 308; *Austin v. Martin*, 29 Beav. 523; *Monsell v. Armstrong*, L. R., 14 Eq. 423; *In re Clay*, L. R., 16 Ch. Div. 8.

For such considerations, upon such terms, and in such manner as the executors might judge best. *Stuart v. Baldwin*, 41 U. C. Q. B. 446.

"That the purchase-money be secured by such personal security as my executor may direct." *Anderson v. McGowan*, 45 Ala. 462.

That the estate, real and personal, remain in the hands of his wife (the executrix) "to rear and educate his three children, and to remain hers during her life-time or widowhood; and in case of her marriage, that the estate be sold and the proceeds divided equally among her and the three children." *Watson v. Martin*, 75 Ala. 506.

To sell certain lands in one year after testator's decease, "and to divide the avails so that my said daughter shall receive one-fourth thereof." *Pratt v. Stewart*, 49 Conn. 339.

"Which I desire may be sold at such credit as he may judge right between the creditors and the estate." *Owens v. Cowan*, 7 B. Monr. 152.

Where testator directed a division of his estate among his children at the death of his wife, to be made by his executors, either by a division of the property in kind, or a sale and division of the proceeds, in the discretion of the executors. *Shields v. Smith*, 8 Bush, 601; see *Gulley v. Prather*, 7 id. 167.

"To sell or lease for such term or terms of years, renewable or not renewable, as they may think proper, the whole or any part thereof, either at public or private sale, if they shall deem such sale or lease beneficial or advantageous to the parties interested." *Druid Park Heights Co. v. Oettinger*, 55 Md. 46; see *Keplinger v. Maccubbin*, 58 id. 203.

To divide into seven equal parts \* \* \* and sell the same at such time and on such terms as he may think fit. *Dilworth v. Rice*, 48 Mo. 124; *Evans v. Blakiston*, 66 id. 437; see *Compton v. McMahan*, 19 Mo. App. 494.

In order to make an equal division among testator's grandchildren. *Howell v. Sebring*, 1 McCart. 84.

To sell at private or public sale, as to them may seem most discreet, with similar power in their successor. *Fish v. Coster*, 28 Hun, 64.

After the death of M. all the lands to be sold and

the proceeds divided equally among testator's children. *Smith v. McCrary*, 8 Ired. Eq. 204.

For any price or prices which to them shall seem meet, by public or private sale. *Meredith's Estate*, Pars. Eq. Cas. 433.

To sell a house devised to testator's wife, if she should so desire, and the executors deem it for the best interest of the wife and children. *Lautz v. Boyer*, 81 Penn. St. 325.

To lease, according to their discretion, and to sell and convey in such manner as they shall think proper, either at public or private sale. *Jackman v. Delafield*, 85 Penn. St. 381; see *Commonwealth v. Forney*, 3 Watts & Serg. 353.

To sell the said house and lot, and invest the proceeds in such security as the executor may consider best, holding the same in trust for S. *Probate Court v. Hazard*, 13 R. I. 3. (This case went off on another point, *vide p. 7.*)

If necessary, or if they think best, to sell a part or any portion of the lands given to R. *Dougherty v. Crawford*, 14 S. C. 628.

The proceeds of sale, after paying debts, etc., to be disposed of as follows: One-fifth to be set apart in the executor's hands and held by him subject to the trusts, etc., named in a certain item of the will. *Harrison v. Henderson*, 7 Helsk. 315, 350; but see *Brush v. Young*, 4 Dutch. 237.

For the purpose of paying debts and supporting testator's children. *Caruthers v. Caruthers*, 2 Lea, 284.

Provided the said land will sell for as much as in their judgment will be equal to its value. *Brown v. Armistead*, 6 Rand. 594.

"Whenever my executors think best." *Mosby v. Mosby*, 9 Gratt. 584.

The court cannot appoint an administrator merely for the purpose of executing a deed for lands sold by his predecessor. *Long v. Joplin Mining Co.*, 68 Mo. 422. Nor to correct a mistake in such deed. *Grayson v. Weddle*, 63 Mo. 523. Nor can an administrator with the will annexed, after resigning, execute a deed for lands sold by him while in office. *Elatner v. Fife*, 32 Ohio St. 358. An attempted sale by an administrator *de bonis non*, made because a sale by the administrator was void, may be enjoined by the purchaser. *Bell v. Craig*, 52 Ala. 215.

A deed executed by an administrator *de bonis non*, under an order directing his predecessor to execute it, was upheld. *Peterman v. Watkins*, 19 Ga. 153.

If the will has never been legally admitted to probate, a sale of land made by an administrator *de bonis non*, who was appointed after the marriage of the sole executrix of such will, is void. *Chase v. Ross*, 36 Wis. 267.

After the guardian's sale had been confirmed and a deed ordered to be executed to the purchaser, the guardian died. *Held*, that his successor might be ordered to execute the deed and receive the purchase-money. *Lynch v. Kirby*, 36 Mich. 238.

Creditors of an intestate brought a bill in chancery against his administrator, and he was removed from office—the title to the intestate's lands, sold by a receiver afterward appointed in the suit, was held good. *Walker v. Morris*, 14 Ga. 323.

Equity may refuse specific performance of a contract for the sale of lands, made by an administrator with the will annexed. *Shelton v. Homer*, 5 Metc. 462; *Paret v. Keneally*, 30 Hun, 15; *Speck v. Wohlten*, 22 Mo. 310; *Robinson's case*, 3 Irish L. R. 429; but see *Peebles v. Watts*, 9 Dana, 102; *Parks v. Sears*, 117 Mass. 513; *Clark v. Hornthal*, 47 Miss. 434; *De Feyster v. Clendinning*, 8 Paige, 295; *Blakemore v. Kimmons*, 8 Baxt. 470; *Toler v. Toler*, 2 Pat. & H. 71.

See in general 1 Wms. Exrs. (6th Am. ed.) 723 [654] note; 24 Am. Law Reg. (N. S.) 689.—JOHN H. STEWART.

## WITNESS—IMPEACHMENT BY CROSS-EXAMINATION—ESTOPPEL.

NEW JERSEY COURT OF CHANCERY MAY, 1887.

PULLEN V. PULLEN.\*

1. A party, in order to discredit his opponent's witness, asked him on cross-examination, if he had not been guilty of larceny, and specified the chattels said to have been stolen, which the witness denied. Held, that this prevented him from proving by others that the witness had admitted having stolen the goods named; nor could he be impeached by producing a justice of the peace, and asking him relative to an arrest and criminal charge of the witness before him, followed by an offer to corroborate such justice's evidence by his docket.
2. Query, whether a witness who has been convicted of a crime, and on cross-examination denies it, can be contradicted by producing the record of his conviction.

ON appeal from the ruling of the master.

G. O. Vanderbilt, for appellant.

W. Y. Johnson, contra.

BIRD, V. C. The suit is for divorce. The defendant sought, on the examination of witnesses before the master, to discredit one of the witnesses called and examined by the complainant. This he endeavored to do, first by asking him on cross-examination, if he had not been guilty of larceny, particularly naming the goods said to have been stolen, which the witness denied; and then by offering to prove that he had admitted to others that he had stolen the goods. This testimony was objected to, and rejected by the master. The master was right. He followed the rule as laid down by Greenleaf in his work on Evidence, § 449, and by all the judges who have considered the question on appeal. The question is, not whether the witness may be asked such a question or not, nor whether he can plead his privilege and refuse to answer, but having been asked and answered, whether or not, in such case he can be contradicted when it appears to touch upon matters wholly collateral to the issue between the parties and solely to pertain to the credibility of the witness. In *State v. Roberts*, 81 N. C. 605, a witness for the State was asked on cross-examination if he had not said to one Wills, "that rather than be outdone by a negro, he would swear to any amount of lies," and also if he had not admitted on a trial before a justice of the peace that he had declared "that he would have all the corn cut down on Sandy Marsh creek, and would poison all the stock on said creek." The witness denied making any such statements. An offer was made to contradict him, which was overruled. On appeal, the Supreme Court said: "The general rule is that when a witness makes statements in the course of his evidence and as a part thereof, as to any fact or facts constituting the subject matter under investigation, he may be impeached by proof of statements or representations to the contrary, but as regards statements of a witness drawn out on cross-examination collateral to the investigation, the same are to be taken as conclusive, and it is not admissible to contradict him by showing declarations or statements inconsistent therewith, with an exception however that disparaging evidence of inconsistent statements in matters collateral may be received when it tends to show the temper, disposition or conduct of the witness in relation to the cause or parties." Greenl. Ev., § 455. In *Commonwealth v. Mason*, 105 Mass. 163, the court, on appeal, said the questions put the government witness, on cross-examination, whether he had

not offered in another case to suborn a witness, and whether he had not forged the name of the defendant, Francis D. Willard, to certain notes, were inquiries as to collateral and irrelevant matters, and the ruling of the presiding judge rejecting them is not open to exception. See also *Commonwealth v. Murray*, 36 Leg. Int. 392; *People v. McKeller*, 53 Cal. 65; *People v. Bell*, id. 119; *Eames v. Whittaker*, 123 Mass. 342; *Kaler v. Builders Ins. Co.*, 120 Id. 383; *Hester v. Commonwealth*, 85 Penn. St. 139-157; *Madden v. Koester*, 52 Iowa, 692-694; *Lewis v. Seiger*, 8 Pac. Rep. 884; *Plato v. Reynolds*, 27 N. Y. 586-588; *Chapman v. Brooks*, 31 id. 75-87; *Corning v. Corning*, 6 id. 97-104; *Stokes v. People*, 53 id. 164-176; *Ryan v. People*, 79 id. 583-600; *Furst v. Second Avenue R. Co.*, 72 id. 542; *Conley v. Meeker*, 85 id. 618; *Stephen's Dig. Ev.* (Chase's ed.), p. 227, art. 130.

An offer was made to make proof of criminal conduct of this same witness by producing a justice of the peace with his docket, and asking the justice respecting his actions in issuing process, and then offering to prove what he had done, and the nature of the offense charged by his docket. The docket was admitted under objections. An appeal was taken. These offers must fail for the reason above given, and also for the reason as every one must admit, that nothing could be more monstrous than to solemnly adjudge that to impeach a witness you need only show he has been charged and arrested for a crime, and also for the further reason that the justice has no authority to keep a docket and to make record in any such case for any such purposes. In this respect the principles laid down in *Hester v. Commonwealth*, *supra*, are applicable.

In these respects the ruling of the master ought to be sustained. The defendant must pay the costs of appeal.

It will be seen that the questions presented do not involve any construction of the first section of the act concerning evidence (Rev. p. 378), which provides that a witness convicted of a crime may be so shown, either by cross-examination or by the production of the record thereof. I have not been called upon to decide whether or not, in such a case, a witness who has been convicted, and on cross-examination denies it, could be contradicted by the record.

NOTE.—The practice in chancery in regard to the impeachment of witnesses is the same as at law. *Sawyer v. Sawyer*, Walk. (Mich.) 48. See *Kober v. Miller*, 38 Hun, 184, 185.

The old rule was that if a defendant, on examination as a witness, denied having been convicted of a crime, he could not afterward be contradicted, 2 Phil. Ev. (C. H. & E. notes) 960; *Goddard v. Parr*, 24 L. J. Eq. 788, 784; see *People v. Wolcott*, 51 Mich. 612; except where he stated on his direct examination that he was not guilty of the former offense. *Com. v. Murray*, 13 Phila. 454.

In *Marx v. People*, 63 Barb. 618, a defendant on trial for a felony offered himself as a witness on his own behalf. On cross-examination he was asked whether he had not been convicted and sentenced on a plea of guilty, for burglary, on a specified day, which he denied. Afterward the prosecutor, stating its contents, offered a copy of the record, showing that a person of the same name as the defendant had been convicted and sentenced as stated, and then offered to prove the defendant's identity, which last offer was overruled. Held, that the record was inadmissible.

After a denial of his guilt, the prosecutor was allowed to introduce the record of his conviction, in order to contradict the defendant. *People v. Chin Mook Sou*, 51 Cal. 597.

The English statutes (28 and 29, Vict. chap. 18, § 6),

\*48 N. J. Eq. 186.

now allows the defendant to be contradicted 2 Taylor's Ev., § 1437; Best Ev., § 130; Stephen's Dig. of Ev. art. 130; *Ward v. Singfield*, 49 L. J. (C. B. D.) 696.

And also those in some of the United States, as in Wisconsin (Rev. Stat. of 1878, § 4073), see *Ingalls v. State*, 48 Wis. 647; New York (Civil Code, § 832); *People v. Kelly*, 35 Hun, 295, 304; *People v. Hovey*, 29 id. 382, 390.

If without producing the record, the defendant is asked whether he has ever been convicted, and he answers without exception, or does not insist upon the production of the record, he cannot afterward raise the question of his privilege. *People v. Reinhardt*, 39 Cal. 449; *Root v. Hamilton*, 105 Mass. 22; *State v. Rockett*, 87 Mo. 666; *Hanoff v. State*, 37 Ohio St. 178; *Perry v. People*, 86 N. Y. 353; *South Bend v. Hardy*, 98 Ind. 577; see *People v. Crapo*, 76 N. Y. 238, 290 (Church, C. J.); *State v. Damery*, 48 Me. 327.

The defendant, after the record has been admitted, cannot countervail it by offering to prove his innocence of the offense of which he thereby stands convicted, *State v. Watson*, 65 Me. 74; *Com. v. Gallagher*, 126 Mass. 54; *Gertz v. Fitchburg R. Co.*, 137 id. 77; *Gardner v. Bartholomew*, 40 Barb. 325; see *Driscoll v. People*, 47 Mich. 413; *Com. v. Feldman*, 131 Mass. 588; *Sacia v. Decker*, 10 Daly, 204; *Com. v. Ervine*, 8 Dana, 30; except in case of a foreign conviction, *Sims v. Sims*, 75 N. Y. 466; nor can a pardon be contradicted, *Hester v. Com.*, 85 Penn. St. 139; *Jones v. Harris*, 1 Strobbh. 160.

Where a convict is brought from a State prison to testify, and does testify, the fact that his reputation for truth and veracity at the time of and previous to his sentence was bad, may be shown. *Hamilton v. State*, 34 Ohio St. 82; see *Ranken v. Com.*, 82 Ky. 424; *Johnson v. Com.*, 2 Gratt. 581.

If after serving a sentence, a convict testifies and admitting that fact, alleges a reformation, such allegation cannot be disproved. *Conley v. Meeker*, 85 N. Y. 618; *People v. Amanacus*, 50 Cal. 233; see *Gertz v. Fitchburg R. Co.*, 137 Mass. 77; *Curtis v. Cochran*, 50 N. H. 242.

A charge or sworn complaint before a justice of the peace is inadmissible as evidence on another trial to discredit the defendant therein named, *West v. Lynch*, 7 Daly, 245; *McKesson v. Sherman*, 51 Wis. 303, 311; see *People v. Clark*, 102 N. Y. 735; *State v. McKennan*, Harp. 302; *State v. Hannett*, 54 Vt. 83; or the justice's docket, *State v. Gaffney*, 56 Vt. 451; *Coble v. State*, 31 Ohio St. 100; see *Spalding v. Low*, 56 Mich. 366; *Beemer v. Kerr*, 23 U. C., Q. B. 557; or proof of an arrest, *People v. Crapo*, 76 N. Y. 288; *People v. Elster*, (Cal.), 5 Crim. Law Mag. 687; *Gale v. People*, 28 Mich. 157; *Stout v. Russell*, 2 Yeates. 334; see *Commonwealth v. Bonner*, 97 Mass. 587; *People v. Hovey*, 29 Hun, 382; *People v. Brandon*, 42 N. Y. 265; or of an effort to evade an arrest, *Moore v. State*, 68 Ala. 360; see *Ryan v. People*, 19 Hun, 188; 79 N. Y. 593; *State v. Schaffer*, 70 Iowa, 371; *Smith v. State*, 58 Miss. 867; *State v. Starnes*, 94 N. C. 973.—JOHN H. STEWART.

#### EVIDENCE — PAROL — MEMORANDUM OF CONTRACT.

SOUTH CAROLINA SUPREME COURT, OCTOBER 14, 1897.

##### BULWINKLE V. CRAMER.

A writing in the following form:

May 17. Sold H. Bulwinkle & Co.—

5,000 Bu. mixed sacked corn @ 71½¢.

1,000 " " " " " 80¼¢.

Schooner shipment, payable on arrival. No wharfage.

[Signed]

CRAMER & BLOHME,

accepted by the purchasers, is a complete written con-

tract, and parol evidence is not admissible to show that the subscribing party contracted as agents, and not as principals.

APPEAL from Common Pleas Circuit Court, Charleston county. The opinion states the case.

MCGOWAN, J. This was an action against the defendants Cramer & Blohme for \$1,138.70, damages sustained upon a lot of shelled corn, in sacks, purchased from them by the plaintiffs on May 17, 1884. The following writing was offered as the written contract of the parties:

"May 7. Sold H. Bulwinkle & Co.—

5,000 Bu. mixed sacked corn @ 71½¢.

1,000 " " " " " 80¼¢.

"Schooner shipment, payable on arrival. No wharfage.

[Signed]

"CRAMER & BLOHME."

At the time the purchase was made the corn was not in the city; but soon after, about the last of May or first of June, the schooner *May Williams* reached Charleston with the corn. Upon its arrival in the harbor the plaintiffs were notified of the fact. Mr. Hasloop, one of the plaintiffs, went down to the vessel, and finding about 150 sacks out, examined the corn in two or three of them, and found that "it seemed good." On June 4, before all the corn was out of the vessel, the defendants presented their account for the corn, \$4,400.45. The odd cents were paid, and the plaintiff gave their note as follows:

"\$4.400. CHARLESTON, S. C., June 4, 1884.

"Forty days after date we promise to pay to the order of Cramer & Blohme forty-four hundred dollars, at any city bank. Value received. Due July 19-22.

"H. BULWINKLE & Co."

Indorsed as follows:

"Pay A. Bequest, without recourse.

"CRAMER & BLOHME.

"A. BEQUEST."

Written across the face:

"Paid July 22, 1884."

A few days after the note was given, in removing the corn, it was discovered that some of the sacks were damaged. Immediate notice was given to the defendants, but as they refused to correct the matter, or to have any thing to do with it, the corn was "surveyed" by two gentlemen at the request of the "Merchants' Exchange," and 1,470 sacks were found to contain corn in "a damp, blue-eyed and musty condition." This damaged corn was sold at auction, and brought less than the price of good corn of the same kind by \$1,138.70. In the meantime, and before the note fell due, the defendants transferred it, and as the defense of unsoundness of the corn could not be made to it in the hand of an innocent holder before due, the plaintiffs paid it, and brought this action for the damages sustained.

The cause came on for trial before Judge Kershaw and a jury. A witness, one of the defendants, was asked whether they (the defendants) contracted in their individual capacity, or in what capacity. The plaintiffs objected to the question, claiming that parol testimony could not be offered to alter the written contract. The judge admitted the parol evidence, saying: "I do not regard this paper, which is a mere memorandum of contract taken down at the time, as precluding testimony as to the conversation between the parties which might in any way throw light on the contract they were making. If these parties knew from any source, at the time that the paper was made, that they were actually dealing with the defendants as agents, I think it can be shown as part of the *res gestæ*," etc. The testimony being admitted, the jury, under the charge of the judge, found for the defendants.

The plaintiffs appeal upon the following exceptions: "(1) That his honor committed error in ruling that the paper or contract sued on was a mere memorandum of contract, and did not preclude testimony as to conversations between the parties which might in any way throw light on the contract, or the nature of the contract, they were making, and that the plaintiff knew from any source at the time the paper was made, that they were dealing with the defendants as agents, it could be shown as part of the *res gesta*. (2) Because his honor ruled that if in this case there was a clear understanding between the parties that defendants were acting as agents, such understanding was not excluded by that paper. (3) Because his honor admitted parol evidence on behalf of the defendants, after objection thereto, as to conversations between the parties tending to throw light on the contract, or nature of the contract, they were making. (4) Because his honor admitted parol testimony, on behalf of defendants, tending to show that the defendants were dealing as agents, and not as principals, in signing the written contract sued on by plaintiffs. (5) Because his honor admitted parol testimony, on behalf of defendants, tending to show in what character defendants were contracting, whether as agents or principals, when they signed the contract or writing sued on, and put in evidence by plaintiffs. (6) Because his honor erred in instructing the jury as follows: 'If the jury find that the defendants, or either of them, signed the written contract offered in evidence by the plaintiffs, they are personally bound by said contract, unless it was distinctly understood by both parties that the defendants were not to be personally liable for defects in the article purchased.'"

We agree with the Circuit judge that in this State, as to personal property, the rule of law is that "sound price requires sound property," and the contract for the corn must be read as if these words were added, "corn warranted to be sound." A part of the corn turned out to be "unsound," and it would seem that the plaintiffs are entitled to redress on the warranty, unless they in some way waived their rights. Something was said in the case about the plaintiffs' having accepted the corn for themselves after an examination, but as there is no reference to that subject in the exceptions, the matter of course is not now before us.

As we understand it, the sole question in the case is as to who is liable—whether the defendants, who sold the corn, signed the agreement, and took the note of plaintiffs, and realized upon it in their own name, had the right at the trial to introduce parol testimony tending to show that they were not acting as principals, but as agents of Robert Turner & Son, of Baltimore, and the contract of plaintiffs having been made with Turner & Son through them, they are not liable individually. The question as to the admissibility of the evidence seems to have been considered in two aspects: First, whether the paper offered as the agreement was such a contract in writing as to be within the rule which excludes parol testimony; and if so, second, whether the judge erred in charging the jury "that the defendants were not liable if it was distinctly understood by both parties that the defendants were not to be personally liable for defects in the article sold."

All the authorities agree, that as a general and most inflexible rule of evidence, "whenever written instruments are appointed, either by the requirements of the law, or by the compact of parties, to be the depositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy." Stark.

Ev., 648. This seems very plain, but the application of the rule is not always free from difficulty. In the infinite combination of circumstances, cases arise which seem exceptions, but when clearly examined are found not to fall within the principle. As for example, it may happen that the written instrument does not purport to cover the whole field of contract, and is not intended to be the "depository" of the whole agreement, but only one branch of it. In such case the whole contract may be proved by parol without touching the principal; the object being, not to add to or alter the written instrument, but to show the whole agreement, of which the writing is only a part. *Kaphan v. Ryan*, 16 S. C. 380, is an example of this class, where the court were "not called on to give construction to the note and mortgage, but to determine from the evidence for what purpose they (as executed) were to be used," etc. Here the writing covers the whole field, stating who are the parties, and what the consideration and the price, in condensed form, but with exhaustive particularity. Sometimes the "written instrument" does not state specifically the consideration; as where a note says generally, "for value received." There is a class of such cases where the consideration may be inquired into, and in that way matter may get in by parol "which does not necessarily tend to change the terms of the note, although by showing the true consideration upon which it was given it may control the recovery upon the note." See *McGrath v. Barnes*, 13 S. C. 382, where the court reviewed our cases upon the subject, and the former chief justice, Willard, endeavored to reconcile them on the distinction here indicated. In that case it was held that "when an executor gave his promissory note for the payment of money, which was expressed to be the amount due by his testator's estate for medical services rendered, most of which during last illness, parol evidence of a contemporaneous agreement that the note was to be paid only upon a certain condition (that the Probate judge would pass the account) is incompetent." In the case before us there cannot be the slightest doubt that the consideration was as stated in the instrument. There is no doubt that a mere receipt, although in writing, may be explained by parol; but that goes on the ground that a receipt does not necessarily import a contract. As was stated in the case of *Heath v. Steele*, 9 S. C. 92: "In itself a receipt does not express the terms of any contract or writing of the minds of the parties between whom it passes, but merely evidences by way of admission the fact stated in it." See *Moffatt v. Hardin*, 22 S. C. 9; 1 Greenl., § 305.

But assuming that this case does not come within any of the seeming exceptions above indicated, it is urged that the paper was too informal and *ex parte* to amount to a contract, but must be considered as a "mere memorandum of a contract," and therefore not such "a written instrument" as to come within the rule as to the exclusion of parol evidence. Most assuredly a simple bill of parcels is not a contract, for the very good reason that it lacks the essential element of agreement, being only the statement of a fact—a memorandum; "a note to help the memory;" as for instance, the bill for the price of the corn rendered in this case was a mere memorandum. But a contract is a promise from one to another, either made in fact, or created by law, to do, or to refrain from doing, some lawful thing. Blsh. Cont., § 1. There is no particular form required, the only requirement being that it must contain the contract of the parties, and be definite and free from ambiguity. We can well understand how, in the hurry of business, parties would substitute condensed forms for regularly drawn out covenants or agreements. The defendants

were offering corn for sale, to come by a vessel; the plaintiffs agreed to purchase a lot, and the defendants committed the agreement to writing thus: "MAY 17. Sold to H. Bulwinkle & Co. \* \* \* corn," etc. "Schooner shipment, payable on arrival. [Signed] CRAMER & BLOHME." Why was that not a complete contract? It is said that the plaintiffs did not sign it. The whole case shows that it was not *ex parte*, but expressed the contract of both parties. We think it is not unusual, in a certain class of agreements, to be signed only by one party, as in the case of an ordinary note, the terms of which are binding upon both parties. Suppose the defendants had offered the corn for sale at public auction, and upon a lot being purchased by the plaintiffs at a certain price the defendants had made upon their sale-book the same entry precisely as they made in this case, "Sold, etc., to Bulwinkle & Co.," would they not be liable upon it as their contract? The research of the plaintiffs' attorney enabled him to furnish the court with references to several cases, which seem to conclude this.

In *Meyer v. Everth*, 4 Camp. 22, the action was on a contract in these words: "50 hogsheads of Hambro's sugar loaves at 155s., free on board of a British ship. Acceptance at 70 days." Lord Ellenborough held that it was a contract, and refused to admit parol testimony tending to show that when the sugar was purchased a sample was exhibited, saying: "When the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would amount to the admission of parol evidence to contradict a written document," etc.

In *Powell v. Edmunds*, 12 East, 10, the action was on a sale-note in these words: "April, 1806. I agree to become the purchaser of lot the first (timber trees) at £700, and agree to fulfill the conditions of sale. [Signed] A. EDMUNDS." At the trial an effort was made to show by parol testimony a warrant as to quantity by the auctioneer, but the evidence was rejected, the court saying: "There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced to writing at the time, if the representation then made as to quantity swayed him to bid for the lot. If the parol testimony were admissible in this case, I know of no instance where a party may not, by parol testimony, superadd any term to a written agreement, which would be settling aside all written contracts, and rendering them of no effect," etc.

In *Smith v. Jeffries*, 15 Mees. & W. 560, the terms were: "I hereby agree to sell Mr. Smith, of Tauner, three months, and is to give £50 cash on Friday next. [Signed] SAMUEL JEFFRIES." It appeared that in the neighborhood three qualities of potatoes were known as "Wares," and the effort was to show by parol that the contract was for a particular kind of Wares. Held, "that the evidence ought not to have been received; it went to vary and limit the contract between the parties."

In *Greases v. Ashlin*, 3 Camp. 428, the words were: "Sold to John Greases 50 quarters of oats, at 45s. 6d. per quarter, out of 175 quarters. [Signed] I. STEVENSON, for I. ASHLIN." The defendant attempted to prove that his agent Stevenson had verbally made it a condition of sale that the plaintiff should take away the oats immediately, and had abated 6d. per quarter of the price originally offered, in expectation of his agreeing to do so. The court held that "it was not competent to the defendant to give such evidence, as it materially varied the contract, which had been reduced into writing."

In each of the two last cases cited the paper was signed only by one of the contracting parties, and the action was brought by the party who had not

signed it. See also *McClanaghan v. Hines*, 2 Strob. 122, and *Gibson v. Watts*, 1 McCord Eq. 490.

We think the paper proved in this case was a contract in writing of both parties within the rule as to the exclusion of parol evidence.

But it is insisted, that while this may be so as to what may be called the terms of the paper—the quality of the article, consideration, time of payment, etc.—yet parol testimony was admissible tending to show that the defendants Cramer & Blohme, in selling the corn, committed the agreement to writing, taking the note, and realizing upon it in their own name, were acting, not as the papers represented, but as agents of a house in Baltimore, and that the plaintiffs contracted with said house through Cramer & Blohme as their agents. Is not the signature to a contract in writing, showing who made it, and in what character, a part, and a very important part, of that contract? We are unable to see any good reason why this part should not be protected from alteration or addition, as well as any other part of the contract in writing. It seems to us, that when the defendant signed the contract in their own names that became a part of it, and could not be altered by parol, so as to add to the signature, "as agents of Robert Turner & Son, of Baltimore." "A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name."

\* \* \* If an agent selling goods as bought of him (the agent), he would be personally liable for a failure to deliver the goods." Story Ag. 269. See also *id.* 219; *Benj. Sales*, § 219; *Higgins v. Senior*, 8 Mees. & W. 834; *Nash v. Towne*, 5 Wall. 703, and *Jones v. Lilledale*, 6 Ad. & El. 486, in which last case cited Lord Chief Justice Denman said: "There is no doubt that evidence is admissible on behalf of one of the contracting parties to show that the other was agent only, though contracting in his own name, and so fix the real principal; but it is clear, that if the agent contracts in such a form as to make himself personally responsible, he cannot afterward, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds, until the invoice, by which the defendants represent themselves to be the sellers; and we think they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands and to prevent its being paid to their principals; but in so doing they have made themselves responsible," etc.

In the case from Wallace Mr. Justice Clifford said: "Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal, at the time the contract was executed. Where a simple contract other than a bill or note is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. 'Such evidence,' says Baron Parke, 'does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another;' and that principle has been fully adopted by this court"—citing numerous authorities.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause remanded to the Circuit Court for a new trial.

Simpson, C. J., and Molver, J., concur.

**PROPERTY IN LETTERS—CONTRACT FOR  
SALE OF PRIVATE LETTERS—  
PUBLIC POLICY.**

U. S. CIRCUIT COURT, E. D. WISCONSIN, AUGUST, 1887.

**RICE V. WILLIAMS.**

An advertising solicitor entered into a contract with a "specialist," to furnish him with 60,000 letters which were in the possession of the Voltaic Belt Company, of Marshall, Michigan, that had been written to that company in response to its advertisements of the curative qualities of the instruments and articles in which it dealt. The solicitor paid \$500 to the company for such letters, and delivered them to the specialist, who agreed to pay him therefor \$1,200, and did pay him \$500, but refused to pay him the balance, claiming that the letters had already been used by other specialists, and were valueless. The solicitor sued to recover the balance. *Held*, that the receiver of the private letters has not such an interest therein that they can be made the subject of a sale without the writer's consent, and that the contract in this case was void for that reason, and also because it was contrary to good morals.

*G. W. Hazelton*, for plaintiff.

*Markham & Noyes*, for defendant.

**DYER, J.** At the conclusion of the plaintiff's testimony on the trial of this case, the court directed a verdict, which in effect was a dismissal of the suit. The plaintiff has moved for a new trial. The facts developed by the testimony were in brief, these: The plaintiff testified that he was an "advertising solicitor," and that among other advertisements solicited by him were such as specialist furnished for the cure of so-called "private diseases." In 1885 he opened correspondence with the defendant, who was a "specialist," practicing his calling at Milwaukee, for the sale to him, for a pecuniary consideration of 60,000 letters which were in the possession of the Voltaic Belt Company of Marshall, Michigan. That company was engaged in furnishing electric belt suspensories, and other electric appliances for the cure of various ailments and disorders. The letters in question were such as it had received from persons residing in different parts of the country, in response to advertisements of the curative qualities of the instruments and articles in which that company dealt. After considerable correspondence on the subject, the plaintiff agreed to furnish to the defendant the letters in question, and the defendant agreed to pay therefor, or for the use thereof in connection with his business, the sum of \$1,200. The letters were shipped to the defendant and received by him, and he paid to the plaintiff \$500 on the purchase. The plaintiff testified that he paid the Voltaic Belt Company \$500 for the letters, and as a part of the transaction, was to furnish to that company other letters procured from "specialists." The defendant's purpose in procuring the letters in question was to obtain the names and post-office addresses of the writers, so that he might send to them circulars advertising his remedies for the various diseases which he professed to cure. It was claimed in argument that it was not, and could not have been one of the objects of the parties engaged in this business, to enable the defendant to learn from the letters the nature of the maladies with which the writers were afflicted, because a perusal of the contents of the letters would be in the last degree dishonorable, and of course the parties contemplated only an honorable transaction! The court is however of the opinion that parties who would engage in such a traffic as this, would hardly refrain, on a point of honor, from a

perusal of the letters, not only to obtain the names and post-office addresses of the writers, but also all the disclosures which the writers might make concerning the physical infirmities from which they were suffering. The court has no doubt that this was one of the objects sought in the sale and purchase of the use of these letters, because obviously it was quite as important to the defendant to know whether the writers of the letters stood in need of such restoratives to health as he could supply, as to know their names and post-office addresses.

The defendant refused to pay the balance of \$700 yet due to the plaintiff on the sale, and this suit was brought to recover from the defendant that sum. The defendant resisted payment, on the ground that the plaintiff represented to him, in making the sale, that the letters had never before been used, or in the technical language of the profession "circularized;" that this representation was false, and that the letters were valueless. Enough was disclosed in the testimony to show that the sale of the use of the letters in the manner described, is a branch of "industry" extensively pursued by certain "specialists" throughout the country. But it would seem that in cases where the writers are made the repeated victims of advertising circulars, their better sense at last gets the advantage of their credulity, and they refuse longer to be baited by the remedies which might otherwise tempt them, and so their letters become valueless as articles of merchandise, or for further use. Thus it was, according to the theory of the defense, in the case at bar. The trial however did not proceed far enough to fully develop the facts in this regard.

To fitly characterize the contract in suit is to unreservedly condemn it as utterly unworthy of judicial countenance. It was *contra bonos mores*, and it would seem that on grounds of public policy, the court might well refuse either to aid the plaintiff in enforcing it, or the defendant in recovering damages for the breach of it. Thus to traffic in the letters of third parties, without their knowledge or consent, and to make them articles of merchandise in the manner attempted here, was, to mildly characterize it, grossly disreputable business. It was said on the argument that the letters were not in evidence, and that the court could assume nothing with reference to their contents. But enough was indicated in the correspondence of the parties which preceded the making of the contract, which correspondence was in evidence, to point to the conclusion that the letters which were the subject of bargain and sale, were written by persons who sought medical aid for disorders with which they were afflicted. Counsel for defendant had in court a large number of the letters, and his statements were not controverted that they related to infirmities and maladies of which the writers sought to be cured. The very nature of the contract in suit presupposes such to have been the fact. Ought courts of justice to lend their sanction to such a traffic? Suppose a physician—trusted and confided in as such in the community—were so far to forget or abuse the obligations of his profession, as to make the confidential communications of his patients the subject of bargain and sale, would any court listen for a moment to his complaint of non-performance of the contract, and aid him to recover the purchase price? Presumptively, the letters here in question, were confidential, at least they were personal as between the writers and the receiver, and though it be true, as was said in argument, that authority is wanting directly applicable to the question here presented, I would not hesitate, on grounds of morality, and upon considerations of common justice, to make an example of this case, by putting upon it the stamp of judicial reprobation.

But there is another ground upon which applying

to the case a principle sanctioned by high authority, the court may, it seems to me, well refuse to lend its aid to give legal effect to this transaction. The writers of these letters retained such a proprietary interest in them that they could not properly be made the subject of sale without their consent. The receiver of the letters had only a qualified property in them, and legal authority to sell them for a pecuniary consideration could only be maintained upon the theory of an absolute property right. Such a right did not exist.

At an early day in the history of equity jurisprudence, the question arose as to the right of the receiver of letters to cause them to be published without the consent of the writer, and as to the power of a court of equity to restrain such publication. It would be ill-timed and superfluous to review in detail all the cases on the subject, since they have been so thoroughly reviewed and discussed by Justice Story in the case of *Folsom v. Marsh*, 2 Story, 100, and by Judge Duer, in the case of *Woolsey v. Judd*, 4 Duer, 379.

The leading cases in England on the subject are *Pope v. Curl*, 2 Atk. 342; *Thompson v. Stanhope*, 2 Amb. 787; *Perceval v. Phipps*, 2 Ves. & B. 19; and *Gee v. Pritchard*, 2 Swanst. 403.

In the first-mentioned case, Pope had obtained an injunction restraining the defendant, a London bookseller, from vending a book entitled "Letters from Swift, Pope and others," and a motion was made to dissolve it. Some unknown person had possessed himself of a large number of private and familiar letters which had passed between Pope and his friends, Swift, Gay and others, and they had been secretly printed in the form of a book which the defendant had advertised for sale. The case was argued before Judge Hardwicke, and he continued the injunction as to the letters written by Pope. It was objected that the sending of letters is in the nature of a gift to the receiver, and therefore that the writer retains no property in them. But Lord Hardwicke said: "I am of opinion that it is only a special property in the receiver. Possibly the property in the paper may belong to him, but this does not give license to any person whatsoever to publish them (the letters) to the world; for at most the receiver has only a joint property with the writer."

*Thompson v. Stanhope* was the case of the celebrated Chesterfield letters, in which Lord Bathurst continued an injunction which had been previously granted, restraining the publication of the letters, on a bill filed by the executors of Lord Chesterfield to enjoin the publication.

In *Perceval v. Phipps*, a bill was filed praying an injunction to restrain the publication of certain private letters which had been sent by Lady Perceval to the defendant Phipps. Lord Eldon granted an injunction, but the vice-chancellor, Sir Thomas Plumer, dissolved it, and laid down the doctrine that it is only when letters "are stamped with the character of literary compositions," that their publication can be enjoined. And he sought to bring the decisions in *Pope v. Curl* and *Thompson v. Stanhope*, within the scope of that doctrine, thereby making them inapplicable to the case before him.

Then came *Gee v. Pritchard*, which was a case presented to Lord Eldon, on a motion to dissolve an injunction which he had previously granted, forbidding the publication by the defendant of a number of private and confidential letters, which had been written to him by the plaintiff in the course of a long and friendly correspondence. The motion to dissolve the injunction was denied.

Following the authority of *Perceval v. Phipps*, maintaining that the cases of *Pope v. Curl*, *Thompson v. Stanhope* and *Gee v. Pritchard*, involved only the principle of literary property, Vice-Chancellor McCoun in

*Whetmore v. Scovell*, 8 Edw. Ch. 543, held that the publication of private letters would not be restrained, except on the ground of copyright, or that they possessed the attributes of literary composition, or on the ground of a property in the paper on which they were written. This view of the question received the sanction of Chancellor Walworth in *Hoyt v. Mackenzie*, 3 Barb. Ch. 320; but these two cases stand in antagonism to the views expressed by Story in his work on Equity Jurisprudence (vol. 2, §§ 944-948), and to the judgment of the same learned jurist in *Folsom v. Marsh*, *supra*. The opinion of Judge Duer in *Woolsey v. Judd*, *supra*, is an exhaustive and able review of the subject and analysis of the cases; and he very satisfactorily shows that the decisions in *Pope v. Curl*, *Thompson v. Stanhope* and *Gee v. Pritchard*, proceeded upon the principle of a right of property retained by the writer in the letters written and sent by him to his correspondent, without regard to literary attributes or character. The case was one involving the right of the receiver of a private letter to publish it; and it is there clearly shown that the proposition settled as law by Lord Eldon, in *Gee v. Pritchard*, was that "the writer of letters, though written without any purpose of publication or profit, or any idea of literary property, possessed such a right of property in them that they can never be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Commenting on *Pope v. Curl*, the learned judge made the very just observation, that not only was there no intimation in the judgment of Lord Hardwicke "that there is any distinction between different kinds or classes of letters, limiting the protection of the court to a particular class, but the distinctions that were attempted to be made, and which seem to be all the subject admits, were expressly rejected as groundless." Again, in discussing the effect of the decision in *Gee v. Pritchard*, Judge Duer observed: "Two questions were raised and fully argued by the most eminent counsel then at the chancery bar: First, whether the plaintiff had such a property in the letters as entitled her to forbid their publication, it being fully admitted that they had no value whatever as literary compositions, and that she never meant to publish them; and second, whether her conduct toward the defendant had been such as had given him a right to publish the letters in his own justification or defense. These questions were properly argued as entirely distinct, and each was explicitly determined by the lord chancellor in favor of the plaintiff. The motion to dissolve the injunction was accordingly denied with costs. It has been said that it was through considerable doubts that Lord Eldon struggled to this decision; but the doubts which he expressed related solely to the question whether it ought originally to have been held that the writer of letters has any property in them after their transmission. He had no doubts whatever that such was the established law, and that he was bound to follow the decisions of his predecessors. He expressly says that he would not attempt to unsettle doctrines which had prevailed in his court for more than forty years, and could not therefore depart from the opinion which Lord Hardwicke and Lord Apsley had pronounced in cases (*Pope v. Curl*, *Thompson v. Stanhope*) which he was unable to distinguish from that which was before him. Subsequently in support of his opinion that the plaintiff had a sufficient property in the original letters to authorize an injunction, he refers to the language of Lord Hardwicke (quoting the exact words in *Pope v. Curl*), as proving the doctrine that the receiver of letters, although he has joint property with the writer, is not at liberty to publish them without the consent of the writer; which is equivalent to saying that the latter retains an exclusive right to control publication.



He then adverts to the decision in *Thompson v. Stanhope*, as following the same doctrine, and declares that he could not abandon a jurisdiction which his predecessors had exercised, by refusing to forbid a publication in a case to which the principle they had laid down directly applied. He then says: 'Such is my opinion, and it is not shaken by the case of *Perceval v. Phipps*;' and significantly adds: 'I think it will be extremely difficult to say where the distinction is to be found between private letters of one nature and private letters of another nature.'

Such also was the view of Story; for he says (sections 947, 948, Eq. Jur.), speaking of private letters on business, or on family concerns, or on matters of personal friendship: "It would be a sad reproach to English and American jurisprudence, if courts of equity could not interpose in such cases, and if the rights of property of the writer should be deemed to exist only when the letters were literary compositions. If the mere sending of letters to third persons is not to be deemed, in cases of literary composition, an utter abandonment of the right of property therein by the sender, *a fortiori*, the act of sending them cannot be presumed to be an abandonment thereof, in cases where the very nature of the letters imports, as matter of business, or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy. Fortunately for public as well as for private peace and morals, the learned doubts on this subject have been overruled, and it is now held that there is no distinction between private letters of one nature and private letters of another;" citing *Gee v. Pritchard*.

In *Folsom v. Marsh*, *supra*, a case decided in the Circuit Court of the United States for the First Circuit, Justice Story held that an author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a property therein, unless he has unequivocally dedicated them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character. "The general property," he says, "and general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the correspondence remains in the writer and his representatives; \* \* \* *a fortiori*, third persons, standing in no privity with either party, are not entitled to publish them to subvert their own private purposes of interest, or curiosity, or passion. If the case of *Perceval v. Phipps*, 2 Ves. & B. 21-23, before the then vice-chancellor (Sir Thomas Plumer), contains a different doctrine, all I can say is that I do not accede to its authority; and I fall back upon the more intelligible and reasonable doctrine of Lord Hardwicke in *Pope v. Curl*, 2 Atk. 342, and Lord Apsley in the case of *Thompson v. Stanhope*, 2 Amb. 737, and of Lord Keeper Henley Eden in the case of *Duke of Queensberry v. Shebbeare*, 2 Eden, 329, which Lord Eldon has not scrupled to hold to be binding authorities upon the point in *Gee v. Pritchard*. 2 Swanst. 403."

If this be the law, where the right of publication is in question, assuredly it is not less so in a case where third persons, having obtained possession of private letters, are seeking to make them the subject of sale and purchase, without the consent of the writers. Nor do I think the court should hesitate to apply the principle here, although the writers are not themselves interposing for equitable relief, since, if the property right is yet retained by the writers, no lawful sale of the letters can be made. In *Eyre v. Higbee*, 22 How. Pr. 198—decided by Judges Gould, Mullin and Ingraham,

all concurring—it was adjudged that letters in regard to matters of business or friendship, although they pass to an executor or administrator, are not assets in their hands, and cannot be made the subject of sale or assignment by them. This judgment of the court was made expressly to rest upon the principle that "the property which the receiver of letters acquires in them is not such a property as the holder must have in order to make them assets."

Motion for a new trial overruled.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**BOND—CONDITIONAL DELIVERY—LIABILITY OF SURETIES.**—In an action against a county treasurer and his sureties upon his official bond for a default, it appeared that the sureties had executed the bond and placed it in the hands of third parties, upon an agreement with the principal that it should not be delivered until other sureties should sign and qualify to a certain amount; that after this the principal persuaded the persons holding the bond to deliver it to him, and he presented it to the county supervisors, by whom it was accepted without knowledge of any condition in its execution. Held, that the sureties were liable thereon. It is conceded by the appellants that if they had delivered the bond to the principal with the same understanding, his delivery would be a good delivery, and the appellants would be precluded from setting up the fact that the bond was signed with conditions, unless they could show that the supervisors had knowledge of the conditions, or were put upon inquiry in respect to them. The law indeed is well settled, at least in this State, that in such case the sureties would be deemed to have clothed the principal with apparent power to deliver the bond. *Carroll Co. v. Ruggles*, 69 Iowa, 276. But it is said that the case is different where the sureties took the precaution to put the bond into the hands of a third person. To this however we have to say that it appears to us that Johnson and Dunlavey were the agents solely of the sureties, and if the bond was delivered in violation of the conditions upon which the sureties signed it, it was the fault of their own agents. The sureties selected untrustworthy persons, and the loss should not fall upon the county, who had had nothing to do with these persons. If the supervisors had received the bond from Johnson and Dunlavey, it may be that they would have been charged with the duty of discovering what their powers were. But they received the bond from the very person who might be expected to deliver it, and who had the apparent power to deliver it. If we should sustain the appellants in their defense, no such bond could be safely accepted by a board of supervisors, though presented by the principal, until they had brought all the sureties before them, and ascertained from them upon what conditions, if any, they had signed the bond, and if upon any, whether they had been performed. The appellants especially relied upon *Smith v. Bank*, 32 Vt. 341. In that case a bond and mortgage had been deposited with one Rolfe, to be delivered when certain conditions were performed. A delivery having been made without the performance of the conditions, it was held that the delivery was not valid. But the court in that case regarded the deposit with Rolfe of such a character that the instruments became escrows. Besides it appears that when the instruments were delivered it was known they came from Rolfe's hands, who was a special agent; and it was held, that that fact being understood by the parties, the party to whom the delivery was made should have inquired in regard to the extent of his powers. The bond sued



on is not, in our opinion, to be deemed an escrow, in the proper sense of the term. It was deposited with a third person, by the obligors alone, and not by any agreement between them and the obligee. Nor did the plaintiff have any knowledge of the special agents, Johnson and Dunlavy, and there was nothing, so far as we can see, to put the board upon inquiry in respect to the obligation of the sureties. The correct rule seems to be expressed in *State v. Peck*, 53 Me. 284. The court said: "A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it upon the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice." See also in this connection *Dair v. U. S.*, 16 Wall. 2; *Deardorf v. Foresman*, 24 Ind. 481; *Nash v. Fugate*, 24 Grat. 208; *Chicago v. Gage*, 95 Ill. 593. Iowa Sup. Ct., Oct. 26, 1887. *Taylor Co. v. King*. Opinion by Adams, C. J.

**CARRIERS—OF GOODS—LIABILITY OF WAREHOUSEMAN—ALLOWING EGGS TO FREEZE.**—The defendant placed eggs received by freight in its warehouse on December 11. While there the temperature from December 17 to December 22 was from zero to seven degrees above. Eggs would freeze in this warehouse with the thermometer at eight degrees above zero. The eggs were frozen when examined after the 22d. *Held*, that the defendant was liable for damages. It was the duty of the defendant company, when it received these eggs at Fort Gratiot, to safely deliver them at Buffalo. The company performed its duty as far as the carriage was concerned, and there is no fault found with it in that respect. But instead of keeping these eggs in the refrigerator car, as it did the others in the full car, until the same were called for by the consignee, and before its agents had taken any steps to notify him, or knew whether or not he was to be found in the city, its agents unloaded these eggs and placed them in a warehouse, where they were liable to be frozen on any day they remained there. It is to be expected, as a natural result, that the temperature may drop to eight degrees above zero, and lower, at any time in the month of December in the latitude of Buffalo. I think the court below was right in his charge given. The defendant was certainly liable, as a warehouseman, the moment it removed the eggs from the car, and was bound to exercise common and ordinary prudence in the storing of them. It was certainly bound to take the same care of the property that an ordinarily prudent man would exercise over his own goods. I hardly think that if these 4,900 dozen of eggs had belonged to the railroad company, its agents would have taken them out of this refrigerator car and placed them in this warehouse. Nor did the delay of Carter in calling for them avoid the defendant's liability. By removing the eggs from the car without notice to the consignee, and without knowing whether or not he was a resident of Buffalo, the defendant became a bailee of the consignee, and was liable if he did not exercise ordinary care in keeping the property safe and secure. If the eggs had been left in the car, and frozen there, the delay of Carter in calling for them would have been of some moment. But it seems that he took the eggs in the other car without demur or complaint, as he probably would these had they been left as ship-

ped. Mich. Sup. Ct., Oct. 27, 1887. *Burroughs v. Grand Trunk Ry. Co.* Opinion by Morse, J.; Sherwood, J., concurs; Campbell, C. J., and Champlin, J., dissenting.

**— OF PASSENGERS—DUTY TO GIVE PASSENGER REASONABLE TIME TO FIND TICKET.**—When a person having bought and put in his pocket a proper railroad ticket, takes a seat on the proper train, on the conductor's demand for his ticket, searches for and fails to find it, but informs the conductor that he has one, and asks the conductor to wait for him to find it, the conductor is bound to wait a reasonable time for him to produce his ticket; and the question, what is a reasonable time, is one of fact for the jury. Tex. Sup. Ct., Oct. 18, 1887. *International & G. N. R. Co. v. Wilkes*. Opinion by Willie, C. J.

**CRIMINAL LAW—MAYHEM—INTENT PRESUMED.**—In a prosecution for maiming, under section 177, Penal Code, the injury must be willfully inflicted, "with the intent to injure, disfigure, or disable;" but the "intent" is to be presumed from the act of maiming, unless the contrary appears. The defendant's principal contention is that the intent to disfigure, disable, etc., being made a necessary ingredient of the offense, should be distinctly and independently shown or made to appear, and that evidence of the infliction of the injury is not by itself sufficient. In this however he is in error. The Legislature were not content to leave the courts to apply the ordinary rule in respect to legal presumptions in such cases, but have especially declared and emphasized it in the statute. It is a transcript of the recent New York statute on the same subject. The law as it previously stood in that State required proof of premeditation. *Tully v. People*, 67 N. Y. 18. The purpose to change the rule is clear. It will be observed that the words "premeditation," "maliciously," or "malice aforethought" are omitted. The object of the statute was to throw additional safeguards around the person of the citizen, and to suppress brutal or barbarous modes of assault and personal injuries. In the majority of cases, maiming is not done upon premeditation and in cool blood, but in sudden rencounters. The offense of maiming may therefore under this statute be committed in the heat of passion, or in sudden combat. But while the statute is thus clear and specific as to presumptive evidence of the intent therein defined, it is equally clear as to the necessity of the existence of such intent. The maiming must be with the intent to maim, or more accurately, the injury must be purposely (not accidentally) inflicted, "with the intent to commit a felony, or to injure, disfigure, or disable;" and this is a question for the jury. The offense may be committed in attempting, or while intending to commit a felony, as robbery, murder, etc., or with the intent to disfigure or disable, or to inflict serious bodily injuries to the person, or any member or organ of the body. It is obvious that the term "intent to injure," in the connection used, is intended to refer to personal injuries of the same general class, or to such as might reasonably be expected to be dangerous, or result in serious bodily harm, and not to slight injuries or assaults, from which such results are not naturally or reasonably to be expected. The intent then referred to in the statute may be the purpose and disposition at the time to do, without lawful authority or necessity that which the statute forbids, and it may be presumed from the infliction of the injury. Such presumption is of course disputable. The circumstances attending the alleged wrongful act may so explain it as to leave its criminal character in doubt or rebut it altogether; and the defendant may show that it was done under the pressure of necessity while lawfully defending himself, or that it

was accidental, or not within the probable consequences of what he intended or actually attempted to do. *State v. Crawford*, 2 Dev. 428; *Com. v. Webster*, 5 Cush. 306. Minn. Sup. Ct., Oct. 10, 1887. *State v. Hair*. Opinion by Vanderburgh, J.

**DAMAGES—EXPENSE OF NURSING.**—In an action for personal injuries, it is no defense to a claim for moneys paid a nurse that the plaintiff had a family capable of taking care of him; and evidence of that fact is inadmissible. The plaintiff testified he hired and paid a man for nursing him. He also testified that he had a wife and a grown son and daughter. The defendant offered to prove that the plaintiff's family "could have given the care and attention he was needing without expense." The evidence was rejected by the court. There is some evidence that the plaintiff and his wife and family, for some sufficient reason, it should be assumed were not living together, and therefore the evidence was not admissible. But in any view we think the proposed evidence was immaterial. Upon the supposition that the plaintiff was injured as he claimed, we do not think he was required to have his family take care of him without regard to the question of their competency, but that he could, if he saw proper, procure a trained nurse or other competent person to take care of him, and that if he did so, the defendant cannot insist that the expense incurred was unnecessary, on the sole ground that he should have been nursed by his family without expense. Iowa Sup. Ct., Oct. 27, 1887. *Kendall v. City of Albia*. Opinion by Seever, J.

**DEFINITION—"PUBLIC PLACE"—GRAND JURY ROOM.**—Pen. Code Tex., art. 144a, provides for a fine against a person found intoxicated "in any public place." *Held*, that the grand jury room, while the grand jury was in session, was a public place, within the meaning of this section. In substance, the information and complaint charges that the defendant was found in a state of intoxication in the grand jury room, the grand jury being in session in said room at the time, and that said grand jury room was then and there a public place. It is contended by counsel for the defendant, that notwithstanding the complaint and information allege that the grand jury room was a public place, it also alleges a fact which shows that it was not a public place, to-wit, that the grand jury was in session therein, which fact constituted said room a private place, and that therefore said information and complaints do not charge any offense. It has been held that the term "public place" does not mean a place devoted solely to the uses of the public; but it means a place which, in point of fact is public as distinguished from private, a place that is visited by many persons, and usually accessible to the neighboring public. *Parker v. State*, 26 Tex. 204; *Elsberry v. State*, 41 id. 158. We think the definition of the term given in the decisions above cited is applicable to the term as used in the statute before us. Taking this definition for our guide, we are clearly of opinion that a grand jury room, while the grand jury is in session therein, is a public place. Such room is not only for the time being devoted solely to the public use, but it is a place that is visited by many persons, and is usually accessible to the neighboring public for the purpose of transacting the public business. Not only do the members of the grand jury, the county and district attorney, and the bailiff assemble and visit there in the discharge of their public duties, but numerous other persons visit the place as witnesses, either voluntarily or in obedience to process. The object of this statute is to prevent intoxication at places which are within the observation of persons indiscriminately, because of the consequences resulting from the evil example. It would certainly not be in furtherance of

the accomplishment of this object to hold that a grand jury room, while the grand jury was in session, was not a public place; when the fact is that the young as well as the aged, the female as well as the male—all persons indiscriminately—not only visit such place voluntarily, but are compelled to go there by the process of the law. That the jurors and witnesses are required to take an oath that they will not divulge the proceedings of the grand jury, and that the deliberations of the grand jury are secret, cannot be held to make the grand jury room a private place. It is the proceedings and the deliberations of the grand jury upon which these provisions of the law place the seal of privacy, and not the room or place where such proceedings and deliberations take place. Tex. Ct. App., Oct. 12, 1887. *Murchison v. State*. Opinion by Willson, J.

**EXEMPTION—LAWYER'S OFFICE FURNITURE.**—Code Iowa, § 3072, provides that "the proper tools, instruments, or books of the debtor, if a \* \* \* lawyer," shall be exempt from execution. *Held*, that a lawyer's ordinary office furniture, including his table, necessary to enable him to carry on his business, included in the term "instruments," is exempt from execution, and cannot be seized on a landlord's attachment. We observe that one of the articles attached is the defendant's office table. Strictly speaking, perhaps a table is not an instrument. Its general use is such that the word "instrument" seems inapplicable. But it should be borne in mind that a lawyer's table is used specifically in his employment; it is one of the things which he employs as a means in the accomplishment of his work. The fact that a table, in its general use, is not an instrument, is not important. It appears quite different when it is adopted specifically as means in an employment. It then fulfills all the essential ideas of an instrument, and that unquestionably is the important consideration. It is the policy of the law that every man who is the head of a family shall be allowed, as far as possible, to follow his chosen vocation. It is better ordinarily, we presume, even for the creditor, that the debtor should not be deprived of the instruments of his vocation, and so turned aside to something for which he is unprepared, and which consequently would be less remunerative. It is true that not everything with which the head of a family earns his living is exempt to him. Machinery is not exempt. It is proper that the exemption should be more limited. The creditor's rights must be considered as well as the debtor's. But the value to a lawyer of the ordinary office furniture which he uses in doing his work is so much greater than it can be to his creditors, we think it comes within the spirit of the exemption statute. Iowa Sup. Ct., Oct. 24, 1887. *Abraham v. Davenport*. Opinion by Adams, C. J.

**LANDLORD AND TENANT—TRADE FIXTURES—RENEWAL OF LEASE.**—The acceptance of a new lease by a tenant, without any agreement as to the trade fixtures owned by him, does not waive his right to such fixtures, unless the new lease in clear terms covers the fixtures upon the premises leased. If he take the new lease with an agreement, either expressed or implied, with the landlord that he shall still retain the right to remove the fixtures, his right is not lost by accepting such lease, any more than it would be if he surrendered the actual possession, having at the same time obtained the permission of the landlord to remove such fixtures after such surrender. All the cases hold that if the landlord agrees that the tenant may remove the fixtures after a surrender of his possession, the landlord is bound by such agreement, and the tenant retains the right to remove the same after such surrender. It would seem that the reason upon which the courts

have based the rule that the tenant cannot re-enter and remove his fixtures after surrender of the possession under his lease, is that such surrender is presumed to be intended either as a gift of the fixtures to the landlord, or if not a gift, a waiver to any right to re-enter and remove them. It becomes therefore to some extent at least, a question as to the intention of the parties; and when the evidence clearly shows that there was no intention on the part of the tenant to relinquish his unquestioned right to the fixtures, and there is also evidence showing that the landlord understood such intention, and acquiesced therein by promising him that he might remove them after the surrender, the right is not lost. See *Torrey v. Burnett*, 38 N. J. L. 457, and *Keogh v. Danell*, 12 Wis. 164-172. In the case of *Torrey v. Burnett*, *supra*, the court, speaking of the insufficiency of a mere declaration of the tenant that he does not waive his right to remove his fixtures after he makes an actual surrender of the premises, say: "But while this seems clear, I think it is equally so that this legal presumption of a gift may be repelled by proof of the assent of the landlord to the retention by the tenant of his right of removal. In my opinion if the landlord should say to the tenant that he should have a certain time within which to remove his fixtures, such a license would be valid, and would prevent for the time being the incorporation of the fixtures into the land. Such stipulations as these are common in leases, and in that form have been frequently enforced by judicial action." It was held in this case that when the landlord had agreed, before the tenant had finally yielded up the possession of the premises, that he would endeavor to effect a sale of the fixtures for the benefit of the tenant, the right of the tenant to the fixtures remained in him after the surrender, and was subject to attachment by a creditor of the tenant. In this case the fixture was a steam-engine. This case was commented upon by this court in *Joselyn v. McCabe*, 46 Wis. 591, and while the late chief justice questioned whether a mere promise of the landlord before the actual surrender of the possession of the tenant, to assist in selling the fixtures amounted to an agreement by which the title to fixtures should remain in the tenant after the surrender, yet in the commencement of the opinion he expressly states that if a tenant reserves by agreement with the landlord the right to remove the fixtures, the tenant does not lose his right to them by surrender of his possession of the premises with the fixtures thereon. The rule which is applied to the cases of actual surrender of the possession to the landlord applies with much greater force when it is sought to divest the right of the tenant to his trade fixtures, because he takes a new lease from his landlord, extending the time of his tenancy. In that case there is no actual transfer of the possession of the fixtures to the landlord. The tenant at all times retains the actual possession and control, and in such case, we think, there ought to be something more than the mere taking of a new lease extending the term to divest the tenant of his right. If he accepts a lease which in express terms recognizes the right of the landlord to the fixtures, and he agrees to pay rent for their use thereafter, and keep them in repair, and surrender their possession at the end of the new term, a strong case would be made out in favor of a surrender of the fixtures to the landlord by the acceptance of such new lease, and it would require very clear evidence that, notwithstanding the acceptance of such new lease, there was an agreement that the title to the fixtures should remain in the tenant. If it should be admitted that the general words of description in the new lease would under ordinary circumstances be a lease of the fixtures as well as of the land and buildings, still the lease only raises a presumption that it was intended to cover the fix-

tures, and it is open to proof whether it was in fact intended to cover such fixtures, or whether they were intended by both parties to be excepted therefrom. *Kerr v. Kingsbury*, 39 Mich. 150. Wis. Sup. Ct., Oct. 11, 1887. *Second Nat. Bank of Beloit v. O. E. Merrill Co.* Opinion by Taylor, J.

**MISTAKE—OF LAW—RELEASE AND DISCHARGE—EVIDENCE TO CONTRADICT.**—In an action against a town, to recover damages for injuries caused by a defect in a highway, the defendant's counsel introduced a writing, signed by the plaintiff, acknowledging the receipt of a certain sum, "in full of all demands for damages sustained" by reason of the defect in the highway complained of. The plaintiff did not attempt to show that the release was procured by fraud, or that he had attempted to rescind the agreement by restoring the money he had received. *Held*, that the plaintiff would not be permitted to show that he signed the writing under a mistake as to its legal effect and that it was orally agreed at the time between him and the defendant's agent, that the release should apply only to the damages to the property of the plaintiff, and not to his personal injuries. *Mass. Sup. Jud. Ct.*, Oct. 21, 1887. *Squires v. Inhabitants of Town of Amherst.* Opinion by Field, J.

**MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS—ACTION FOR DAMAGES—PLEADING.**—In an action by a private person against a municipal corporation, a declaration which alleges that defendant rebuilt the outlet of Franklin street sewer where it enters the Riopelle street sewer, upon a new and different grade from that at which the original outlet was built, and that in so doing, the defendant carelessly, negligently, wrongfully and unskillfully raised the grade above the grade of the Franklin street sewer, by means whereof the water and sewerage from the public sewer in Franklin street and Riopelle street were flooded upon plaintiff's premises, to his damage, etc., sets up a cause of action, and states facts which entitle him to relief. The argument in support of the demurrer proceeds upon two principles: First, that a municipal corporation is not liable for an injury resulting from the exercise of its legislative powers; and second that a municipal corporation is not liable, at the suit of a private individual, for damages arising from the insufficiency or defective construction of its public sewers, when such damage results directly to the party injured from his use and occupation of the same for his private advantage and convenience. That the first proposition, broadly stated, is not universally true, is shown by the case of *Ashley v. Port Huron*, 35 Mich. 296, and cases cited in the opinion. The distinction is that, where the plan adopted by the municipality must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable; but where the fault found is with the wisdom of the measure, or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, then the municipality is not liable. *Detroit v. Beckman*, 34 Mich. 125; *Ashley v. Port Huron*, 35 id. 296. For such an act of misfeasance the defendant should be held liable, unless the second point taken by his counsel should prevail. Counsel for defendant insists that the case of *Dermont v. Detroit*, 4 Mich. 435, supports the second position assumed by him. It was held in that case that the defendants were not liable, at the suit of a private individual, for damages arising from the insufficiency or defective construction of its public sewers, when such damages resulted directly to the party injured from his use and occupation of the same for his private advantage and convenience. It was

however intimated in that case that had the plaintiff's damage happened directly in consequence of the defendant's want of prudence or skill in the construction of its sewers, instead of by reason of his private drain being connected with the sewer, the case would have merited a very different consideration. It was also suggested, that had the injury occurred in consequence of the imprudent and unskilful construction of the Congress sewer with the Woodward avenue sewer, a very different question from the present would have been presented. The case made by the declaration in this case rests upon the careless and wrongful action of defendant in raising the grade at which the Franklin street sewer enters and connects with the Biopelle street sewer. It complains of a ministerial act negligently and wrongfully done, and not of an act involving legislative or discretionary power. The acts complained of are analogous to those in the case of *Ashley v. Port Huron*, 35 Mich. 206, and if upon the trial the facts developed show that the act complained of was committed by the defendant in the execution of a ministerial duty, or in the exercise of a wrongful act, by which plaintiffs' premises were flooded by the water in the sewer being set back and discharged upon their premises through a sewer connection which they had a right to make and maintain, the principles enunciated in the *Ashley* case will control this. The questions pertaining to the defendant's duty and liability in this respect should be determined upon the facts as established upon the trial. It is too early in the case to anticipate what those may be. We merely express our opinion at this time that the declaration discloses a cause of action. Mich. Sup. Ct., Oct. 20, 1887. *Defer v. City of Detroit*. Opinion by Champlin, J.

**POWER TO FORBID PEDDLING MEAT NOT CONFERRED UNDER POWER TO REGULATE MARKETS.**—The provision of Code Iowa, § 456, that "cities shall have power \* \* \* to establish and regulate markets," does not empower a city council to make an ordinance forbidding the peddling of meats; and an information charging defendant with having violated an ordinance declaring the peddling of meats to be a misdemeanor is bad on demurrer. The power given by statute is to establish and regulate markets. The city cannot go beyond the power thus given. Now an ordinance which is designed merely to prevent peddling meats does not appear to us to be an ordinance to establish and regulate markets. It seems to be an ordinance designed to favor private butcher shops in the city, if there are any. But it does not establish such shops. It may be that the inhabitants of Burlington have no means of buying meat except from street peddlers. We do not think the city council can interfere with such occupation until it has established a meat market; and not then, unless it may be as a regulation of the market. To sustain the plaintiff, we should be obliged to hold that the design of the statute was to give the power to regulate the mode of selling meat in the absence of specific markets, but in our opinion, we should not be justified in so doing. Iowa Sup. Ct., Oct. 28, 1887. *City of Burlington v. Dankwardt*. Opinion by Adams, C. J.

**STATUTE OF LIMITATIONS — NEGOTIABLE INSTRUMENTS—ACTION AGAINST INDORSER.**—As against the indorser of a note after maturity the statute of limitations begins to run from the date of the indorsement, and not from the maturity of the note. As between the indorser and the indorsee this was a new contract, founded upon a valuable consideration, by which the indorser became liable (Code, § 2780) "to pay the money, if the parties to the instrument primarily liable thereon failed to pay according to the terms thereof; and hence, if there are several indorsers, each is liable to subsequent ones in the order of their in-

dorsement." The liability of an ordinary indorser is greater than that of a surety. The latter becomes bound simply for the accommodation of his principal, and receives no consideration for the favor he bestows. He is bound only to the same extent as his principal, and whatever defense the principal succeeds in making inures to the benefit of the surety, whose undertaking is identical with that of the principal. By signing the paper he enters into no new or different contract to the payee from that into which his principal has entered. Their obligation is generally contemporaneous, and is joint, or it may be both joint and several. But with an indorser it is different; he usually receives a consideration for his promise. If the note he indorsed is for any cause invalid, he is nevertheless bound; as for instance, if it is without consideration, or is founded upon a gaming or usurious consideration, or was forged, he would be liable on his indorsement, notwithstanding the principal might on that account be released from its payment; or if when he indorsed this paper it had been barred by the statute of limitations, and no action could have been maintained on it against the maker, he would nevertheless have been bound, by his contract to pay the money it was made to secure, according to its terms and stipulations. The party in this instance might have entitled himself to the defense set up if at the time of entering into the engagement he had stipulated that the suit should be instituted against the maker before the bar of the statute attached; or he might have limited his liability by express stipulation in his indorsement (Code, § 2777), or he might have paid the note and controlled it, so as to enable him to bring and prosecute the suit in his own name; or if the paper indorsed had had three months to run before the statute bar attached, he might have protected himself by notifying the indorsee to sue the principal. Code, § 2156. In this case however there was not sufficient time to have made the notice available. The authority derived from text writers, and the few cases we have been able to find, or to which our attention has been called, sustain this view of the question. Wood Lim. Act, § 134, *Brian v. Banks*, 38 Ga. 300. Ga. Sup. Ct., May 9, 1887. *Graham v. Roberson*. Opinion by Hall, J.

**TRADE-MARK—CONTRACT FOR ROYALTIES—BREACH.** By the terms of a written contract between the plaintiff and the defendant, in which it was stated that it was for the mutual interest of both parties thereto that the defendant should have the sale of certain mineral water, known as "Clysmic Water," taken from plaintiff's spring of the same name, for the purpose of increasing the sale thereof, it was agreed, that in consideration of the payment of a certain royalty, the defendant should have, for a long term of years, the exclusive sale of such waters in the United States and foreign countries. Held, that during the life of the contract, the defendant had no right to sell other mineral waters, under the same name, in competition with the waters of plaintiff's spring, notwithstanding the fact that he had himself given the name to the waters before plaintiff acquired title to the spring. There are trade-marks to which the characteristic of personal proprietorship attaches, because they assert to the public that some particular person has given his special skill to the production or selection of the articles they cover. *Leather Cloth Co. v. American L. C. Co.*, 11 H. L. Cas. 544; *Hoxie v. Chanoy*, 143 Mass. 593; *Holt v. Menendez*, 23 Fed. Rep. 869. There is another class of trade-marks, which assert for the articles they designate some particular place of origin. In such case the trade-mark is inseparable from the place. It passes as an incident with the sale of the place. *Congress Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 302; *In re Swezey*, 62 How. Pr. 219; *Mau-*

facturing Co. v. Hall, 61 N. Y. 226; Pepper v. Labrot, 8 Fed. Rep. 29; Milling Co. v. Robinson, 20 id. 218. It is unnecessary to review the authorities in detail. Limiting this decision, as we do, to an adjudication of the rights of the complainant and the defendant Lookwood during the continuance of the contract relations subsisting between them, we must hold that the name "Clysmic" became affixed and appurtenant to the complainant's spring, as indicating the source of the water known to the public as "Clysmic Water," and that the complainant cannot be deprived, in the manner attempted by the defendant, of the advantage which has accrued to her, as the purchaser of the spring from such designation. We regard this ruling as fully sustained by the principles laid down in the case of Congress Spring Co. v. High Rock Congress Spring Co., *supra*, Woodward v. Lazar, 21 Cal. 448, distinguished. U. S. Cir. Ct., E. D. Wis., June 24, 1887. *Hill v. Lockwood*. Opinion by Dyer, J.; Harlan, J., concurred.

**WITNESS — CROSS-EXAMINATION OF ACCUSED — HANDWRITING.**—A party prosecuted in a United States District Court for violating the election law, by writing names improperly on the registration book, who on the trial testifies, in his own behalf, that he did not write the names unlawfully written, may be compelled on his cross-examination to write the same names on a paper in the presence of the jury, and such paper may be offered in evidence on rebuttal, and the jury permitted to compare it with the writing in the registration book. While a defendant in a criminal case cannot be compelled to give testimony against himself, while he may not be put upon the stand against his will, yet if he avails himself of the privilege, and goes on to the witness stand, and testifies in his own behalf, he subjects himself to the ordinary rules of cross-examination, and if this was legitimate cross-examination, then he cannot be heard to say that by it he furnished testimony against himself. He may be impeached in any way that any other witness can be. Of course cross-examination is in the Federal courts limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject-matter of the direct testimony. The question will perhaps resolve itself into two forms or two phases. The first, is the writing of the same names on an independent piece of paper, a matter directly connected with the subject of the direct testimony. I think there can be little doubt on that point. Of course, it would not be doubted but that questions could be asked as to whether the witness was present at the time of the writing, whether he could or could not write, and other kindred matters, because all that is connected directly with the question whether he did or did not make the writing upon the book. I suppose it matters not whether the case is one in which the testimony is sought to show that he did or did not make the writing. Supposing in any civil case, a witness testifies that he did make a particular writing, would not it be germane to that matter to show that he could not write at all; to give him a pen, and have him show before the jury that he either could not write at all, or that his writing was so completely variant from that in question that it was utterly impossible that he could have written it? Surely, the two matters are connected as closely as two things can be; and it would be conclusive against the testimony of any witness that he had written a certain writing, if it appeared from his own demonstration before the jury that he could not write at all, or that his handwriting was completely variant from that in question.

Then the other phase is whether you can compel a witness on cross-examination to do other than answer questions. This was a physical act which he was called

upon to do in the presence of the jury. It is a matter of common experience in a court-room that witnesses are often called upon either for some exposure of their person, or to do some physical act supporting or contradicting their direct testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true, and the test accurate. A person who testifies as to his physical condition may be compelled, there being no improper exposure of person, to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he never was wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve that the jury may see whether or no there was a scar or mark of wound on his arm. In some recent cases, although the matter has been questioned, courts have required plaintiffs in personal damage cases to submit themselves to an examination of the witnesses of the defendant outside of the court-room, in order that their testimony might be given to the jury as to the physical condition; so the fact that the witness is called upon to do some physical act, or to make some exposure of his person, which supports or contradicts his direct testimony, is not necessarily objection to its validity. U. S. Cir. Ct., E. D. Mo., Sept. 20, 1887. *United States v. Mullaney*. Opinion by Brewer, J.

#### NOTES.

A recent number of the ALBANY LAW JOURNAL contains a just criticism upon the decision of the Supreme Court of Alabama, not long since rendered, which is to the effect, that if a person from mental disease is unable to control his own actions, he is not legally responsible for those actions, even though he is able to distinguish between right and wrong. He is subject to the mental insanity of inability to govern his own conduct, even when he can distinguish right from wrong, and know that what he is doing is contrary to law. There is an intimation by the court that this is the kind of insanity to which Galtreau was subject when he shot President Garfield. This new theory of insanity, though advocated by some physicians, is contrary to the settled judicial judgment of this country. That judgment, as also that of England has from time immemorial assumed that if one knows enough to distinguish between right and wrong in respect to his own actions, this is sufficient to make him legally responsible for those actions, and liable to punishment if he violates the laws of the land. The Supreme Court of Alabama now adds another test of such responsibility and liability, and this is that he must not be subject to such mental disease as will prevent him from controlling his own actions. Saying nothing about the metaphysics involved in this added test, we venture to ask two practical questions: How shall the fact be ascertained that a man who knows the difference between right and wrong, is subject to such a disease to any extent? How shall the fact be ascertained that the disease, if existing at all, exists to an extent that puts his actions beyond his control, and therefore releases him from all legal responsibility? It strikes us that this theory, when sought to be applied by courts in the administration of justice, would be beset with very grave difficulties, and that to the damage of the general community it would open the way for the escape of a great many persons who ought to be punished for their crimes. The doctrine generally held by courts is likely to stand, the Supreme Court of Alabama to the contrary notwithstanding. — *The Independent*.

# The Albany Law Journal.

ALBANY, JANUARY 14, 1888.

## CURRENT TOPICS.

NEARLY every one of the law reforms of the last forty years in England has originated, we believe, in this country, and no word of credit has ever been given, to our knowledge, but the English have calmly appropriated them, and put on the airs of virtue about them. She wiped out her chancery system over night, and simplified her forms of procedure, without alluding to the fact that she was merely following the example of New York, and she allowed parties to be witnesses for themselves without acknowledging that Connecticut had done it before her. This latter fact is brought out in a pamphlet issued by the Hon. Charles J. McCurdy of Connecticut, who quotes a passage from an article by Mr. Justice Bowen in Mr. Ward's new book, entitled "The Reign of Queen Victoria; A Survey of Fifty Years of Progress." After describing the inconsistencies, absurdities and perversions of justice incident to the practice of the common law, the writer says: "Perhaps the most serious blemish of all consisted in the established law of evidence, which excluded from giving testimony all witnesses who had even the minutest interest in the result, and as a crowning paradox, even the parties to the suit themselves. 'The evidence of interested witnesses,' it was said, 'can never induce any rational belief.' The merchant whose name was forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer conjectures and beliefs as to the authenticity of the disputed signature from what they knew of his other writings. If a farmer in his gig ran over a foot passenger in the road, the two persons whom the law singled out to prohibit from becoming witnesses were the farmer and the foot passenger. In spite of the vigorous efforts of Lord Denman and others, to which the country owes so much, this final absurdity, which closed in courts the mouths of those who knew most about the matter, was not removed till the year 1851." Mr. McCurdy shows that in 1847, while lieutenant-governor and president of the Senate of Connecticut, he drew and introduced a bill enabling parties to testify, which was rejected. The next year he renewed the attempt with success. In 1851, while in England, at the suggestion of Mr. Field, he explained to a law committee there the change, the reasons and the results. Mr. Field, in drafting the New York bill of 1848, suggested this change derived from Mr. McCurdy's bill, and accompanied by a letter from him, and he says, probably with justice, "I know that the English got the idea from you," Mr. McCurdy. We think Mr. McCurdy is right "to put on record the true genesis of that great improvement in one of the most important of all human transactions—the

administration of justice." Perhaps it may be pardoned to ourselves to refer to the fact that the first piece of legal writing we ever did was an essay in favor of this innovation. At any rate we take pride in it. It is well to keep our profession in our own country at least correctly informed on these points, for one of these days we shall have some Anglo-maniac attributing our law reforms to England.

The Inter-State Commerce Commission have decided the very important question whether express companies are within the purview of the act. Commissioner Walker gives an elaborate opinion. The conclusions are that railroads doing express business are within the act, but independent express companies are not. The commissioner says, among other things: "It is moreover true, as claimed, that the express business, so called, has been of such long standing, and presents such a well known and complete organization in every portion of the country, that it must be considered to be a subject which was perfectly understood by Congress at the time of the enactment of the law in question. More than this, it is a business which has heretofore and frequently been the occasion of distinct legislation by Congress, both in connection with railroad business and as contradistinguished therefrom. We have been referred to a series of congressional enactments running back for twenty years, in which the express business, by name, has been the subject of statutory provisions, and the same is true in the legislation of the various States. In view of this the question is asked, if it was the intention of Congress to make the express companies subject to the provisions of the inter-State commerce act, why did not the law explicitly so state? It is said that the addition of a few words would have simply expressed the legislative intent, if such intent existed. It is argued that the failure to so state clearly expresses a purpose to omit them from its scope, and it is claimed, that under the circumstances, the general provision of section 1 should be treated as referring only to railroad companies, either alone or under a common control with water transportation lines. This argument is not without weight in determining the construction of the statute. It is also said that the act throughout is obviously directed toward the regulation of railroads and the railroad systems of the country; that the investigation which preceded the enactment of the law was an investigation of railroads and of transportation by railroad companies; that express companies were not alluded to in that investigation, and that no evils connected with the management of public business by them were brought to the attention of Congress. This consideration is also proper and should not be overlooked, although the commission has reason to believe that the claim made by the express companies, that their rates and their methods of rate-making are perfectly satisfactory to the public, is somewhat overstated. It is further claimed that the details of the law in its various provisions are so framed as to apply distinctly to railroads and

railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used, and to this reasoning also there is much force. \* \* \* It is proper to note the further fact that in one important particular the legal status of the independent express companies differs materially from that of the railroad companies. They have not in all respects the same *quasi* public character. The right of eminent domain is not invoked in their behalf. Whatever property they own must be acquired by contract, and such transportation facilities by rail or by rail and water as they afford the public must be provided in the same way. The power of Congress in respect to their business rests upon its constitutional control over inter-State commerce, which involves the regulation of the relations between common carriers engaged therein and the public, but which in the case of the express companies finds no support in any delegation to them of governmental powers."

Governor Hill makes some interesting legal recommendations in his last message. He recommends that the limit of recovery in cases of death by negligence to five thousand dollars should be increased to ten thousand dollars. This seems very judicious. He also recommends a revision of the laws concerning the commitment of alleged lunatics to asylums. We agree with this. But his most important suggestion is the following: "It is suggested that the practice on appeals in criminal cases (other than capital cases) be modified by statute, so as to permit the Court of Appeals to affirm a judgment of conviction, notwithstanding the admission of improper testimony against the accused, where the court is unanimously of the opinion that there was sufficient other and legal evidence produced upon the trial to warrant the conviction, and is satisfied with like unanimity from such legal evidence that the accused is actually guilty of the offense charged in the indictment. Under existing practice the Court of Appeals has no discretion in such cases, but is required to grant a new trial. It is believed that the modification proposed would work no real injustice, and greatly facilitate the administration of justice, and more thoroughly and speedily insure the punishment of the really guilty." Our first criticism on this is that we see no reason for excluding only capital convictions from its application. It would seem that it should apply also at least to sentences of imprisonment for life, and to very long terms of imprisonment, such as those for above twenty years. But we do not see why the present rule is not right. The present rule is that if illegal evidence has been admitted there must be a new trial unless the court can see that its admission could not possibly have prejudiced the prisoner. Now on this point courts will differ. For example, in the Sharp case the General Term conceded that one piece of evidence was improper, but

held that it could not have prejudiced the prisoner. The Court of Appeals held it improper, and that it might have been prejudicial. There is no safety then in relying on the infallibility of the courts. The governor's suggestion would constitute the Court of Appeals a jury to pass on questions of fact, which is not their constitutional duty or power, nor in our opinion a desirable alteration of the scheme of their functions. The question would remain, what would the jury have said about the convincing character of the remaining evidence? It is the prisoner's right to have the verdict of the jury on legal evidence exclusively; not on legal and illegal evidence mixed, and the opinion of seven judges as to the cogency of the legal part of it. After these criticisms, we are somewhat in doubt whether the governor's suggestion would change the result at all. At present the courts of review may disregard the admission of illegal evidence if they can see that it did not harm the prisoner. The governor proposes to allow them to disregard it, if they are unanimous that there was sufficient legal evidence to warrant conviction, and that the accused is guilty. What is the difference? If the court can see that there was sufficient legal evidence, and that the accused is guilty, why then *they* can see that the accused was not harmed by the illegal evidence, can they not? This is a mere criticism on the form of the governor's expression. But at present thinking, we incline to the opinion that it should be for the jury to say whether the legal evidence was sufficient. We examine the governor's suggestions with high respect as the reasonings of an acute legal mind, and with due appreciation of the importance of the subject, and of casting about for some remedy for the delays in the administration of our criminal justice.

#### NOTES OF CASES.

**I**N *East Tennessee, V. and G. R. Co. v. DeArmond*, Tennessee Supreme Court, Oct. 26, 1887, an action brought by the conductor of a train against a railroad company for damages for injuries received in a collision resulting from the negligence of a telegraph operator in the employ of the company, the court in its instructions to the jury said: "If you find that D. was conductor, and had a full crew of hands for managing the train, that B. as telegraph operator had nothing to do with the actual management of the train, but was only connected with D. as the medium through which orders were transmitted from G., the superintendent of the railroad, to D., then D. and B., are not fellow-servants, and the risk of injury from the negligence of B. is not such a risk as the law places on D., by reason of his employment as conductor." *Held*, that the instruction was correct. The court said: "It is with us well settled, whatever may be the rule in other States, that the servant does not assume the risk of the negligence of another servant where the latter is engaged in a different de-



partment of the work or service; as for instance, the train crew do not take the risk of the negligence of the track or section hands; nor where the negligent servant is the superior, permanently or temporarily of the injured one, having authority to direct or control the latter, does the rule apply. *Haynes v. Railroad Co.*, 3 Cold. 222; *Railroad Co. v. Carroll*, 6 Heisk. 347; *Iron Co. v. Dobson*, 7 Lea, 367; *Railroad Co. v. Wheless*, 10 id. 741; S. C., 43 Am. Rep. 317; *Railroad Co. v. Collins*, 1 Pickle, 227, and others might be cited. See also *Railroad Co. v. Ross*, 112 U. S. 377. Under the proof in the case at bar, indeed from the lips of the superintendent, T. W. Garrett, we have it that 'the telegraph operator is the agent through which we transmit orders from the superintendent's office for the movement of trains; he merely receives and conveys; he is the medium, or the mouth-piece, for the transmission of orders from this office to the trainmen or person in charge of the train.' It is manifest that the operator is not in the same department with the trainmen, nor engaged in the same branch of the common employer's service. And while he may not be said to be in person the superior of the trainmen to whom he delivers orders, as he, of his own motive, has no right or power to issue orders, he is in a sense the superior, for he is the arm or mouth-piece of the train dispatcher or superintendent—in a qualified degree a vice-principal. It is immaterial that these men are hired and paid by a common employer, and that they are engaged in the effort to accomplish a common result, to-wit, the movement of trains. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would, practically, exempt the company from all liability to those in its service. It may be interesting to mention that the modifications of the common-law rules as to the liability of the master for negligence of a fellow-servant, which have been adopted by the decisions in this State, are the same in principle as those since embodied in the employer's liability act passed by the English Parliament in 1880. So that the English courts which we refused to follow have since been abrogated by the English statute. As was said by the Supreme Court of North Carolina in a recent case: 'No definition of the term 'fellow-servant,' applicable to all cases, had yet been adopted in this country by the courts, and probably could not be. So variant were the relations between master and servants in different employments, and so close the line of demarkation between co-laborers and middlemen, that each case would have to stand upon its own facts.' *Dobbin v. Railroad Co.*, 81 N. C. 446; S. C., 31 Am. Rep. 512. Where there is any controversy as to the facts the question is one for the jury, upon a proper charge of the court. See *Railroad Co. v. Morgenstern*, 12 Am. & Eng. R. Cas. 228. That a train dispatcher is not a fellow-servant with a brakeman has been adjudged by the Supreme Court of Wisconsin. *Phillips v. Railway Co.*, 25 N. W. Rep. 544. To

the same effect is *Darrigan v. Railroad Co.*, from the Supreme Court of Connecticut, reported in 24 Am. Law Reg. (N. S.) 452; as also in *Sheehan v. Railroad Co.*, 91 N. Y. 332, where a train dispatcher is held not to be a fellow-servant with any of the train crew. So it will be seen that we are not by any means alone in the conclusion to which our own decisions necessarily lead us in this case." Exactly the contrary is held in *Slater v. Jewett*, 85 N. Y. 61; S. C., 39 Am. Rep. 627. See notes, 58 id. 45, 621.

The House of Lords, in 12 App. Cas., has given the Court of Appeal a black eye in three very important cases. (1.) A steamer was insured by a time policy in the ordinary form on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed, which ought to have been kept open, water was forced into and split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear. *Held*, reversing the decision of the Court of Appeal (17 Q. B. Div. 195; 34 ALB. LAW JOUR. 109), that whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words "perils of the seas," etc., nor under the general words "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance." *West India and Panama Telegraph Company v. Home and Colonial Marine Insurance Company*, 6 Q. B. Div. 51, disapproved. *Thames and Mersey Marine Insurance Company v. Hamilton*. Page 484. (2.) The plaintiffs instructed a broker to reinsure an overdue ship, whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a reinsurance of £800 through the broker's London agents. Afterward the plaintiffs effected a reinsurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to reinsure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith. *Held*, reversing the judgment of the Court of Appeal and restoring the judgment of Day, J. (17 Q. B. Div. 558; 34 ALB. LAW JOUR. 481), that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700. *Fitzherbert v. Mather*, 1 T. R. 12; *Gladstone v. King*, 1 M. & S. 35; *Stribley v. Imperial Marine Insurance Company*, 1 Q. B. Div. 507; *Rugles v. General Interest Insurance Company*, 4 Mason, 74; 12 Wheaton, 408; and *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511, commented on. *Blackburn v. Vigors*. Page 531. (3.) Rice was shipped under a charter-party and bills of lading which excepted "dangers



and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants. *Held*, reversing the decision of the Court of Appeal (17 Q. B. Div. 670; 34 ALB. LAW JOUR. 438), and restoring the decision of Lopes, L. J. (16 Q. B. Div. 629), that the damage was within the exception, and that the shipowners were not liable. *Hamilton v. Pandorf*. Page 518. The opinions are too numerous and too long for publication in our columns.

**NUISANCE—POLLUTION OF STREAM BY  
SEVERAL PERSONS—REMEDY AGAINST  
ONE CONTRIBUTOR.**

CHANCERY DIVISION, JULY, 1887.

**BLAIR AND SUMNER V. DEAKIN; EDEN V. DEAKIN.\***

Where several manufacturers, having their works upon a stream, cause a nuisance to a riparian owner below them by discharging offensive matter into the stream, it is no answer—in an action for nuisance brought by the riparian owner against one of those manufacturers—to say that the share he contributed to the nuisance is infinitesimal and inappreciable.

**T**WO actions consolidated. The opinion states the facts.

Sir Henry James, Q. C., Ince, Q. C., Ingle, Joyce and Broughton, for plaintiffs.

Sir Richard E. Webster (A.-G.), Marten, Q. C., and O. Leigh Clare, for defendants.

KAY, J. This action raises some very interesting questions of law. In the view I take, it is not necessary to give a very minute description of the *locus in quo*, nor of the particular facts. The material facts for the purpose of my judgment are these: The plaintiffs are two manufacturers, and have different works situated a mile or two from one another, upon a stream, which at the works of the plaintiff Eden is called the Eagley brook. After passing Eden's works it receives an effluent called the Astley brook, and the combined stream takes the name of the Tonger river, and as the Tonge river it flows past the works of the other plaintiffs, Blair and Sumner. Six miles, speaking roughly, above Eden's works and seven miles above Blair and Sumner's works, the defendants have two sets of works. Practically they are upon the head waters of this stream. They are called—and I will call them for the purpose of what I have to say—the Belmont Upper and Belmont Lower Works. Practically I say they are on the head-waters of this stream, for just above the upper works this stream receives the greater part of the water in that portion of it from a compensation reservoir. It seems that a long time ago the reservoir was made for the purpose of supplying the town of Bolton with drinking water. The water being taken from the gathering ground of this stream, the corporation of Bolton, as is commonly the case, made a compensation reservoir from which they were bound, I presume, to send a certain amount of water every day into this stream. It amounts to 4,050,000 gallons in the course of twelve hours. During the night time they send nothing unless there happens to be an overflow in the compensation reservoir; but during the day time they send down day after day through a gauge the quantity which I have mentioned.

In addition, there are two small effluents which bring down more or less water, but not much except in a rainy season. They are the only supplies above the Belmont Upper Works. The Belmont Upper Works are printing works, and the Belmont Lower Works are also printing and dyeing works. At the Belmont Upper Works a means has been adopted of clarifying the effluent water from the processes, and the residuum, which is said to be tolerably clear water, is turned into a large lodge or reservoir which is called the Ornamental Reservoir. For a long time the Belmont Lower works did the same. Upon the stream of the Eagley brook there are a number of manufacturing works, the one next below the Belmont Lower Works being Charles Turner & Co.'s paper works. Turner & Co.'s paper works receive the water from the Ornamental Reservoir, and they use it for the purpose of their operations, and they return it into the course of the Eagley brook at a point about half a mile below the Ornamental Reservoir. In 1883 the plaintiffs, and Turner & Co., and certain other manufacturers, complained of the pollution of this stream, and attributed it in an increasing degree to the Belmont works. The complaint of the plaintiffs produced no effect. The complaint of Turner & Co. however did produce an effect. Turner & Co., it seems, are tenants of the same landlord as the defendants. Whether on that account or not, the defendants agreed with Turner & Co. not to send the polluting effluent from the lower works any longer into the Ornamental Reservoir, by which means it reached the water more or less which Turner & Co. used at their works, but to send it by a series of troughs past the Ornamental Reservoir to the lower end of the reservoir, where it silted up. Those troughs were made in 1884 and discharge at a little distance above the by-wash of the Ornamental Reservoir, which is sometimes called the Weir in the evidence. The effluent then runs by a channel cut in the silted up part of the Ornamental water over this lodge and down into the course of the brook. It is very important to observe that whereas, before 1884, the effluent from the lower Belmont works went into the ornamental water, after 1884, since the troughs have been made, no part of it goes into the Ornamental water at all, but all runs over this by-wash into the course of the stream. The consequence is, that that part of the stream receives nothing else except a very small contribution—the amount of which I do not think is given in the evidence—from what is called the Shaw brook. I do not know exactly where it comes in. In the half-mile of the course of the stream between the foot of this weir or by-wash, and the place where the effluent from Turner & Co.'s paper works comes in, the main part of what runs into the stream is the water from these troughs, that is the polluted refuse from the Belmont works. While I am upon that subject I may remark that it seems that no treatment whatever of the refuse from the lower works is provided in order to clarify it excepting that it is collected from all the different sheds and vats into a tank which is three yards wide and three yards deep. This tank gets filled up to the points where the refuse comes in and goes out, in a comparatively short space of time, and then the effluent runs over the top of the sediment and goes out into the troughs. That is the only attempt at clarifying or purifying the refuse at all at the Belmont Lower Works. It is not treated chemically, it is left to subside as much as it may in passing through this tank. This has only been done since the troughs were put up in 1884. It is said, that when the tank gets full of sediment up to the level of the pipe that lets it off, the sediment is taken out, mixed with lime, and thrown on some land belonging to the defendants. That is the course of proceeding at these

\*58 L. T. Rep. (N. S.) 522.

works. The first defense which I have got to deal with is as follows: The defendants say this in their amended statement of defense: "The defendants do not admit that they discharge into the Eagley brook any refuse or foul or dirty water." Why that should be put in I do not know, because the evidence is abundantly clear that they do, by these troughs, discharge nothing but foul and dirty water into this brook. "In the alternative the defendants say, that if they do discharge into the said brook any refuse or foul or dirty water, they do not discharge into the said brook any larger quantity of refuse or foul or dirty water than they or their predecessors in title have been accustomed as of right to pour into the said brook during the period which has elapsed since the month of July 1845." That is a defense, of course, of prescriptive right to do that which they are doing now. I will go back to the year 1845, and see what the state of things was then. In the year 1845 these works were occupied by Messrs. Walker & Dewhirst, who occupied them until 1857. In 1857 Walker left the firm and Dewhirst carried on the business alone from 1857 to 1860. In 1861 it was taken up by a firm called Lindop & Co., who were represented by the witness who had given evidence here, Mr. Bevan, who was a partner in that firm. In 1867 the works were stopped, and they did not recommence until 1870. In 1870 Deakin, the father of the present defendants, who now carries on the Egerton works lower down the stream, recommenced working them, and he handed over the business after a short time to his sons. Up to the year 1880 the upper works had not been used as dye works, but in that year they began to use the upper works as dye works, as I understand, and complaints, as I have said, were made in 1883, and the troughs were put up in 1884. I have now to see whether, upon the evidence before me, the defendants' claim of prescription can be maintained. (His Lordship then reviewed the evidence on this part of the case, stating, at his conclusion therefrom, that it was clearly proved that the materials which were used at the defendants' works from 1845 till a recent period were substantially different from the materials used there at present; that formerly the principal mordant used was the vegetable mordant madder; that very little ferric oxide, or iron in any shape, was formerly used at the defendants' works; that the amount of effluent was formerly not any thing like so great as it had been since the time the defendants had been occupying the works; that the amount of pollution, whatever its nature, was formerly not any thing like so much as during the increasing business of the defendants had been poured into the stream; that whereas during former times the effluent from the works went straight into the Ornamental Reservoir and there settled, so that the water which came from that reservoir was comparatively clear, in 1884, all the refuse from the lower works, subject to the subeidence in the tank, had been diverted from the Ornamental Reservoir, and poured straight into the stream over the weir or by-wash; that the pouring of such refuse as was poured into the Ornamental Reservoir could give no prescriptive right to send it into the stream without passing through the reservoir; that the defendants were now doing that which was very much more likely to injure the plaintiffs than what was done before 1884, even supposing the effluent was exactly the same in each case; but that it was clearly proved that the effluent was not the same, being formerly very much less noxious to manufacturers so far down the stream as plaintiffs were; and that consequently, the claim to prescriptive right was a claim which could not be maintained. His Lordship proceeded as follows:) But then comes this question, which is raised more distinctly in the evidence than in the pleadings. Is that which the de-

fendants are now doing an injury; and if an injury, does it produce damage to the plaintiffs? In other words, is it a case for damages, or for an injunction? Upon that a very interesting and no doubt a very serious question of law is raised. (His Lordship then reviewed the evidence in regard to the ingredients discharged into the effluent coming from the lower works into the stream, the most deleterious of which was proved to be ferric oxide. His Lordship discussed the noxious effect produced by the refuse of the ferric oxide, which had been used as a mordant, and which refuse after escaping into the stream was indestructible, as although the action of the stream and air might alter its condition, it could not actually destroy the refuse. His Lordship said that the defendants' contention was, that assuming it to be proved that a certain amount of ferric oxide was brought in by the troughs, the dilution of that ferric oxide as it went down the stream was so great as to become an exceedingly small decimal of a grain per gallon; and that such dilution was sufficient to render the amount of ferric oxide poured in by the defendants innocuous for bleaching purposes at the works of Eden, and still more so at the works of Blair & Sumner. His Lordship proceeded as follows:) I will assume that to be proved, and I will also assume that to be the actual condition of the property. Upon this stream there are a quantity of other works, and I will assume that they produce the effect which everybody admits is proved to exist at Eden's works, and at Blair's works. The evidence shows that the condition of the stream there is that of an open sewer simply, and everybody agrees that the water of the stream could not possibly be used, without great expense at any rate, for bleaching purposes either at Eden's works or at Blair's works. Now assuming that to be quite conclusively proved, this is the problem proposed: Given first the fact that the amount of pollution brought in by the defendants is such that by itself it would not sufficiently injure this water as to make it unfit for bleaching at the works of either of the plaintiffs; but given also the fact that the amount poured in by the defendants, together with the amount poured in by their father at his works, is enough to produce the condition of things which actually exists—namely, that the water at the plaintiffs' works is unfit for bleaching—now, is it the law, supposing it is impossible to say that any one of those persons pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufacturers above him. They might all laugh at him and say. "You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage." All I can observe is, that in my opinion, it would be a most unjust law if there were such a law. Were the case absolutely new, and my individual opinion had to be given upon it, I still should say distinctly that that was not the law. A man is not bound to sue anybody until he finds that he is being injured. A riparian owner has, as I have already remarked, a natural right to the use of the water which passes him in the stream in its original pure condition as nature would send it to him. If he finds that it is no longer in such a condition; that it is impossible to use it for domestic purposes or for manufacturing purposes, and that it becomes a filthy sewer like this stream; and further, if he finds that that was produced by the combined acts of a number of riparian proprietors above him, is he without remedy? Has he no remedy because each one of them

can say: "It was not my doing. I only contributed a part, and the part I did contribute was not enough to do you damage?" I put another illustration during the course of the argument which has not been answered to my satisfaction. Suppose that there were only two polluting sources; suppose that one of two manufacturers sent in a particular chemical which of itself would do no kind of harm, and then that the other below him sent in another chemical which of itself would do no kind of harm; suppose that the combined effect of those two chemicals—and the thing is quite possible—would be such that the stream would become poisoned and quite unusable for any domestic or manufacturing use, would neither of those manufacturers be liable? I have no hesitation in saying, that in my opinion a man so injured has distinctly a right to take the several persons who injure him in detail and to say, "I am suffering from the combined acts of all of you; if I can prove that each one of you contributes to that result which is damaging me, I have a right to sue, and a right to ask the court to prevent each of you from sending in his contribution to that which in the aggregate does me damage." I repeat, that my opinion is he has that right. Therefore if the case stood so simply, and if I were convinced that the amount of injurious matter sent down by the defendants would not of itself produce actual damage to the plaintiffs, I should still hold that they had nevertheless a right of action against the defendants, if it were proved that the deleterious ingredient sent down by the defendants did reach the plaintiffs. That it does so is proved beyond question. Every one of the chemical witnesses admits it might; and I have no kind of doubt that the ferric oxide, being an indestructible ingredient, would in the natural course of things reach the works of the plaintiffs six or seven miles lower down the stream. But the point is not entirely without authority, because in the case of *Tipping v. The St. Helens Smelting Company*, 12 L. T. Rep. (N. S.) 776; 11 H. of L. Cas. 642, there was an immense amount of smoke in the air, and taking the summing up of the learned judge which was adopted by the House of Lords in the well-known judgments, the jury in that case found damages. Moreover in a later case (L. Rep. 1 Ch. App. 66), the same plaintiff came upon that finding for an injunction, and obtained it. Again in the case of *Crossley v. Lightowler*, 16 L. T. Rep. (N. S.) 438; L. Rep., 3 Eq. 279, 288; L. Rep., 2 Ch. App. 478, the same proposition was touched upon in the language of the learned judge (Lord Hatherley), before whom that case first came. He said: "The defendants' case is this, they say in the first place, although it has been lightly thrown out and could not have been suggested with any effect, 'you (the plaintiffs) have really nothing to complain of, because if our works were all away, you had such a fouling of the water before by various others mills, especially by a mill of one Mr. Thomas Crossley, about a quarter of a mile higher up than our works, by certain wire works below, by certain cotton works of Messrs. Holt, which have been going on from 1856 to 1864, by the works of a Mr. Pilling, and by the works of some other persons down the river, that wholly irrespective of any thing we can or may do, your water must be so fouled as to be to you useless. That would still be so were it not that you have bought up the rights of many of these parties, Royston and others; and if you had bought them all up no doubt you might say you had acquired pure water: but it is idle to talk of pure water until those rights have been bought.' That contemplates rather a different state of things. There as I understand the report, the case of the defendants was not that they did not do the plaintiffs any damage, but that so much damage was done before they came that they had a right to add

their proportion to it, although what they did might of itself do the plaintiffs damage. But the learned judge goes on thus: "The very circumstances of the plaintiffs buying up these rights indicates the soundness of the rule of law which was laid down in the House of Lords in the case of *St. Helens Smelting Company v. Tipping*, 12 L. T. Rep. (N. S.) 776; 11 H. of L. Cas. 642, viz., that you cannot justify an additional nuisance in the case of smoke, if it can be clearly traced to your new chimney, on the ground that the plaintiff has had a great many nuisances to encounter before. If the nuisances that he has had to encounter before have been such that it is impossible to trace an evil at all to the work you are conducting with your new chimney, possibly the case may be otherwise; though even there it must be seen at once how unreasonable it would be to allow such an excuse, because the circumstance that a person who is so infested can buy up those who have acquired rights against him is no reason why he should be compelled to submit to your additional nuisance until he has bought up all the rest." There the point is touched because the learned judge is dealing with the case that it is impossible to trace any evil at all to the particular defendant. But the point seems to me to have come distinctly before the Court of Appeal in the case of *Thorpe v. Brumfit*, L. Rep., 8 Ch. App. 666. That was a case of nuisance by obstruction of a right of way, the obstruction being the loading and unloading of a number of wagons. The action seems to have been brought against several people, which is not always easy or possible, and each one of them seems to have suggested that what he did would not of itself be a nuisance. That defense was dealt with by James, L.J., in these words: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience; but if a hundred do so, that may cause a serious inconvenience which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he done causes of itself no damage to the complainant." It seems to me that the mind of the learned judge was addressed precisely to the case I have been imagining. It seems that he was dealing in the case of a right of way, with precisely the same state of things which I have imagined to exist here, viz., that a number of persons contribute what I will call in each case an infinitesimal share to that which becomes in the aggregate a grievous nuisance. He says that no one of those persons can allege when he is sued that his share is by itself inconsiderable. That seems to be consistent with law and common sense. I am very glad that there is an authority which touches the point, and which I readily follow, because I entirely agree with it; for it holds that in such a case it does not lie in the mouth of one of the contributors to the nuisance who is sued to say the amount of his contribution is infinitesimal. In this case it is alleged that the amount of contribution by the defendants is infinitesimal. I confess however that my view of the evidence is that that is not made out. (His lordship then reviewed the evidence on this part of the case, stating that he was satisfied therefrom that when the ornamental water was let off from time to time the amount of pollution, to which the upper works were the only contributors, went into

the stream, a considerable part of it finding its way down to the plaintiffs' works; that with reference to the water from the troughs, which for half a mile below the bottom of the weir was the principal water that went into the stream, the evidence showed that every pool down such half-mile of the stream was thereby filled with the filthiest possible deposit of matter; that the water which came from the troughs was far too filthy for the purpose of being used for bleaching; that occasionally there came a flood causing the water to flow over the weir from the Ornamental Reservoir, and to wash out the stream; and that the deposit, after a long drought, consisting of foul matter sent from the troughs, became cleared out by a flush of water, and polluted the water of the stream to such an extent as to produce actual damage to the plaintiffs' works. His lordship proceeded as follows: But that is not all. There are in this stream, as I have said, a number of works. The owners of all of them, except the defendants and their fathers, have had the good sense and neighbourly feeling to yield to the remonstrances of the plaintiffs, and have adopted different modes of purifying the water which they themselves contaminate at their works. The lodges are more or less fed from the streams. The take in water there, and of course they take very good care not to defile the water in their own lodges. They are used as settling lodges, and any foulness that is in the stream is allowed to deposit in these lodges before the water is used for the purpose of that particular manufactory. There are sources of supply no doubt besides that. For instance, at the works of the defendants, there is the Delf brook, which is a considerable effluent running into the lodge and mixing with the water from the Eagley brook. But particularly, and generally on Saturday afternoon, these lodges are flushed out. What for? Of course for this reason, that they would get so foul in time that they could not be used. Why do they get foul? Why does the Egerton lodge get foul? There are no sources of contamination in the Egerton lodge except that sent down by the defendants and what comes from Turner & Co.'s paper works. The Egerton lodge is, as I have said, every Saturday flushed out by opening the sluice and letting the foul water go down the brook. The effect on the plaintiffs' works is undeniable. The water comes down so foul when these lodges are flushed out that it could not be used for any purpose at all. Of course every manufacturer is aware of what is going to happen and is alive to the danger and shuts off the intake and lets the foul water pass. I am told that that is no wrong, because the manufacturers are quite aware of what is going on, and that this being the regular custom of the stream it is no wrong or damage. In law riparian proprietors have a right to the use of the water from it every day and every night in its natural state. People have no right to create foulness, dam it up for a week, and then send it all down the stream on Saturday afternoon. In law that is a wrong, and the consequences of it is damage, if a man is obliged, because such foul water is sent down, to shut down his cloughs and sluices, and prevent water coming into his reservoir. Clearly that is damage, and therefore I am convinced that there do occur occasions when the foulness poured in by the lower works of the defendants contributes in a material degree to the fouling of this brook, and of itself occasions damage. That is my distinct finding on the evidence before me. The defense fails in my opinion in every single point. Accordingly I must grant an injunction against the defendants to restrain them from sending into the Eagley brook, either through the Ornamental Reservoir or by means of the troughs or otherwise, any ferric oxide or other polluting matter to the damage of the plaintiffs Messrs. Eden & Thwaites, or of the

plaintiffs Messrs. Blair & Sumner; and I direct the defendants to pay the costs of this action. I do not however think that this is a case where the costs should be on the higher scale. I will suspend the injunction for six months in order to enable the proper remedy to be applied. I am asked to allow the costs of the shorthand notes on the ground that the case has been curtailed by having them; but my own notes will be found quite sufficient. I always beg counsel to give me time to take proper notes, in order to prevent the necessity of having any shorthand notes, and I will not allow the expense of a shorthand note.

[See *Chipman v. Palmer*, 77 N. Y. 51; S. C., 33 Am. Rep. 586; *Blaisdell v. Stephens*, 14 Nev. 17; S. C., 33 Am. Rep. 523, and note 526.—ED.]

### CARRIER—DUTIES TO PASSENGERS—PROTECTION FROM STRIKERS.

SUPREME COURT OF ILLINOIS, NOV. 11, 1887.

CHICAGO & A. R. CO. V. PILLSBURY.

Defendant, a railroad company, stopped at a place not a usual stopping place to take aboard laborers who had taken the place of strikers. The police guarded the laborers until they entered the train, and they went into the smoking car. When the train stopped at a railroad crossing, a mile and a half beyond, it was boarded by a mob, who attacked the laborers, and shot the plaintiff, a passenger. The court instructed the jury that it was the duty of the defendant "to exercise the utmost care, skill and vigilance to carry plaintiff safely, and to protect him against any and all danger, from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented."

Held, that as the point at which the train took the laborers on board was not a regular station, and as it must be presumed from the verdict that defendant knew of the dangerous mob, under the circumstances of this case the instruction was properly given.

**A**PPPEAL from appellate court, Second District. On petition for rehearing.

SCOTT, J. Under the facts as they must have been found from the evidence by the trial and appellate courts, it is a question of law what duty defendant owed to plaintiff and the other passengers on the train at the time the injury was inflicted upon plaintiff, and whether any liability rested upon defendant.

Upon these questions the trial court instructed the jury it was the duty of the defendant, as a common carrier of passengers, "to exercise the utmost care, skill and vigilance to carry plaintiff safely, and to protect him against any and all danger from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented." It is said this instruction does not announce the law with entire accuracy; that it required a higher degree of care to be observed by defendant for the safe carrying of a passenger than the law imposes, and in that respect was misleading. It is freely conceded there is a marked distinction between the liability of a common carrier as to freights and passengers. As to freights, the carrier is an insurer, and is obliged to carry and deliver safely, at whatever hazard, and from that obligation it can only be relieved by "the act of God" or the public enemy. But the carrier is not an insurer of the absolute safety of the passenger to be carried. Its liability in that respect is limited by care and diligence. What degree of care the common carrier must observe for the safety of a passenger on its train to

exonerate it from liability for injury is a question of law. The rule of law is quite well understood, that as to the selection of suitable machinery and cars, the fitness of the road, both as to manner of construction and material used, and in the use of all appliances adapted for the government or moving of trains, and as to the selection and retention of competent and faithful servants, the carrier of passengers is obligated to use the highest reasonable and practical skill, care and diligence. This principle of law is not called in question, but the argument is made, that in guarding the passengers from dangers and perils not incident to ordinary railway travel, the carrier is only to be held to the use of ordinary and reasonable care and diligence. The distinction taken is not without support, both in reason and authority. So far as the machinery and cars furnished for the carriage of passengers, the fitness of the road-bed, and the competency and faithfulness of the servants employed, and in the use of the best known mechanical appliances to insure safety are concerned, the passenger must rely solely on the carrier, and can do nothing to insure his personal safety. It is for that reason the carrier in this respect is obligated to the highest reasonable and practicable skill and diligence. The safety of passengers requires the strict and rigid observance of this rule against all carriers, by rail or otherwise. But as to dangers and perils not incident to ordinary perils by any mode of travel, the rule of liability imposed upon the carrier of passengers by law is less stringent. The carrier however must omit no care to discover and prevent danger to a passenger or passengers that is reasonable and practicable. The public exigency and security demand thus much of the carrier at all times and under all circumstances. It is the duty of carriers by rail to preserve order in their carriages, and to protect passengers from all dangers, from whatever source arising, on their trains, whether from the dangerous and violent conduct of other passengers or otherwise. To this end, all conductors in this State, while on duty on their respective trains, are invested by statute with police power. With regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel, the degree of care to be observed to discover and prevent all danger and consequent injuries to passengers must depend in a large measure on the attendant circumstances. No doubt in many cases, if the carrier observes ordinary care and diligence to discover and prevent injury to passengers, such as any prudent person would do for his own personal safety, it will be exonerated from liability. In other cases, and under other circumstances, it will no doubt be the duty of the carrier to exercise the utmost care, skill and diligence to protect the passengers from danger and injury, so far as the same, by the exercise of such care and skill and diligence, could have been reasonably and practically foreseen and anticipated in time to prevent injury. In no case must the carrier expose the passenger to extra hazardous dangers that might readily be discovered or anticipated by all reasonable, practicable care and diligence. It is upon this latter principle, if at all, that defendant can be held liable for the personal injuries received by plaintiff. So far as any question of fact is involved, it will be presumed it was found against defendant by the trial court. There is some evidence that would warrant the jury in finding defendant's servants were fully advised it was a dangerous service to take off and put on the non-union workmen at the dock gate. It must have been found they knew a desperate and wicked mob, consisting of great numbers, was organized there to prevent, at all hazard, whatever the consequences might be, the taking on of these men, and that it could only be done by the aid of a powerful and

efficient police force. Prior to the time the plaintiff was injured the box cars containing these laborers had been assailed, and it might reasonably have been inferred the danger to passenger cars on the same account was imminent, and common prudence should have induced the taking of extraordinary precautionary measures. It could have been readily ascertained upon the slightest inquiry; the fury of the mob had in no degree abated. Reasonably it might have been inferred it would be dangerous to continue to take on and put off the laborers in the midst of that lawless assembly of rioters. Even ordinary care would have discerned the danger. Under the circumstances the law would charge the defendant with negligence in stopping a train filled with passengers in the midst of a howling, revengeful, lawless mob to take on persons whom the mob was seeking an opportunity to maltreat. The defendant was under no legal obligation to stop its train at the point in question, as it was not a station designed for that purpose. To do so was a needless and unwarranted exposure of the lives and persons of passengers to imminent peril. This train, filled as it was with men, women and children, as it may be presumed it was, stopped at a point not a station, in the midst of a fierce mob, and the objects of its vengeance taken into the same car with passengers. This was unwise and hazardous in the extreme, to say the least of it. At all events the offensive persons should have been placed in a car to themselves, where they could have been protected, or could have protected themselves, without danger to regular passengers who had not previously been advised as to the danger to be encountered. Some of the passengers, it seems, were advised by the conductor it would be dangerous to remain in the smoking car, where the laborers were to be received, but plaintiff was not so advised. It is said none of the officers had any knowledge the rioters intended to, or had any purpose to, attack defendant's passenger train at Brighton Park, or elsewhere, on that or any other train. That is no doubt true. Had the officers of the road been informed the rioters purposed an attack on the passenger train of defendant at Brighton Park, or elsewhere, it would have been criminal negligence to have exposed the passengers to such peril without a sufficient police protection, as would have afforded protection, and which would have been inexcusable for any reason or upon any ground. No such negligence can be imputed to defendant under the facts of this case. But defendant ought reasonably to have anticipated the mob might attack its train to reach the object of their vengeance so soon as it had passed from the protection of the police, and precautionary measures should have been taken. Such a thing was likely to occur at any near distance from the central point of the disturbance. A like attack had been made prior to that time, two miles distant, upon the laborers that had been carried in the box car. On this occasion the mob seems to have been more violent than usual, and the utmost care and vigilance should have been taken to prevent the injury to passengers. The verdict is a sufficient warrant for the conclusion that reasonable precautions were not observed.

Some criticism is made on the instruction given in the use of the word "such," and in the use of the words "care, skill and diligence;" but the distinction taken in this respect is too subtle to be warranted by any fair reading of the instruction. After a most careful consideration, it is thought the first instruction given for plaintiff of which complaint is made, states the law applicable to the facts of this case with sufficient accuracy, and there is no just ground for complaint on that score. It might be, that in another case, where the facts are materially different, the instruction would not be applicable, and might

be held to impose a degree of care and skill not enjoined by the law.

What is said of the first instruction is sufficient to dispose of the objections to the other instructions, and they need not be further discussed. It may be conceded the fifth instruction of the series given for plaintiff is in some respects slightly inaccurate, but not seriously so. The injury suffered by plaintiff is so serious in its consequences that the judgment in his favor ought not to be reversed for any mere subtle objection to an instruction not warranted by the substantial justice of the case.

Objections are also taken to the refusal of the court to give a number of instructions asked by defendant, and to the modification of others by the court. It is seen the instructions for defendant are quite numerous, and state the law very favorably to the defense sought to be made. It may be conceded, as is done, that some of the instructions refused might have been with propriety given had not others been given containing substantially the same proposition. The court was under no duty to repeat the same thing, although expressed in different language, and differently formulated. It would have aided in no proper way the defense defendant was endeavoring to make.

It is assigned for error the court permitted counsel in his closing argument to make statements of fact not in evidence, to the prejudice of defendant, and to address the jurors by name, and to propound questions to them, and receive answers to such questions, against the objection of defendant. It may be counsel indulged in intemperate language not justified by any thing in the case, but the manner of conducting the oral argument before the jury is so much within the discretion of the trial court that this court will hesitate to interfere unless it should appear manifest injustice has been done. It is the duty of the trial court to require counsel to keep always within the bounds of propriety, and to be mindful of the rights of others who are not permitted in that presence to make reply.

The judgment of the appellate court will be affirmed.

MAGRUDER, J., dissenting. I do not concur in this decision, seeing no reason for retreating from the views expressed in the opinion adopted by a majority of the court on the original hearing, but which has subsequently been rejected upon the rehearing. The opinion so rejected, with the exception of a few unimportant changes, is as follows:

"The question presented by this record is whether a railroad company can be held liable for injuries inflicted upon a passenger by a mob which boards the train at a legal stopping place, and overpowering the officers in control, makes an attack upon certain of the passengers who have incurred its ill-will. \* \* \* In order to justify a recovery it must be shown that appellant was guilty of negligence, and that such negligence was the proximate cause of the injury to appellee. The instructions proceed upon the theory that the taking of the non-union men upon the train on the evening of June 1, 1882, was an act of negligence. The jury were told, in substance, that if the circumstances were such as to lead a prudent man to believe that the presence of the non-union men upon the train would provoke an attack by the strikers, and the appellant knew of such circumstances, then the admission of the non-union men into the cars was a violation of appellant's duty to its passengers, and the appellee was entitled to a recovery.

"The law requires common carriers of passengers to take and carry every one who desires to go, provided they have room, and there be no objection on account of the condition, habits, character, deport-

ment, or purposes of the passenger.' *Railroad Co. v. Yarwood*, 15 Ill. 468. 'The company has no power to adopt rules and regulations prohibiting decently behaved persons, who will pay their fare, and conform to all reasonable regulations for the safety and comfort of passengers, from travelling on the road.' *Railroad Co. v. Bryan*, 90 Ill. 128. It is the duty of a railroad company 'to receive and carry all persons as passengers wishing to become such, provided they in good faith offer to pay the usual fare.' *Rorer Railr. 961; Ang. Carr., §§ 524, 525; Story Bailm. 591.*

"It is true that the rule here laid down is subject to certain qualifications. There are those whom the common carrier is not bound to receive or carry. 'He is not obliged to carry one whose ostensible purpose is to injure the carrier's business; one fleeing from justice; one going upon a train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling or committing any crime; nor is he bound to carry a person, who on account of his drunken condition would be obnoxious to passengers, nor one affected with a contagious disease.' *Thomp. Carr. 29.* Persons may be rejected 'who are of known or notoriously bad or even justly suspicious characters, or persons offensively gross and immoral in their conduct, habits or behavior, \* \* \* or such as refuse to pay their fare, or to conform to the reasonable rules and regulations of the company.' *Rorer Railr. 968.*

"The above extracts, based as they are, upon numerous adjudicated cases, indicate the nature and character of the objections which common carriers are justified in making to persons who demand to be carried as passengers. No such objection existed in the case of the thirteen non-union laborers received on its train by appellant.

"It is said that these laborers had incurred the wrath of an angry mob, and that their presence on the train invited the vengeance of that mob. They had however done nothing to deserve the hostile treatment exhibited toward them. They had agreed to work for the steel company upon being paid certain wages, and were endeavoring to perform their agreement. What they were doing was clearly permissible under the law. Where the employer and the employee make a contract with each other, and arrange the terms satisfactory to themselves upon which the one shall receive and the other shall render service, they are acting strictly within the limits of their constitutional rights. In this country any man has a right to work for whom he pleases, upon any condition that he chooses to submit to, provided the occupation engaged in is lawful in its character. Any individual or any organization which assumes to interfere with the exercise of such right infringes upon the personal liberty and freedom of action which it is the object of our institutions to secure to every law-abiding citizen.

"In the light of these principles the non-union workmen were committing no offense. They were earning their living in an honest way, by legitimate labor in a lawful occupation. To hold that because they were so doing a common carrier was authorized to refuse to give them passage over its road would be to maintain a monstrous doctrine indeed. It is true that the Ore Shovellers' Union, a labor organization, outside of and unknown to the law, chose to take offense at their conduct, and to pursue them with unnatural violence. But we are not prepared to hold that a common carrier will be justified in refusing to receive a person as a passenger in its conveyance simply because that person's exercise of his lawful rights has become offensive to his unreasonable neighbors, and provokes from such neighbors unreasonable de-

monstrations of hostility against his person. Suppose that the appellee, who is a judge of one of the appellate courts of this State, had by his declaration of the law upon some public question, stirred up such a feeling of hostility toward himself among a certain class of persons along the line of the railroad over which he was obliged to travel from his home to the place where his court held its sessions that he was in danger from mob violence, and that upon his application to be received as a passenger, the railroad company had declined to admit him upon its train, on the ground that his presence there might provoke an attack at some point on the road, and so cause injury to the passengers, would the company be justified in thus preventing him from going to the performance of his official duties? We see no difference between the case supposed and the case presented by the record. The law is no respecter of persons. Its glory is that it extends its protecting hand as well to the lowly workman as to the learned judge. Each one of these thirteen non-union laborers, soiled with ore dust from the docks, yet willing to comply with the reasonable regulations, which require him to take his seat in the smoking car rather than in either of the passenger coaches, was as much entitled as was appellee to demand of a carrier holding its franchises at the hands of the State for the benefit of the whole public, a safe passage, at the close of a day's labor, to his home and his family. Hence it was no less the duty of the railroad company to take the thirteen laborers on the train than to take the appellee thereon.

"Appellant was not obliged to neglect its duty to the one because the performance of that duty might in some remote and uncertain degree result in harm to the other. It is not contended, nor is there a particle of evidence to show, that the appellant had any notice that this attack would be made on its train, either at the place where it was made, or at any other point on its road. Laborers had been brought up from Joliet to Chicago in the morning, and returned to Joliet in the evening, prior to June 1, 1882, but the strikers had made no attack before this particular day upon any passenger train. They laid their plans with rare cunning and secrecy. \* \* \* Instructions must be based upon the evidence. If it is left to the jury to determine whether or not a prudent man would draw certain conclusions from certain circumstances, it must at least appear that there was some reasonable and natural relation between the circumstances existing and the conclusions to be drawn from them. No prudent man, even in the exercise of that high degree of care which the law imposes upon the carrier of passengers, could be expected to foresee or anticipate that the animosity of union toward non-union laborers would lead to such a wanton and fiendish attack as is shown by this record to have been made in a civilized city, and under a government of law, upon a train full of peaceable and orderly passengers.

"The third instruction given for the appellee told the jury that the appellant could not justify the admission of the non-union laborers into the train, 'on the ground that the defendant had issued to the foreman of said laborers a ticket on which they were carried on said train.' We think that this instruction was calculated, under the circumstances of this case, to make a wrong impression upon the minds of the jury. It seems to intimate that the obligations of appellant to the laborers would be less binding in a case where their common employer paid for the passage of all of them, and purchased one ticket for them all, than such obligations would be in a case where each laborer paid his own fare and bought his own ticket. We know of no authority, and can see no reason for any such distinction. Whatever rights and privileges would inure to the benefit of the laborers by

reason of their fare being paid, would so inure whether such fare was paid by themselves or by the steel company which employed them.

"It is further claimed that there was no regular passenger station at the ore docks, and that for this reason appellant was not obliged to stop there and take on the thirteen workmen. Even if it was not obliged to stop, it will not be denied that it had the right to stop. And it is a matter of serious doubt whether the industries of a great commercial center, or the carriers and other agencies which minister to and aid in their operations, are bound to suspend the exercise of their legal rights, or cease the transaction of their lawful business, simply because there exists some disturbance in the community, which the officers of the law, either through unwillingness or inefficiency, fail for the time being to successfully quell.

"But independently of this consideration, the undisputed proof shows that the gateway of the dockyards was just south of the river, while right across the bridge, on the north side of the river, was the regular Bridgeport station; that some weeks before June 1, 1882, the steel company had made an arrangement with appellant, by which the latter agreed to let off and take on the laborers at the docks, rather than at the station, because the men would be in danger of being injured by the mob if compelled to walk from the one place to the other across the bridge; that the taking on of the thirteen workmen on June 1, 1882, was merely one act in the performance of a previous contract between the appellant and the steel company, by the terms of which appellant was to bring men from Joliet and return them to Joliet on each and every day when their services were needed at the docks. The eighty-fifth section of the Railroad Act provides that railroad companies shall receive and deliver passengers 'at their regular or appointed time and place.' The eighty-eighth section provides that trains shall stop a certain length of time at each station advertised \* \* \* as a place for receiving and discharging passengers. Hurd Rev. Stat. 1885, pp. 944, 945. These sections are merely declaratory of a general rule of the common law, that where a common carrier advertises that it will stop at certain regular and appointed stations, such advertisement constitutes a special contract between it and the public that it will so stop. Aug. Carr. § 527a. Hence the obligation to stop at a regular passenger station rests upon the basis of contract. In the case at bar the duty of appellants to stop at the docks did not grow out of a contract to be implied from its appointment and advertisement of the docks as a regular station, but it did grow out of an equally binding contract actually entered into before that time, as above stated, between appellant and the steel company. It is to be observed also that this contract was made for the benefit as well of the non-union laborers as of the steel company. When appellant brought the men from Joliet on the morning of June 1 it landed them at the docks, with the distinct understanding that the train was to stop for them in the evening and take them home. To have refused to receive them on board in the evening would have been to leave them to the tender mercies of the mob during the night. This would have been, not only a violation of the contract, but an unmitigated cruelty. The instructions given to the jury on behalf of the appellee by the trial court kept entirely out of view the obligations which were imposed upon appellant by reason of the previous arrangement for the carriage of the workmen so made between it and the steel company. They also ignored and kept out of view the obligations which appellant was under to take the laborers away from the docks at the close of the day by reason of having carried them to the docks at the beginning of the day. These instructions simply pre-



sented to the jury the naked question whether it was right or not for appellant to stop at the docks and take on the laborers on that particular evening, without reference to the binding force of the existing contract on the subject, and without reference to the binding force of appellant's previous contract toward the laborers themselves. They were therefore erroneous.

"It is however contended that if the appellant was bound to take the non-union men on board, it should have provided a sufficient force to protect them against the dangers which were likely to arise under the circumstances. It is true that section 105 of the railroad law of this State provides that conductors of railroad trains 'shall be invested with police powers while on duty on their respective trains' (Hurd Rev. Stat. 1885, p. 948), but the object of this provision was merely to clothe such conductors with the authority to keep order among their passengers. This abundantly appears from the language of sections 106 and 107, which authorize conductors to remove disorderly passengers, and to call on the other employees of the train and the other passengers to aid them in such removal, and which also authorizes a conductor to arrest any person committing crime on the train. It was never the intention of the statute to require railroad companies to carry a force large enough to repel the attack of an outside mob. In this case the testimony tends to show that the strikers who made the attack consisted of between 100 and 200 men. The officers in control of the train were unable to do anything against such a force, and were overpowered. The duty of protecting the citizens of the State against so large a body of rioters as is here referred to rests upon the civil authorities, and not upon the railroad corporations. To impose such a duty upon the latter would be to clothe them with a part of the functions of the government itself.

"In *Railway Co. v. Hinds*, 53 Penn. St. 512, the Supreme Court of Pennsylvania says: 'The case is that of a mob rushing with such violence and in such numbers upon the cars as to overwhelm the conductor as well as the passengers. It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration.' The doctrine here announced in the Pennsylvania case was approved and indorsed by the Supreme Court of Massachusetts, speaking through Mr. Justice Gray, in *Simmons v. Steamboat Co.*, 97 Mass. 361. Rorer on Railroads, at page 1106, says: 'A railroad company is not liable in an action at the suit of a passenger for injuries received by mob violence in the course of his transportation on its cars, if without the power of the company to prevent the same. The duties of railroad companies as carriers do not include the obligation of providing and carrying a police force or guard sufficient to suppress mobs who intrude into the cars. To the same effect is *Shear. & R. Neg.*, § 278b.

"Tested by the principles here laid down, the first instruction given for appellee was erroneous. It directed the attention of the jury to the negligence of the defendant 'as alleged in the declaration.' One count of the declaration alleges that appellant was guilty of negligence, because 'it failed and neglected to provide a sufficient force \* \* \* to protect the said train from attack by said striking workmen.'

Sheldon, C. J., concurs in this dissenting opinion.

[See *Geismer v. Lake Shore, etc., Ry. Co.* (102 N. Y. 593), 55 Am. Rep. 837. The reader must supply the word "that" in Judge Scott's opinion to suit himself. —Ed.]

## NEW YORK COURT OF APPEALS ABSTRACT.

AGENCY—CONSIGNMENT OF GOODS—STORAGE AND PAYMENT OF CHARGES—REIMBURSEMENT.—Merchants in Manila shipped two cargoes to New York, drawing drafts on their London house, which defendant discounted, taking bills of lading as security. The defendant, at request of the payees, turned over the bills of lading to the plaintiff, a commission merchant in New York, that the cargoes might be sold and the drafts paid, taking from him a receipt in which he agreed to store the goods as the defendant's property in a public warehouse as soon as landed, and to give the warehouse receipts to defendants; the intention of the agreement being to "protect and preserve unimpaired the lien of the defendant." When the ships arrived, in order to get the goods, plaintiff paid the freight out of his own funds. Defendant demanded the receipts of him, which he refused to deliver until his outlay for freight and insurance was paid. The consignors and their London house had failed meantime, and the drafts were not paid, and the cargoes did not sell for enough to pay the drafts and freight. Plaintiff had acted as commission man for the consignors before, had paid freight on cargoes, and reimbursed himself out of their sale. Held, that plaintiff did not act as agent for consignors in paying the freight, and was to be repaid by defendant for expenses incurred by him, including the freight, which was a lien on the cargo, which he had to pay before he could store it as defendant's property. Nov. 29, 1887. *Cooper v. Hong Kong & Shanghai Banking Corp.* Opinion by Peckham, J.

ASSIGNMENT FOR CREDITORS—LIENS—PRIORITY OF MORTGAGE.—One of the partners in a firm sold his interest in the real estate owned by members of the firm, and took a mortgage on the property in part payment. The firm subsequently became insolvent, and made an assignment for the benefit of creditors, and the assignee conveyed the real estate in question by deed, subject to all liens and incumbrances. The assignee's grantee claimed priority to the mortgage, on the ground that when the mortgage was given there were outstanding claims of creditors of the firm, which created a lien on the property in question to the benefit of which he was entitled. Held, that the mortgage took priority of the deed from the assignee, as the firm was solvent at the time the mortgage was made; but even if the lien claimed were established, the assignee's grantee would not be benefited by it, as his deed was subject to existing incumbrances. (1) A defense to the foreclosure of a purchase-money mortgage on the part of the mortgagor, alleged to have existed at the time of its inception, can only arise when fraud has been practiced by the mortgagee in procuring its execution, or there is a failure of consideration. Thus it is held that a purchaser of land, who has given a bond and mortgage thereon to secure the purchase-money, and is in the undisturbed possession thereof, cannot resist the foreclosure of the mortgage on the mere ground of a defect of title, there being no allegation of fraud in the sale nor any eviction. *Abbott v. Allen*, 2 Johns. Ch. 520; *York v. Allen*, 30 N. Y. 105. In such case he is remitted for relief, if any he has, to the covenants contained in his deed, and if there are no such covenants, he is remediless. *Banks v. Walker*, 2 Sandf. Ch. 344; *Parkinson v. Sherman*, 74 N. Y. 88; *Frost v. Raymond*, 2 Calnes, 188; *Leggett v. McCarty*, 3 Edw. Ch. 124; *Edwards v. Bodine*, 28 Wend. 109. "The rule," says Mr. Justice Swaine, in *Peters v. Bowman*, 96 U. S. 56, "is founded on reason and justice. A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such cases the vendor, by his covenants,



if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property." A purchaser of mortgaged premises, who takes a deed thereof subject to the mortgage, and agrees to pay the same, is estopped from the contesting the consideration or validity of the mortgage; and when the mortgage is given by his grantor to secure the purchase-money, such grantee cannot, so long as he remains in possession of the premises, defend against the mortgage because of failure of title. *Parkinson v. Sherman, supra*; *Ryerson v. Willis*, 81 N. Y. 277. The mortgagee's title cannot be questioned in defense of a bill for foreclosure. If he takes by virtue of his mortgage any estate whatever which is still subsisting, he is entitled to a decree, and the court will not inquire what interest he has in the mortgaged estate. *Jones Mortg.*, § 1492. (2) This mortgage was a valid and subsisting lien, at the time of the conveyance to Fales, upon the property described in it, for the sum therein mentioned, even though its object was liable thereafter to be defeated by the exhaustion of the fund through the enforcement of prior liens, whether legal or equitable, affecting the property conveyed. It follows, as a necessary consequence from these facts, that the defendant Fales, having acquired title to the property in question, subject to all liens and incumbrances upon it, is not, and neither can his grantors be, at liberty to question the liability of the property mortgaged for the payment of the mortgage debt. Even if it were in the power of the assignees, as representatives of any creditors, to question the lien of this mortgage, they never did so, and they transferred no right to do so to their grantees, but by making the deed subject to existing liens and incumbrances, impliedly withdrew such right from them, and made their title depend upon the payment of the mortgage. The transfer from the assignees to Fales conveyed simply an equity of redemption in the premises, and by the terms of their deed he took no greater interest in the property than such as remained after the extinguishment of the lien then resting upon it. *Fire Co. v. Lent*, 6 Paige, 635. The attempt of the appellants to clothe themselves with any supposed equities existing in favor of creditors has therefore no foundation in the facts of the case, as there were no such equities existing; and even if there were, the defendants have not succeeded to them. (3) But a further answer to the contention of the defendants is found in the fact that there are no such creditors asserting claims which antedate the execution of the deed and mortgage in suit. The firm existing at that time and previous thereto were solvent, as found by the referee at the date of McDonnell's deed, and the individual members of such firms had an interest in their assets capable of being sold and conveyed, and of being made the subject of security for the payment of the purchase price of the property. In so far as those interests become contributions to the capital of subsequent firms formed to carry on the same business, they could only be used for that purpose, subject to the liens already existing upon them, and the creditors of such firms could acquire no right to contest the validity of such liens, except such as belonged to the firm itself. The attempted defense of the appellants is simply a claim that, at the time of McDonnell's deed to Clark, there were outstanding claims in favor of creditors which might have been used in equity to extinguish McDonnell's legal title, and thus produce a failure of consideration for the mortgage. This defense is not sustainable, either in law or equity, or by the facts of the case. Nov. 29, 1887. *McConlie v. Fales*. Opinion by Ruger, C. J.

EASEMENT—RIGHT TO USE OF SPRING—DEED—"APPURTENANCES."—B. was the owner of two lots, by title obtained from different sources, at different dates, and separated by some land owned by a third party, whom he had permitted to take water from a spring on one of his lots, charging rent therefor, and allowing his tenant on the other lot, by parol license, to take water by a pipe, supplying the intervening lot. He sold the lot without the spring to one who sold to the grantor of the plaintiff. The deed conveyed the land by metes and bounds, "with the appurtenances thereto belonging," but did not mention any water-rights. B. never intended that any right to the spring should go to the grantee, and the latter understood that he had the right to the water only by parol license. *Held*, that the right did not pass by the use of the word "appurtenance" in any of the deeds, nor as an easement by implication. Nothing passes by the word "appurtenance" except such incorporeal easements or rights of privileges as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere conveyance is not sufficient to thus create such a right or easement. See *Ogden v. Jennings*, 62 N. Y. 523; *Green v. Collins*, 86 id. 246; *Griffiths v. Morrison*, 106 id. 165; 12 N. E. Rep. 580. Nor do we think, that under the circumstances, there was any implied easement which passed to the grantees under the deed from Bradbury. It must be remembered that the two premises, although at one time both owned by Bradbury, were essentially two distinct plots of ground, and the title to each vested in Bradbury from a different source. Between the two lots of ground was this intervening strip of fourteen rods in width, substantially and physically separating the premises, and making two separate and distinct lots. It must also be remembered that the spring existing on the land now owned by the defendant was owned by Bradbury long anterior to the time when he became the owner of the premises now owned by the plaintiff, and that before that time, and while the intervening lot was owned by one Beebe, permission had been obtained by Beebe, from Bradbury to take the waters from the spring across Bradbury's land to the lands now owned and occupied by Beebe, and that Bradbury had distinctly refused to grant him any permanent right, having given him simply a parol license to take it during his pleasure only, and in consideration of a small annual rent. This state of things existed at the time Merchant, who occupied at one time the land now owned by the plaintiff, was permitted to take the surplus water from the intervening lots, and conduct it to his own premises; and that was done by the mere parol license of Beebe and Bradbury. The same state of things existed at the time Rowley became Merchant's successor in the possession of the premises now occupied by the plaintiff. In the character of tenant to Bradbury, and subsequently as his grantee, Rowley at all times understood perfectly well the terms and conditions upon which his right existed to conduct the water over Bradbury's premises to his own, and he understood that it rested simply upon the parol license of Bradbury. All the facts show conclusively that Bradbury understood his own rights in the premises, and never intended that any right to obtain the water from the spring on the premises now occupied by the defendant should accrue to the owners or occupiers, either of the intervening lot, or of the premises now occupied by the plaintiff. We see nothing in the facts found by the learned trial judge which would change the right to use the water from a right resting simply in a parol license to an absolute right, based upon an easement implied in a grant of the premises to plaintiff and her grantors. We do not think the case comes within the principle of those cases cited by the counsel for the

plaintiff, of which *Lampman v. Milks*, 21 N. Y. 505, and *Curtiss v. Ayrault*, 47 id. 73, are examples. In *Lampman v. Milks* the original owner of the land, across which a stream flowed, diverted the stream through an artificial channel, so as to relieve a portion of the land formerly overflowed by the stream, and that portion of the land he afterward conveyed to a third party. The court held that neither he nor his grantees of the residue of the land could return the stream to its ancient bed, to the damage of the first grantee. That is an entirely different case from the one at bar. The land which the owner conveyed after he had diverted the channel of the stream would have become worthless by being overflowed, if he or his grantees of the remaining portion had been permitted to return the stream to its original channel. The court held that under such circumstances the owner, in conveying the premises thus relieved from overflow, charged the remaining portion of the premises with the servitude of submitting to the stream running through their lands. In the course of the opinion in that case the learned judge distinguished between those easements which are continuous—that is, self-perpetuating, independent of human intervention—and those which are termed discontinuous easements, the enjoyment of which can be had only by the interference of man, such as rights of way or a right to draw water. In regard to such latter kind of easements upon a severance of tenements by the owner, they only pass which are absolutely necessary to the enjoyment of the property conveyed. In *Curtiss v. Ayrault* the same general doctrine is held. In that case it appeared that a marsh had been drained by the owner of the whole tract by digging a ditch, which carried the water to other portions of the tract, where it made a permanent channel in which the water gathered in the marsh, flowed in a continuous stream; thus mutually benefiting the land drained, and the lands through which a supply of good water was thereby conveyed. The owner of the property, while these reciprocal benefits and burdens were in existence and apparent, divided the tract into parcels, and conveyed the parcels to different grantees, who contracted with reference to the then open and apparent condition of the land; and it was held that such condition was essential to the enjoyment of all the lands, and especially to that portion which by the digging of the ditch had been drained and made good available land. To the same effect is *Adams v. Conover*, 87 N. Y. 422, although that case arose under an alleged breach of covenant of warranty and of quiet enjoyment contained in the deed. It was contended that the covenant was broken because at the time of the conveyance of the premises, which consisted of a mill, a dam, and a pond which furnished water-power for the mill, they were in a certain visible condition in regard to the height of the dam; and yet a right existed in, and was subsequently exercised by a third party to compel the lowering of such dam, the effect being to substantially ruin the premises for use as a water-power, which was the sole consideration for their purchase and their chief value. The court held that the conveyance by metes and bounds, which included the dam and water-power, conveyed the dam as it then stood, at its existing and apparent height. The court said that the power of the water thus created and stored was the essential and material element of value in the mill property, which was the subject of the conveyance, and therefore there was a breach of the covenant of warranty and of quiet enjoyment, when it was shown that there was a superior right in a third person to demand a reduction of the height of the dam, and the lessening of the head of of water thereby; and it was so determined because

of the fact that substantially the whole value of the property depended upon continuing the height of the dam as it existed, openly and apparently, at the time of the conveyance. Nov. 29, 1887. *Root v. Wadhams*. Opinion by Peckham, J.

**INSURANCE—REPRESENTATIONS—FALSITY—ESTOPPEL.**—An application for insurance, drawn by defendant's agent, purported to represent the age of the insured, who at the time of making the application refused to make any statement regarding his age, saying that he did not know it, and the age, as represented, was in fact computed by the agent from data alleged to have been given by the insured; but the conclusion arrived at was not assented to by the insured, and the application was not read over to him before signature. Premiums were paid on the policy for six or seven years, when defendant repudiated the contract, on the ground of misrepresentation as to age. Held, that the defendant was estopped from setting up the falsity of the statement. In the case however of life insurance policies, it is the settled doctrine of the modern cases, that where the application for insurance is drawn up by the agent of the insurer, and the answers to the interrogations contained therein are inserted by him at his own suggestion, without fraud or collusion on the part of the assured, the insurer is estopped from controverting the truth of such statements, or the interpretation which it has given to the answers actually made by the applicant, in an action upon the instrument between the parties thereto. *Plumb v. Insurance Co.*, 18 N. Y. 392; *Rowley v. Insurance Co.*, 36 id. 550; *Baker v. Insurance Co.*, 64 id. 648. It was said in *Dilliebert v. Insurance Co.*, 69 N. Y. 280, that "if a question is not answered, there is no warranty that there is nothing to answer, and so in the case of a partial answer, the warranty cannot be extended beyond the answer. Fraud may be predicated upon the suppression of the truth, but breach of warranty must be based upon the affirmation of something not true." As we have before seen, no fraud was proved or found, and the defense must rest upon the alleged breach of warranty alone. The rule applicable to such a case as the present is well settled in this State, and was succinctly stated in *Mowry v. Rosendale*, 74 N. Y. 363, as follows: "The principle that if the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurers without any collusion or fraud upon the part of the insured, the insurer is estopped from setting up their error or falsity as a breach of warranty, seems now well settled." *Baker v. Insurance Co.*, 64 N. Y. 648; *Maher v. Insurance Co.*, 67 id. 283; *Rowley v. Insurance Co.*, 36 id. 550; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Mahone*, 21 id. 152. To these might be added *Grattan v. Insurance Co.*, 80 N. Y. 285, and *Plumb v. Insurance Co.*, 18 id. 392. The remarks of Miller, J., of the Supreme Court of the United States, in the case of *Insurance Co. v. Wilkinson*, *supra*, are so pertinent to the question involved here that a quotation at length is deemed appropriate: "In the case before us a paper is offered in evidence against the plaintiff, containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and in fact had refused to make any statement on the subject." After stating that when an application is prepared by the party signing it, and the insurance company has acted in reliance upon its truth, and issued a policy, the applicant will not be allowed to question the truth of such

statement, he proceeds: "If however we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith, and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto. It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or as it is sometimes called, *estoppel in pais*." This case was followed by the same court in *Insurance Co. v. Mahone*, *supra*, where testimony was admitted, under objection to prove that the answers in an application, which it was admitted was signed by the assured, were not correctly entered by the agent. The court held it competent, saying: "The testimony was admitted, not to contradict the written warranty, but to show that it was not the warranty of Dillard, though signed by him. Prepared as it was by the company's agent, and the answers having been made by the agent, the proposals, both questions and answers, must be regarded as the act of the company, which they cannot be permitted to set up as a warranty by the assured." This was held to be so, although the application and answers were subsequently read over to the assured, and he then signed it. We think the evidence in this case brings it clearly within the principle laid down in the cases cited, and that there should be a new trial of the same. Nov. 29, 1887. *Müller v. Phoenix Mut. Life Ins. Co.* Opinion by Ruger, C. J.

**WATER AND WATER-COURSES — DIVERSION OF STREAM — ISSUE OF FACT — ESTOPPEL.** — (1) Plaintiff, in an action for damages for diverting the water of a stream in which it had riparian rights, introduced testimony that the whole stream at times went through defendant's tail-race instead of taking its natural course, and did not return to the stream until it had passed its property. Defendant's testimony was, that as there was no fall in the stream, the only use plaintiff had for the water was for domestic purposes, and for that there was always enough. *Held*, that this raised an issue which plaintiff was entitled to have submitted to a jury. (2) The grantor of plaintiff was the owner of the property while defendant was building his raceway, and knew he intended to take water from the stream, and did not object to it in any way. There was no element of fraud in the case, nor any evidence that plaintiff's grantor induced defendants to make the expenditure. *Held*, that the plaintiff was not thereby estopped from asserting its riparian rights. Nov. 29, 1887. *New York Rubber Co. v. Rothery*. Opinion by Peckham, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**AGENCY — POWER OF ATTORNEY — CONVEYANCE BY AGENT TO SELF — EJECTMENT.** — S. appointed her husband her attorney in fact to sell and convey certain real estate. The power of attorney was filed for record June 9, 1886. On the same day the husband, as at-

torney, conveyed the premises to one Knight, who immediately reconveyed to the husband. On July 9, 1886, the husband conveyed to defendant, and on July 27, 1886, S. conveyed to plaintiff. *Held*, that the conveyance to Knight, and by him to the husband were on their face fraudulent and absolutely void, and could be avoided by an action of ejectment. Such a transaction cannot stand. It bears upon its face its own condemnation. It is *prima facie* void, and as between the parties the principal is not bound by the deeds, and may repudiate the transaction and recover the land. Public policy will not tolerate such misleading on the part of an agent, and courts will not stop to inquire whether a fraud was intended, but looking alone at the relation of the parties, will upon that relation appearing, declare the conveyance invalid. *Gillett v. Pepperoorne*, 3 Beav. 78; *Whart. Ag.*, § 282; 2 *Sugd. Vend.*, chap. 20, § 2; *Gilbert v. Burgett*, 10 Johns. 457; *Claffin v. Bank*, 25 N. Y. 203; *Obert v. Hammel*, 18 N. J. Law, 74; *Michowd v. Girod*, 4 How. 503; *Clute v. Barron*, 2 Mich. 192. In very many of the cases which have been brought to the attention of the courts the agents or trustees have so covered their misfeasance as to make it necessary for the injured party to go into a court of equity to obtain adequate relief. But when the fraud appears upon the face of the papers or conveyances, the remedy can as well be administered in a court of law as in a court of equity. Thus in *Claffin v. Bank*, cited above, an action was brought to recover upon three checks drawn by the president of the bank and certified by its president as good. The defense that the president committed an abuse of his fiduciary relation with the bank was permitted to be shown. Judge Selden said: "The act of the agent is deemed to be unauthorized, and the contract is void;" and that "there could be no *bona fide* holder of such an instrument," for the reason that the want of authority in the president to bind the bank appeared on the face of the check. In *Gilbert v. Burgett*, 10 Johns. 457, which was a contest between the grantee of an unrecorded deed and a subsequent grantee who first placed his deed of record, the court held that actual notice to the second grantee of the existence of the unrecorded deed might be shown in an action of ejectment. Chief Justice Kent held that the motion of the subsequent grantee in obtaining and recording a deed when he had notice of the first conveyance was a fraud upon the holder of the unrecorded deed, and he said: "Fraud will invalidate in a court of law as well as in a court of equity, and annuls every contract and every conveyance infected with it." *Obert v. Hammel*, *supra*, was a case in point, and the court held in an action of ejectment that the sale and conveyance could be avoided in a court of law, citing several English cases in support of the position. It is laid down by *Sugden on Vendors and Purchasers*, and supported by numerous authorities, that "when the trustee buying is the trustee for sale the purchase is absolutely void." Chapter 20, § 2 (8th Am. ed.), p. 689, bottom note n. "So careful," said Mr. Justice Manning, in the case of *People v. Township Board of Overysel*, 11 Mich. 222, "is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction; as to buy of himself, as agent, the property of his principal or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances." Mr. Justice Christiancy concurred with Justice Manning. Mr. Justice Campbell assented to the general doctrine stated, that the same person cannot be vendor and purchaser, because his contract lacks the necessary element of two parties, but he also stated that "even these contracts are not univer-

sally void. They are usually voidable at the option of the party defrauded or affected, but they are not absolutely void, except where by reason of the identity of the vendor and vendee, a contract in the eye of the law is impossible." *Railroad Co. v. Dewey*, 14 Mich. 477, 488; *Sheldon v. Estate of Rice*, 30 id. 286. In these two cases the doctrine was again asserted, the first being a chancery case, and the other a case at law. In cases of sales by executors, administrators and guardians, the statute expressly forbids them to purchase, directly or indirectly, and declares sales made in violation of that section void. How. St., § 6042. This statute was merely an affirmation of the common law. Attention is called by counsel for the defendants to the remarks of Mr. Justice Elmer, in *Bunyon v. India Rubber Co.*, 24 N. J. Law, 475, criticising the former decisions in that State which held that ejectment might be brought by the heirs to recover land fraudulently conveyed by an administrator to himself. And in *Obert v. Obert*, 12 N. J. Eq. 427, where it is said that "there can be no doubt that according to the decided weight of authority, the principle that a trustee cannot be the purchaser of the trust-estate is a mere rule in equity, and that if proper forms are observed the conveyance is good at law." We think that the principle has a broader foundation than a mere rule in equity. Mr. Justice Cooley, in *Sheldon v. Rice*, *supra*, said: "The law esteems it a fraud in such a trustee to take for his own benefit a position in which his interest will conflict with his duty." Mich. Sup. Ct., Nov. 10, 1887. *McKay v. Williams*. Opinion by Champin, J.

**CRIMINAL LAW—TRIAL—INTERROGATION OF WITNESS BY TRIAL JUDGE.**—While it is the right of a trial judge to interrogate witnesses when essential to the administration of justice, yet the practice of so doing, except when absolutely necessary, should be discouraged. The common-law rule conferring arbitrary power upon trial judges has been so far modified by the Code and the advanced civilization of the age as to greatly limit the power, and in case of its abuse a reviewing court would not hesitate to give a new trial to the unsuccessful party. The question here presented has not been before this court heretofore, and is one of importance, as bearing upon the practice in this State, and also as affecting the authority and duties of the presiding judge. It is insisted that as public prosecutors are provided by law, and at public expense, it should be left to them alone to conduct prosecutions, without any suggestions from the court; that the prosecuting attorneys of the several district courts are selected by the people with a view to their fitness and qualification for the position, and that it is the spirit of the law that trial judges leave the matter of presenting testimony entirely in their hands. As a matter of practice in this State, we think the rule generally adopted by the judges has been to avoid examining witnesses, and to permit the case to go to the jury as made by the attorneys. This of course is subject to the exception above stated, in which case there can be no doubt as to the right and duty of a trial judge. Courts should also see that the examination of a witness is conducted in fairness to both of the litigants, and to the witness. Whether or not the judge has the right to go beyond this, under the provisions of our Criminal Code, might become a serious question. At common law the right was not questioned. In *Whart. Crim. Ev.* (8th ed.), § 452, it is said: "The trial court at any period of the examination may put questions to the witness for the purpose of eliciting facts bearing on the issues, and the witness may even be called for this purpose, or a witness not called by the parties may be called and examined by the court. Nor is the court, as to evidence, bound by the rule exclud-

ing the leading questions; but an answer, not in itself evidence, brought out by the questions of the court, may be ground for reversal." This rule has been sustained in *Eppe v. State*, 19 Ga. 102. See also *Archb. Crim. Pl.* 163; 1 *Whart. Ev.*, §§ 231, 496; *State v. Lee*, 80 N. C. 484. Assuming that the rule above cited is the correct common-law rule, the question arises, has the Code so far changed this rule as to require a reversal of the judgment in this case upon the conduct of the trial judge? As a matter of law, we cannot say that in this case the trial judge so far exceeded the rule which is claimed to have been established by the Code as to require a new trial for that cause alone. While it is apparent that the course pursued by the trial judge was not prejudicial to plaintiff in error, yet we deem it proper to suggest that the judges have, to a very great extent, been shorn of the arbitrary power conferred upon them by the common law. It is not necessary here to refer to that which is known by every student of the law, that at common law the authority of the trial judge was deemed to be absolute, and in many instances was greatly abused. This power has, to some extent at least, been removed by the beneficent provisions and spirit of the Criminal Code. The trial judge must have the right to superintend the general course of trials of causes before him, as well as the conduct of counsel engaged therein, but this authority should be carefully and moderately exercised. The judges should be so absolutely impartial upon the trial of a cause as to give no ground for suspicion that he has any opinion upon the merits of the cause on trial, and the greatest care should at all times be observed that no act or word should escape which would deprive a judge of the well-earned reputation of American courts for absolute impartiality. While, as we have said, the conduct of the trial judge to which objection has been made cannot be said to have worked prejudice to plaintiff in error, and does not call a reversal of the case, yet we think that where a case presented involving the abuse of judicial authority to the prejudice of an unsuccessful litigant, the reviewing court should not hesitate to reverse the judgment, that a fair trial might be had. *Neb. Sup. Ct.*, Nov. 10, 1887. *Fager v. State*. Opinion by Reese, J.

**CRIMINAL PRACTICE—NEW TRIAL—MISCONDUCT OF COUNSEL.**—At the trial of the accused one of the counsel for the State told the jury that on a former trial the jury "were not out more than one minute in their deliberations, when they returned into court with a verdict of guilty." The district attorney persisted in reading to the jury, as evidence against the accused, written evidence of a witness which had not been put in. *Held*, on appeal, that where the guilt of the accused is clearly shown by his own testimony, such error in the proceeding will not call for a reversal. For this palpable and serious error we are urged by counsel for appellant to reverse the judgment, and award a new trial, and reliance is placed upon the recent cases of *Martin v. State*, 63 Miss. 505, and *Lamar v. State*, 64 id. 687. In *Lamar v. State*, the error went to the very organization and competency of the jury, the triers of the issue joined. A juror, after evidence had been received, was attacked by the district attorney on a charge of having previously expressed his determination to get upon the jury and acquit the defendant. The juror was, as was said in that case, "thereby put under bonds, as it were, to go against the prisoner, in order to free himself from the charge made against him." The point of that decision was that the act of the State in attacking the juror invalidated the panel, and though the defendant was clearly guilty, the judgment was not permitted to stand, because it was not supported by the verdict of any jury competent to try the issue joined between the accused

and the State. In *Martin v. State*, the conviction rested principally upon circumstantial evidence sufficiently strong to uphold the verdict, but not so conclusive as to enable us to confidently affirm that a verdict of guilty ought and must have followed from the competent evidence alone. In neither of these cases did we depart from the rule that where the guilt of the accused is clearly and incontrovertibly shown by his own testimony, a mere error in the proceeding will not call for a reversal. *Thomas v. State*, 61 Miss. 60. The appellant was examined as a witness in his own behalf, and by his own statement it is clearly and unequivocally shown that he committed the crime of which he has been convicted. He in effect avows his guilt as conclusively as though he had pleaded guilty to the indictment. Under such circumstances, though manifest error has intervened, the judgment must be affirmed. *Miss. Sup. Ct., Nov. 7, 1887. Lamar v. State.* Opinion by Cooper, C. J.

**EVIDENCE — DOCUMENTARY — RECORD OF SIGNAL SERVICE OFFICER.**— In an action to recover damages from a railroad company, for injury to tobacco bales from rain, while in its possession, a witness testified that he was a volunteer weather observer, appointed by the United States government, and his record of the weather, on the day the tobacco was in the hands of the defendant, was introduced in evidence to show that it did not rain on that day until 9:45 at night, after the tobacco had passed out of the hands of defendant. *Held*, that the record of the weather being official, and made by witness in the course of his public duty, was competent evidence. *N. C. Sup. Ct., Nov. 7, 1887. Knott v. Raleigh & G. R. Co.* Opinion by Davis, J.

**FRAUD — SALE OF LAND — RESCISSION.**— Where a person is induced to exchange \$3,000 worth of land for 320 acres of land not worth more than from 75 cents to \$1.25 per acre in another State, by reason of the false statement of its value made by a person who is represented by the owner as a reliable and trustworthy person, well acquainted with the character and value of the land, he will be entitled to have the trade set aside on the ground of inadequacy of consideration and false representation. Mere inadequacy of price is not *per se* ground for setting aside a transfer of property, yet it may be so gross and palpable as to amount in itself to proof of fraud; and this in connection with proof of imposition and misrepresentation on the part of the purchaser and his agents, will be sufficient to characterize the transaction as fraudulent in a court of equity. *Reed v. Peterson*, 91 Ill. 289. Here is a gross disproportion between the properties of the two parties, and false representations in reference to the quantity and value of the Wisconsin land, which are sufficient to bring the case within the rules indicated in *Reed v. Peterson*. Ill. Sup. Ct., May 12, 1887. *Wetherox v. Riddle.* Opinion by Craig, J.

**GIFT — IN PRESENTI — CAUSA MORTIS — WHAT CONSTITUTES.**— A mortgagee in extreme sickness and expectation of death, executed a formal written satisfaction of mortgage, and delivered it, together with the note and mortgage, to the mortgagor (who was his brother) as a gift, with intent to discharge and satisfy the same. Subsequently, but as a part of the same transaction, he required the brother to deliver the note, mortgage and satisfaction to an uncle, for the purpose of ascertaining the portion of personal property the brother would be entitled to, in addition to the value of the gift. Subsequently the mortgagee died, and the note, mortgage and satisfaction were redelivered to the brother by the uncle. *Held*, that the delivery of the note, mortgage and satisfaction by the mortgagee constituted a valid gift *in presenti* or

*causa mortis*. There can be no question but what a person of sound mind, even *in extremis*, may make a partial as well as a total disposition of his property by will. The same is true in case of a gift as to any property which is the subject of gift. The mere fact that he attempts at the same time, and as a part of the same transaction, to dispose of the whole of his property, but for some cause the disposition is ineffectual as to a part of it, will not prevent its being effectual as to the other part. Here the matters of conveying the land to the sister, and the directions for disposing of the personal property, are not within the issues, and hence not before us for determination. No question of creditors or other claimants is involved. The only question presented is whether what was said and done by the intestate constituted a complete satisfaction and extinguishment of the note and mortgage. A mortgage may undoubtedly by way of gift to the mortgagor completely satisfy the debt, and discharge the mortgage. *Moore v. Darton*, 4 De Gex & S. 517; *Lee v. Boak*, 11 Gratt. 182; *Darland v. Taylor*, 52 Iowa, 508; *Carpenter v. Soule*, 88 N. Y. 251; 42 Am. Rep. 248. Where a gift of personal property is made with intent to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, it is certainly binding upon the donor as a gift *inter vivos*, even if the donor at the time is *in extremis*, and dies soon after. *Tate v. Leithhead*, Kay, 658; *McCarty v. Kearnan*, 86 Ill. 292. But where such intent is not manifest, and the gift is otherwise made, under such circumstances it will ordinarily be regarded as a gift *causa mortis*. *Rhodes v. Childs*, 64 Penn. St. 23, 24; *Grymes v. Hone*, 49 N. Y. 17. But even such a gift is not complete without delivery. *Id.*; *Wilcox v. Matterson*, 53 Wis. 23; *Brunn v. Schuett*, 59 Wis. 280. Such a gift may be defined as one made by the delivery of personal property by the donor in his last sickness, and in expectation of death then imminent, and upon condition that it shall belong to the donee if the donor dies, as anticipated, without revoking the gift, leaving the donee him surviving, and not otherwise. *Rhodes v. Childs*, *supra*; *Grymes v. Hone*, *supra*; *Ogilvie v. Ggilvie*, 1 Bradf. 356; 2 Quar. Law Rev. 446; 21 Am. Law Rev. 734, and cases there cited. But even such a gift is defeated if the donor survive such sickness. *Stanland v. Willott*, 3 Macn. & G. 664. Here the intestate, as mortgagee, actually delivered the note, mortgage, and satisfaction to the mortgagor personally as a present. True, the intestate subsequently directed the mortgagor to deliver them to the uncle, as he directed Mrs. Adolph Henschel to deliver the deed she had received from him to the uncle. But this was apparently done in order that the uncle might the better ascertain the value of the land conveyed, and thus ascertain the difference in the value of the two gifts thus made, and then divide the personal property so as to make the gifts equal. Under such circumstances, in view of the apparent absence of any hope of recovery, it would seem that the note, mortgage, and satisfaction may be regarded as so delivered to the mortgagor as an absolute gift *in presenti*. But even if there was an absence of such intent to make a then present and unconditional gift, yet as the delivery by the donor was complete, and he was at the time in his last sickness, and died soon thereafter, without revoking the gift, we must regard it as a valid and binding gift *causa mortis*. *Wis. Sup. Ct., Nov. 1, 1887. Henschel v. Maurer.* Opinion by Cassoday, J.

**INJUNCTION — TO RESTRAIN CRIMINAL PROSECUTIONS.**— Complainant was the owner of certain picnic grounds within the limits of defendant village, which passed an ordinance declaring public picnic grounds a nuisance, and providing a penalty for allowing them

use for picnics, or any purpose whereby disorderly people are congregated. Complainant was prosecuted seven times for violating the ordinance, was convicted once, and the other suits were pending. Held, that where complainant had not established the invalidity of the ordinance, equity will not interfere by injunction to protect repeated acts of violation of it, and where there are valid provisions in the ordinance, nothing appearing to the contrary, it will be presumed he was prosecuted under them. It is insisted by counsel that a court of equity should restrain these prosecutions in order to prevent the multiplicity of suits. Bills of peace will lie, under some circumstances, for the purpose of quieting and suppressing litigation. It is said however that to entitle a party to maintain a bill on this ground, there must be a right claimed affecting many persons; "for if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed." 2 Story Eq. Pl., §857. In the case of *West v. Mayor, etc., supra*, the chancellor, quoting from what he had said in *Oakley v. Mayor, etc.*, which was a bill for injunction to restrain prosecution under the market ordinances of the city, uses the following language: "If the objection to the legality of these ordinances was well taken, the complainant has a perfect defense at law, and this court would not grant an injunction to protect him against a multiplicity of suits, until his right to such protection had been established by a successful defense at law, in some of the suits," and cites in support the case of *Eldridge v. Hill*, 2 Johns. Ch. 281, and concludes: "I am not aware of any case in which this court has sustained such a bill to prevent the defendant from suing at law, where the rights of the party depended upon a question of law merely, and where the defendant in the case at law must eventually succeed without the aid of this court, if the law is in his favor." *Eldridge v. Hill, supra*, was a bill for injunction to restrain all but one of a series of prosecutions for the erection and maintenance of a nuisance, and to enjoin the bringing of other suits threatened to be brought for its continuance. Kent, C. J., denied the injunction, saying: "No case goes so far as to stop these continued suits between two single individuals. so long as the alleged cause of action is continued, and there has been no final or satisfactory trial or decision at law upon the merits." In *McCoy v. Chillicothe*, 3 Ohio, 379, it is held that the repetition of actions for trespasses between the same parties is not that multiplicity of suits which will induce a court of equity to interfere by injunction. In this case the bill alleges the pendency of the suit sought to be enjoined, but does not show that the complainant had established the invalidity of the ordinance at law; on the contrary, it is shown that in the only case tried the validity of the ordinance was sustained at law. If the ordinance is valid, as held by the court imposing the penalty mentioned, equity will certainly not interfere to protect the complainant from deserved punishment for its violation, nor because the common-law court may have erred in its judgment as to the complainant's guilt or innocence. Nothing could be more detrimental to society, and provocative of violations of law, than for courts of equity to interfere in such cases by injunction, and thereby protect repeated acts in violation of ordinances, which might each furnish new ground of complaint. While the injunction continued, the functions of municipal government would be suspended, and irreparable injury might thereby ensue. If the municipal law be of doubtful validity, complainant cannot by his willful and repeated violation of his provisions, each furnishing separate grounds for prosecution, and depending upon separate facts, create this ground for equitable interposition, with-

out first settling the validity of the ordinance in the courts of laws. If he fears prosecution of other suits, he can refrain from the repetition of his acts in violation of its provisions, until the proper forum has determined its invalidity. The case of *Railroad Co. v. Mayor, etc.*, 54 N. Y. 159, cited by counsel, was a bill to enjoin all but one of seventy-seven suits brought against the railroad company for running its trains into the city without a license as provided by ordinance. The bill attacked the validity of the ordinance, and it was held that a demurrer to the bill was properly overruled, upon the ground that had the suits been brought in a court of record, they could have been consolidated under a statute authorizing the consolidation of causes as a matter of right, and as the magistrate's court in which they were pending was without such power, and as the prosecution of all at the same time separately would be onerous and oppressive, the case was one in the opinion of the court, where equity jurisdiction might properly be invoked and exercised. This case can have no application here, nor does it conflict with the rule announced in *West v. Mayor, etc., supra*, and kindred cases. The case of *Wood v. City of Brooklyn*, 14 Barb. 425, relied on by counsel, is clearly distinguishable from the case at bar. There the ordinance was clearly void and provided for arrest, imprisonment and imposition of a fine for an act the complainant was clearly authorized by the statutes of the State to do, and it further appeared prosecutions had been threatened, but were delayed and not commenced against him, and the court found that the fact that the ordinance remained apparently in force so that the threatened prosecutions might be brought under it, and the complainant imprisoned before trial, injured his business, and that therefore there being no actual trespass, there was no adequate remedy at law for such injury. In the subsequent case of *Davis v. American Soc.*, 75 N. Y. 362, in which the complainants sought relief from the enforcement of a penal statute upon the ground, among others, that they had not in fact violated the law, the Court of Appeals held that a court of law was a proper forum in which to try that question, and refused the relief, distinguishing that case from *Wood v. City of Brooklyn*. In this case the ordinance is not claimed to be wholly illegal. That part of the ordinance which prohibits the renting or permitting the use of any yard, ground, etc., for any purpose whereby disorderly persons are congregated, has not received judicial construction, but it would seem to fall clearly within the general powers conferred by law upon this corporation. If there are several prohibitions in an ordinance, some of which are void, and others valid, if a penalty is provided applying to each offense separately, the ordinance may be enforced as to offenses in respect to which it is valid, as if the void portions had been omitted. Dill. Mun. Corp., § 421, and note. The bill is wholly silent as to what portion of the ordinance the prosecutions complained of were brought under, and the presumption would be that they were prosecuted under the valid ordinance. This clearly distinguished this case also from *Wood v. City of Brooklyn*, and authorities of like import. Ill. Sup. Ct., Nov. 11, 1887. *Poyer v. Village of Desplaines*. Opinion by Shope, J.

**INNKEEPER — GUESTS — SUNDAY LIQUOR LAW.**—Persons who resort to an inn on the Lord's day for the purpose of procuring and drinking liquor are not guests within the meaning of the "screen" liquor law. *Com. v. Hogan*, 140 Mass. 289. Mass. Sup. Jud. Ct., Nov. 22, 1887. *Commonwealth v. Moore*. Opinion by Morton, C. J.

**INSURANCE—LIFE—PAYMENT TO PERSON PRODUCING POLICY.**—Suit on a policy of life insurance, under the



system known as "Industrial Insurance." Schaffer, the plaintiff below, is the beneficiary named in the written application, which was made part of the policy. The fifth condition of the policy provided that "the production by the company of this policy, and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied. *Held*, that payment to the daughter of the insured, who produced the policy and the premium receipt-book, and her receipt, constituted a complete defense to the company against any claim of the beneficiary named in the application. The authorities are conflicting, but there are a number of well-considered cases which hold that where a person who has obtained an insurance upon his life, for the benefit of children or others, keeps the instrument himself, and alone pays the premiums, the beneficiary has no vested rights in the policy, and the insurer has the right to surrender it, and take out a new policy payable to other beneficiaries. In some cases the distinction is taken that where, after the policy is taken out, it is delivered to the beneficiary, or to some one in trust for him, the right to it thereby becomes vested in the beneficiary. This was the condition in *Fortescue v. Barnett*, 3 Mylne & K. 38. See *Garner v. Insurance Co.*, 32 Alb. Law J. 91; *Insurance Co. v. Stevens*, 19 Fed. Rep. 671; *Barton v. Insurance Co.*, 3 Atl. Rep. 627. In *Landrum v. Knowles*, 22 N. J. Eq. 594, the insurance was stated in the policy to be for the sole use of the children of the policy-holder; and it was held by the chief justice, in delivering the opinion of the Court of Appeals, that after the death of the insured, this was as complete a transfer as that to the trustees in *Fortescue v. Barnett*, *supra*. But here it will be seen that there is no such condition or provision in the policy, and it does not appear how the beneficiary named in the application could have any equity to require the insured to keep the policy alive, or to control it in any way during the life of the insured. All the cases agree that the contract in the policy must govern. There is no contract or agreement to pay to the beneficiary named in the application. The contract in the policy expressly is to pay to the person or persons named in condition five of the policy before recited, and in the manner therein specified. Conceding that the beneficiary named in the application has a vested interest in the policy, he holds it in accordance with and subject to the conditions of the contract contained in the policy. Condition five of the policy must in that view operate as an appointment, both by the assured and the beneficiary, of persons, any of whom are authorized to receive payment of the sum agreed to be paid. The company has paid in strict accordance with that condition, and is thereby discharged under its express terms, from further liability. The purpose and object of this kind of insurance seem to require the payment to be made in that way, and it should, in good policy, be upheld. N. J. Sup. Ct., Nov. 8, 1887. *State v. Schaffer*. Opinion by Van Syckel, J.

**LIBEL AND SLANDER—CHARGE OF CRIME.**—A charge that a postmaster had detained and broken open mail matter imputes to him an act which if done, constitutes an indictable offense under the laws of the United States, involving moral turpitude and infamous punishment, and the publication of such charge is actionable as slander. The words which the complaint alleges the defendant spoke of the plaintiff as

postmaster, while he held that office, unquestionably imputed to him dishonest and corrupt acts done in his office, which in their nature imply moral turpitude, and work social degradation. They charge acts to have been done by the plaintiff, which if done constitute a gross breach of official faith and duty and a degrading and infamous offense under the laws of the United States, punishable by fine and imprisonment at hard labor, and which renders the offender, if he be a postmaster, forever incapable after conviction of holding that office. Such imprisonment is infamous under the laws of the United States, and the disqualification to hold office is certainly a punishment that implies disgrace and infamy. It fixes upon the convicted party a stigma of disgrace and reproach in the eyes of honest and honorable men that continues for life. It is difficult to conceive of a punishment more galling and degrading in this country than disqualification to hold office, whether one be an office seeker or not. Here generally all honest men are eligible to office, to share in the honors and emoluments incident to it. How great the standing disgrace that one cannot, because of crime that imputes corruption in office. *McKee v. Wilson*, 87 N. C. 301; *Ex parte Wilson*, 114 U. S. 417; 5 Sup. Ct. Rep. 935; *Mackin v. U. S.* 117 U. S. 348; 6 Sup. Ct. Rep. 777; *Ex parte Bain*, 121 U. S. 1; 7 Sup. Ct. Rep. 781; *Rev. Stat. U. S.*, §§ 3890, 3892; *U. S. v. Waddell*, 112 U. S. 82; 5 Sup. Ct. Rep. 36. N. C. Sup. Ct., Nov. 7, 1887. *Harris v. Terry*. Opinion by Davis, J.

**MARRIAGE—ACTION FOR LOSS OF HOUSEHOLD SERVICES OF WIFE.**—Although a married woman may recover for such injuries as are personal to herself, the services rendered by her in the household in discharging the ordinary duties of a wife belong to her husband, and the loss of such services occasioned by an injury to her is his loss, for which he only can recover. Counsel for the city makes the broad claim, that because she was a married woman, her time and service belonged alone to her husband, and that a liability for the same could only arise in his favor. The common-law rule that the husband and wife are one person, and that he has the exclusive right to the labor, service and earnings of the wife, has been wisely and radically changed. A positive enactment of our Legislature has removed many of the restraints and disabilities of coverture, and it contains a provision that "any married woman may carry on any trade or business, and perform any labor or service, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or service shall be her sole and separate property, and may be used and invested by her in her own name." It also prescribes that she may sue to protect and enforce her rights in the same manner as if she were unmarried. Gen. Stat., ch. 62, § 4. It follows from this that the time and services of the wife do not necessarily belong to the husband, nor does an injury which causes the loss of such time and service necessarily accrue to him. At least a portion of her time may be given to the labor or business done on her sole and separate account. The profits or earnings of such business or labor are her sole and separate property, and cannot be appropriated or controlled by her husband without her consent. So far then as she is deprived of these she suffers a loss which is personal to herself, for which she alone can recover. The fact that she is partially or wholly dependent upon the husband for support does not abridge her right of action, nor transfer to him that which accrued solely to her. Notwithstanding this, we are compelled to hold that the instruction was prejudicially erroneous. The duty devolves upon the husband to take care of and provide for the wife, and he is entitled to her society,

and to her services other than those performed on her sole and separate account. If he is deprived of these services in consequence of an injury inflicted, the loss is his, and the right of action therefore exists in him. The rule fixing the liability for the services of a married woman is fairly stated in a case which arose and was tried in New York, where a statute exists substantially like ours. It was held that "the services of the wife in the household, in the discharge of her domestic duties, still belong to the husband, and in rendering such service she still bears to him the common-law relation. So far as she is injured so as to be disabled to perform such services for her husband, the loss is his, and not hers; and for such loss of service he, and not she, can recover of the wrong-doer. But when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a *feme sole*; and so far as she is disabled to perform such service by any injury to her person, she can in her own name recover compensation against the wrong-doer for such disability as one of the consequences of the injury. \* \* \* and the money recovered shall be her sole and separate property." *Brooks v. Schwerin*, 54 N. Y. 343; *Minick v. City of Troy*, 19 Hun, 253; *Railroad Co. v. Dunn*, 52 Ill. 260; *Townsend v. Nutt*, 19 Kans. 282; 2 *Suth. Dam.* 723. In the present case the court ignored the distinction, and in effect instructed the jury that the city was liable to Mrs. Agan for all the time which had been lost by reason of her injury, although it appeared that a large part of it had been devoted to the domestic duties of the household. If the instruction had limited her right of recovery to the injury which accrued to her, or had directed that she could not recover for the loss which her husband sustained by reason of her inability to discharge the ordinary duties of a wife, no prejudice would have resulted. The jury were directed to allow for the loss of time, regardless of whether she was engaged in a business of her own, or was performing labor or service on her sole and separate account. Under the testimony and circumstances of the case the instruction was erroneous. *Thomas v. Town of Brooklyn*, 58 Iowa, 438. Nov. 5, 1887. *City of Wyandotte v. Agan*. Opinion by Johnston, J.

#### OUR NEW YORK LETTER.

THE New Year finds four new judges established on the bench of our metropolitan courts of record. Hon. Morgan J. O'Brien succeeds to the place recently left warm—I might say hot—by Judge Donohue. No judge ever worked harder in the discharge of his duties and for a renomination than he. He put aside the ermine with great reluctance, and during the entire period of his incumbency never forgot his politics, his friends, or his Hall. But his politics, friends and Hall were not strong enough to carry him, for he likewise had enemies—bitter ones, some of them—and they arose in their might and slew him. Judge O'Brien is a man of whom good things are expected. He is not more than five and thirty, but was when appointed corporation counsel a few months ago, the possessor of a large and important practice, and enjoyed the reputation of being a good all-round lawyer.

Judge Lawrence succeeds himself despite the efforts of those who felt aggrieved by his excise decisions to defeat him. His retention is a matter of congratulation by members of the bar and laymen as well. The defeat of Judge Earnest Hall for re-election to the bench of the City Court is generally regretted, especially as the successful candidates in this branch of the judiciary were comparatively obscure lawyers who have their reputations to make.

No retiring surrogate of this county ever handed the probate seals to a successor with greater honor or more respected than Hon. Daniel G. Rollins, who at once becomes the associate of the leader of our bar, Mr. James C. Carter. He probably put in more hours of work every week of his term than any lawyer in this city, and disposed of more important will cases than any probate judge in this country. His decisions have rarely been disturbed, and the widow and the orphan have often had cause to rise and call him blessed. He retires with the pigeon-holes of his desk cleared, and Saturday filed his decisions in the last two important cases awaiting determination. The first was in the Stevens will case, in which Mrs. Paran Stevens sought to have her co-executor, her daughter's husband, removed. The proceedings were attended with great bitterness on both sides, which finally involved the counsel, ex-Judge Noah Davis and Mr. Burrill. The defense was a general mother-in-law, and the court sustained the plea.

The other was the famous Paine will case, which had many sensational features, not the least interesting of which was the finding of a handkerchief containing nearly \$400,000 in greenbacks, the property of the testator, who was an eccentric miser, who made an obscure but enterprising lawyer his sole heir. Paine lived in a miserable attic, depriving himself of the necessities of life, that his hoard might daily grow. The will was contested as a forgery and for other reasons. The decision finds that the will was genuine; that there was no fraud, but holds that the testator had not the testamentary capacity to make it valid. This decision is discouraging to eccentric misers and obscure and enterprising lawyers, but is full of joy to sundry relatives who discovered their kinship after they heard of the old man's death. The heir under the will had the good luck to die before the decision was filed.

I heard a most remarkable will story recently, the truth of which is vouched for by my informant. All rights are reserved. Authors and playwrights infringing will be prosecuted to the full extent of what should be the law. About a fortnight since I had occasion to require a number of photographs of exhibits for use in a certain trade-mark suit which I was about to bring. Not desiring to entrust to a clerk the arrangement of the necessary details, I went myself to the gallery of a down-town photographer who makes a specialty of legal and commercial photographs, and saw my convincing evidence unloaded from a truck. The operator was a genuine old three-ply Yankee, who used to travel through New England with a gallery on wheels. In the intervals between the development of the negatives, the operator entertained me with the recital of some of his lego-photographic experiences. "Last year, about this time," said he, "a young lawyer came in here, and asked me if I could take a photograph of a legal instrument. I didn't ask him no questions—I know my business too well—but just told him that was my particular specialty. He showed it to me without taking his hand off it. I saw them familiar words, 'In the name of God. Amen,' and I knew it was a will. To all appearances it had not been signed or witnessed. I didn't ask no questions, 'cause I know my business too well. Young Mr. Blackstone almost whispered when he told me that he had good reason to believe that the will had been both executed and witnessed, and said he thought the signatures had been erased. He wanted to know if I could not enlarge the hull business five times. 'Yes, counsellor,' says I, 'I kin enlarge it six times, but the paper there where the signatures ought to be is as smooth as the bottom of a baby's foot. I was examin'in' it with a pretty strong glass. There aint no erasures, counsellor,' says I, 'not as I thinks any-



how, but they may have been something else.' 'What?' says he. 'Chemicals,' says I, 'and maybe the old detective 'll catch onto it. I call the lens in that there camera the old detective, and he's done some dreadful fine work, as more 'n one Wall street lawyer 'll tell you. Excuse me a moment, sir, whilst I go out and look at that last negative o' yours.' Well, as I was goin' to say, I happened to look over where the young lawyer sot; 'twas over there by that box you're on, and he was white as a sheet, and perspirin' like a hurdle-jumper. He evidently didn't take no stock in my chemical theory, and saw his case topplin.' I never see it done afore, and it was only kind of an idea of mine that them chemicals might be betrayed by the old detective. I placed the will over against a dark background, and I can see them words now with the red-ink line underneath, 'In the name of God. Amen.' Just as I was about to take the cap off, and let the old detective get in his work, I says to him, just as I did to you a minute ago: 'Counsellor, don't walk 'round whilst the plate's exposed, as you'll be liable to shake the floor and spoil the outline.' They wa'n't no use in that remark, for he sot there like a marble statue, with his eyes glued onto that will. Well, I let her go. The day was a little dark, and the exposure was rather long. Say, counsellor, from the way that young fellah breathed, you'd thought a Staten Island ferryboat was trying to make 'port in a fog. I had just pulled out the slide, and was going over to the dark room there, when he jumped, and caught me by the coat, as though he thought I was a goin' to get away with the hull estate. He could hardly speak for a moment, but I didn't say nuthin'; I know my business too well. Finally says he: 'Old man, I aint got much faith in that chemical theory o' yours, but if you can make them names come out in them three spaces it will be worth \$500 to you and a gold watch and chain besides; and say, old man, it 'll make me a fortune and reputation.' 'Counsellor,' says I, 'I'll do my best; I allus do; I bin doin' it in this business for over thirty years.' I went into the developin' room, and commenced to pour my different medicines over the negative. Counsellor, them were pretty nervous minutes for me. I don't pick \$500 and a gold watch off every negative. After a while I thought I could see some irregular lines growin' into them spaces, and then, counsellor, sure as I stand here, them three names came out like the writin' on the wall. I was afraid they would fade away, but I poured a little nerveatic acid. Yes, I pick up a little lawyer Latin here in the gallery. Well I took it out and showed it to him. 'The detective got 'em,' says I. I wish you could have seen his face as he glanced at my plate. He turned red and white by times. Yes, the names were there to stay—John T. Wells, S. H. Shaw, and Nathan Davis. I'm not givin' away the real names; I know my business too well, but there they were. He only stopped long enough to ask when the prints would be done, and then went down them stairs like a bank cashier on his way to Canady. The next day he kim back and got his prints, and brought an affidavit for me to sign. I signed it and swore to it. He give me his card, and said I'd hear from him. I did. He brought me \$500 and this here gold watch. He then told me that another will had been offered for probate, in which a property of over half a million was given to a cousin of the testator. Two children were out off with \$5,000 each. The second will gave the entire property to the children, and was executed two or three months before the testator's death. The young lawyer said that the cousin, not daring to destroy the second will, caused the signatures to be removed by chemicals. The young counsellor made short work of that case. It wasn't tried. He simply gave one of

them photographs and a copy of the affidavit to the other lawyer. It never got into the papers as I know of, and a big scandal was prevented. That young fellah told me his fee was \$25,000. Don't you think that was rather a full charge for a young lawyer? All the same, it made a very merry Xmas for my boys and girls over in Hoboken."

DEMOT ENMOT.

## CORRESPONDENCE.

### THE SHARP CASE.

*Editor of the Albany Law Journal:*

It is no more than an act of common fairness to the Court of Appeals for some one to point out an error into which a self-constituted appellate court, consisting of an anonymous, one "E. B. R.," has fallen, in a letter lately published in the *Tribune*.

It is rather amusing to find so infallible (?) a court of review (as E. B. R. evidently considers himself to be) making the same mistake, for which he so vigorously denounces the tribunal on which he is sitting in judgment for its decision in the *Sharp* case, viz., misreading the law.

In his deliverance just referred to, he says of the Court of Appeals in support of a sneer at its ability: "For in the celebrated *Schulting* cases the court, on precisely the same facts gave one man (Hardt) his money and turned the other man (Dambmann) out of court—and it did it too in the same volume, and almost on the same page. Read the opinions, Mr. Editor. You will find them in 85 N. Y. 622-625."

Now will it be credited that E. B. R. is so ignorant of the English language that he cannot understand plain words? But he must fall back upon the pitiful excuse of ignorance, if he is to be acquitted from the graver charge of intentional misrepresentation. The very pages he refers to contradict in express words his statement just quoted.

Instead of the facts being "precisely the same," those pages show they were exactly the opposite. In the one fraud was proved; in the other it was not. That difference was found by the trial court, whose decision on the facts was binding on the Court of Appeals, as E. B. R. well knows (if he is a lawyer).

It is simply inconceivable how any man (if he be a lawyer) can so misread a plain case. I would add, that to avoid any possibility of error in my own statement, I have carefully examined the original appeal books in these two cases. The decision in the *Hardt* case (by Judge Van Brunt) was put on the express ground that the facts differed from the *Dambman* case. The General Term affirmed each case, stating explicitly that the reason for the creditor Hardt being successful, when creditor Dambmann was not, was because of that difference in the facts. Now when this incorrect statement of E. B. R. on one point is thus demonstrated, it will readily occur to most people, that possibly his criticisms upon the Court of Appeals for its decision in the *Sharp* case may be equally unfounded. I, for one, should not be inclined to rely on the opinion of E. B. R. on a grave constitutional question, if he makes so glaring an error in an ordinary law-suit.

I shall not sign my name, because this gentleman makes the charge that a man who defends the Court of Appeals from unjust criticism does so "to curry favor with the court." I am not its champion, have no such desire, but do not doubt he would make the charge against me; for the man who is afraid to make his attack on a court openly over his own signature, the man who hides behind false initials, is the very man of all others to misconstrue the motives of him who signs his name.

I am ready however to exchange cards with E. B. R. in public or private, if he so desires.

Dec. 14, 1887.

X. Y. Z.

# The Albany Law Journal.

ALBANY, JANUARY 21, 1888.

## CURRENT TOPICS.

AS we pride ourselves on knowing all the languages spoken in Great Britain, we are extremely mortified at a typographical error that crept into Mr. Goudy's article on the Scottish procedure, *ante*, page 4. In the second column, sixth line from the bottom, for "geind causes" read *teind causes*, i. e., tithe causes.

The Holland Society of New York had a sumptuous dinner last week. It was our own fault, this time, that we were not present. We peruse with watering mouth the *Spijkskaart*, and with watering eyes the *Heil-dronken*. We cannot read the former, inasmuch as it is not in chop-house French, but we should have eaten and drunken right through it on trust, encouraged by the example of so many good Dutchmen, and by a few suggestive resemblances, such as "oesters," "snippen," "Yorksche ham," "podding," "Mokka koffie," and especially "likeuren." We should not have indulged in "pijpen" and "tabak." And then to have heard Chauncey M. Depew discourse on the scholars, artists and warriors of Holland; Mayor Hewitt on New Amsterdam, growing in greatness but not in goodness; George William Curtis on the Dutchman and the Yankee; Mr. Van Siclen on "Holland—Oranje boven!" ex-Chief Judge Daly on early Dutch explorers and geographers; John Van Voorhis on Vondel, the Dutch Shakespeare; Mr. Van Norden on our nation's debt to Holland; and Mr. Woodhull on the New Jersey Hollander! We doubt not that ex-Judge Noah Davis, who sat among the guests of honor, got new ideas of "entertainment," although he would not "imbibe" them, of course. It was a great opportunity lost to hear the two best after-dinner speakers in the world. But our town was well represented. Our neighbor, Doctor Vander Veer, was there, and Mr. J. V. L. Pruyn, and our reporter, Sickles. There was exhibited an autograph letter of George Washington to the officers of the Dutch church of Schenectady, thanking them for congratulations on his arrival in that place—singular how little some people are thankful for! This letter gives evidence that we are "a bigger man" than G. W. in one respect at least—we can spell correctly, and he couldn't. We should be ashamed of "Prodistant," "churtch," "sin-cearly," "spedye," and "Its." (The latter is not exactly a defect in spelling, to be sure.) But that hatchet incident carried him right through. On perusing the diagram of the dining-tables sent us by Mr. Van Siclen, we are led to fear that the drink was potent, for at one table there were five of Mr. John R. Voorhis, and three of Mr. James B.

Van Woert, and at another three of Mr. Abm. Lott, and so, in a less degree, in a number of other instances. Our townsfolk seem to have kept sober, and so did the clergy. But what an occasion it must have been when one man required from three to five seats! In fact, the only evidence of abstinence which we can discover in the whole proceedings is in the "Song of the Flag," which in one part is marked "Refrain." Again we congratulate this admirable society on its eminent success. So much cleverness and good-fellowship it is hard to parallel.

While we are speaking of the Dutch we may refer to a pamphlet, evidently a brief in some lawsuit, by ex-Judge William H. Arnoux of New York, entitled "The Discovery and Settlement of New York considered in its Legal Aspect," the object of which is "to determine whether the Dutch ever obtained any title of the soil of Manhattan Island," in order to determine whether owners of lots abutting upon the Bowery have any title to the soil of that street, for the occupation of which a railway company is bound to make them compensation. Judge Arnoux is not Dutch, but French by descent, and so we are prepared to find him holding that the Dutch had no rights in the soil in which the roots of Peter Stuyvesant's pear-tree grow, or grew. This paper comes in pat with Mr. Melcher's article on "Old Dutch Roads," 36 ALB. LAW JOUR. 523. These two gentlemen differ radically on the point under discussion. Judge Arnoux goes into this subject with his accustomed learning, research and ingenuity. He first disposes of the Indians by virtue of the decision of the United States Supreme Court. Then he claims title for the English by the discoveries of Cabot in 1497. This claim is made by Edmund Burke, by Chief Justice Marshall, in *Johnson v. McIntosh*, 8 Wheat. 576, and by Chief Justice Taney, in *Martin v. Waddell*, 16 Peters, 367—three rather respectable authorities, it must be conceded. We have not space enough to give even an abstract of this excellent and entertaining argument, but we give his conclusions in the following extracts: "In this brief summary of the events which have taken place, it will be seen that under the law, as it has always been declared in both Europe and America, the English were the owners by right of discovery under governmental authority. This gave them the exclusive ownership. The Dutch were squatters. They had no title in fee to the land. Their only right was that of private ownership, recognized by treaty. Their purchase from the Indians gave them no title as against the English, and it has been always maintained by the English authorities that the Dutch simply were squatters here, and obtained no title to the soil. Among private individuals a squatter's title may become valid by lapse of time. It is not so with nations, as the Supreme Court decided in relation to acts by the Confederate government; when the usurping authority ends it is as if it never existed. Under these circumstances, it will readily appear to the court that the Dutch-Roman law as to highways never could

prevail in this colony. It has been so declared by Mr. O'Connor in points which he has presented to the Courts of Appeals, and in the decision of our courts, and in the Supreme Court of the United States. The rightful title of the English has been recognized in every case but one, and that was in regard to a highway on Long Island, which decision has no application to this case. \* \* \* When the representatives of the Duke of York, afterward James the Second, King of England, by their charters gave to the city of New York all the waste and unoccupied lands, they conveyed in fee the property which had heretofore been undisposed of, but that only gave in respect to the existing highways such title as the State then had, and no more, and throughout the length of the Bowery that title was simply the use of the property, subject to the right in fee of the owner of the bed of the highway. This historical summary therefore leads to the conclusion that the Dutch Roman law never had any application to the Bowery as a Dutch highway; that the common law of England must be held to prevail, and therefore that the judgment, that abutting owners upon the Bowery had no right title, or interest in or to the said highway, was erroneous." It is fortunate for Judge Arnoux that he was not present at the Holland Society dinner. We should have feared for his personal safety, especially as he is a "teetotaler."

One more item of Dutch interest, and we have done with the Dutch for the present. Mr. E. D. Palmer, our famous sculptor, has sent us a cast of his design for the Fort Orange Club seal. A live seal or a beaver would have done well enough, but he has done better. He has moulded a stockade, in front of which stand a Dutchman and an Indian, the former with outstretched arms in an attitude of invitation and hospitality, the latter hesitating, with a bow in one hand and an arrow in the other behind him, evidently prepared for treachery, but not hostile. Flowers spring up at their feet. A beautiful idea, quite characteristic of the graceful genius of our accomplished townsman, and suggestive of the simple good-faith and honest, peaceable nature of the founders of our city, which prevailed over the distrust and savageness of the red men and made friends of them.

A correspondent in West Virginia writes us: "Your issue of the 17th ult. contained a very unjust and narrow editorial against the confirmation of Mr. Lamar. If the editor had been better acquainted with his patriotic history since the war, perhaps it would not have been written. I hope after reading Senator Stewart's letter he will see that he has wronged Mr. Lamar, and will cheerfully and speedily repair the injury. I very much regret to see the weight of the JOURNAL on the wrong side of the scale in this matter, and should feel much gratified to see it correct the wrong by putting its weight in aid of Mr. Lamar's confirmation. If he is not a suitable person to occupy a seat

upon the Supreme bench, I feel safe in saying that there is no man south of Mason and Dixon's line who is. \* \* \* If we are, as we all claim to be, a united people, do not brand us with disloyalty. We feel these thrusts." As Mr. Lamar has been confirmed, we do not care to pursue this discussion. On no account would we do him the smallest injustice. We sincerely hope that he will not verify our fears. But our correspondent omits all references to our other objection to Mr. Lamar, namely, that he is not a sufficiently equipped lawyer for the place, by cast of mind, by experience, or by learning. We have never yet seen it claimed by any one that he is a lawyer of distinction. His mature years have been engrossed by statesmanship and politics, not by the law. Is it possible that there is no better lawyer south of Mason and Dixon's line? We should think that he would feel himself heavily over-weighted by his giant associates. This is not the first time that we have objected to a confirmation to this office. We ridiculed the idea of naming Roscoe Conkling for it, because he was not lawyer enough. We objected to Justice Matthews because he was from Ohio, and because he was, as we thought, more of an advocate than of a lawyer. Will any one pretend that Mr. Lamar is the equal of Mr. Conkling as a lawyer? Mr. Justice Matthews has very agreeably surprised us in his accomplished discharge of his duties, but none the less we think Ohio had no right to another justice on this bench. We concede the present place to the south. It would be indecent not to do so. But is it possible that the south has not a lawyer of recognized pre-eminence and ability, who is free from the suspicions and distrust which must inevitably hamper Mr. Lamar in his judicial career? We know nothing of Mr. Semmes' political history, but as a lawyer he would have commanded the unanimous approbation of the profession, north and south, and he certainly has not been prominent as a politician.

Our very much esteemed contemporary, the *Virginia Law Journal*, also criticises us in a somewhat patronizing and inconsequential manner on account of our opposition to Mr. Lamar. On the one hand, "excellent and esteemed brother;" "noted humorist;" "excellent at law and pretty good at poetry;" "excellent judge of good things, and an honest fellow withal;" but on the other, shakes "a certain ensanguined garment;" "monomaniac on the subject of traitors and treason;" perhaps "sent a substitute," but hopes not; "worm in the bud;" "his little crank about traitors." But we are unaffected either by his "taffy" or his reproaches. Our brother is mistaken as to the garment which we are shaking. It is not the "bloody shirt." It is the empty judicial gown, which Mr. Lamar may rattle around in, but can never fill. It is noteworthy too that the *Journal* has not one word to say in favor of Mr. Lamar as a lawyer. The most it can work itself up is that "the appointment is a good one," and a prophecy that we will enjoy his "luminous opinions." Well, we

hope so, but we do not expect it. But meanwhile the spirit of our critic on the subject of treason is also noteworthy. What we call disloyalty he calls insanity. It reminds us of the servant-girl applying for a place, who mitigated the accusation of having had an illegitimate baby on the plea that "it was a very little one."

The time of our going to press, and the enforced absence of the editor, will prevent our giving any notice of the proceedings of the State Bar Association until next week. We shall then endeavor to give adequate comment on the proceedings. We shall then also publish the opinions in the Sharp case in full.

#### NOTES OF CASES.

**I**N *State v. Green*, Indiana Supreme Court, Dec. 2, 1887, it was held that a statute making residence in the State for a certain number of years one of the necessary qualifications to practice medicine, is constitutional. The court said: "In discussing this constitutional question appellee's counsel assume that the effect of the statute under consideration is to grant the practitioner of medicine, etc., who had resided and practiced his profession in this State for specified periods of time, 'privileges and immunities' which are not given the practitioner who has practiced his profession for the same periods of time, but has resided in another State. Counsel says: 'Ten years' practice of medicine and surgery, and ten years' residence in this State, give to a citizen of Indiana a license; in other words, to follow this profession for ten years is sufficient for a citizen of Indiana. Is ten years' practice by a citizen of Illinois sufficient for him? Does ten years' practice answer the same purpose for each citizen? The statute gives to one a license because he has practiced for ten years, and refuses it to the other, and why? Because the one is a citizen of the State, and the other is not. Can the State make this discrimination between her own citizen and the stranger who comes within her borders from a neighboring State? Not so. The Federal Constitution puts it beyond the power of hostile legislation to render wholly false the great principle that all men are alike equal, and all citizens of the United States alike entitled to the same chances in life.' The fundamental error in this argument of counsel is this: that it rests and proceeds upon the erroneous and unwarranted assumption that the above entitled act grants 'privileges and immunities' to the citizens of this State which are not allowed by the act to the citizens of other States. The act does not grant privileges or immunities to any citizen or class of citizens, whether within or without this State. In the exercise of the police power of the State, for the purpose of protecting its inhabitants from the ignorance or effrontery of the charlatans, empirics, or mere quacks who professed and pretended

to be well skilled and qualified in the noble sciences of medicine and surgery, the General Assembly of the State, by the statute we are now considering, as we have seen, enacted that it should be unlawful for any person (without any reference to residence) to practice medicine, surgery or obstetrics in this State without having first obtained a license so to do, as provided in such act. It is not contended by appellee's counsel, nor indeed can it be successfully maintained that the General Assembly may not, under the police power of the State, so far regulate the practice of medicine, surgery or obstetrics in this State as to require that any person desiring to engage in such practice shall first procure a license so to do. Thus far forth, the constitutionality of the act under consideration has already been upheld and fully sustained by this court in *Eastman v. State*, 109 Ind. 278; S. C., 58 Am. Rep. 400; and *Orr v. Meek*, 111 Ind. 40. In requiring such license, and prescribing the qualifications of the applicant therefor, and the necessary proof thereof, the statute first provided, as we have seen, that license should be issued to any applicant who showed by his or her affidavit that he or she had graduated in some reputable medical college, and who exhibited to the proper clerk his or her diploma, without any reference to his or her residence. This provision of the statute is not assailed by appellee's counsel, and certainly it is not repugnant to either the State or Federal Constitution. It will be observed that the statute nowhere denies to any person of any age, sex, race, color or residence, the right of privilege, if such it be, to obtain a license to practice medicine, surgery or obstetrics in this State, if such person can show, in the mode prescribed by the statute, that he or she is possessed of the requisite statutory qualifications to entitle him or her to such license. In *Ex parte Spinney*, 10 Nev. 323, the precise question we are now considering was before the Supreme Court of the State of Nevada upon a statute containing provisions very similar to those of the statute of this State. Hawley, C. J., there said: 'The real test of qualification, in the act under consideration, is based upon medical skill and knowledge. The physician or surgeon entitled to practice must have received a medical education, and must have obtained a diploma from some regularly chartered medical school. Now, the Legislature saw fit, in establishing this test, to except from its provisions a certain class of physicians and surgeons. In so doing, it in effect declared — to state the extreme cases — that the physician or surgeon who had practiced his profession in this State for the period of ten years immediately preceding the passage of this act was as well qualified, in its judgment, to continue the practice of his profession, as the student, coming fresh from the halls of college with his diploma, was to commence it. In adopting this exception, the Legislature did not infringe upon any provisions of the State or Federal Constitution.' See also *State v. Dent*, 25 W. Va. 1, and *Fox v. Territory*, 5 Pac. Rep. 603; in each of which

cases statutes regulating the practice of medicine, etc., containing provisions similar to those of the statute of this State, were sustained, and held to be constitutional and valid laws."

In *State v. Low*, Missouri Supreme Court, Nov. 28, 1887, a trial for murder, where the defense was insanity, the evidence tended to establish an insane condition of mind existing for years. The court refused to instruct the jury that if defendant was insane in 1877, when he left home, the presumption was that he was insane at the time of the homicide, and that the burden of proof was on the State to show defendant was sane at that time. *Held*, error. The court said: "The rule of law, as I understand it to be, is that where insanity is the result of some temporary cause, as a fit of sickness or the like, that then no presumptions of continuity flow from such temporary cause; but on the other hand, when you establish, as the evidence tended to do in this case, an insane condition of mind, existing and exhibiting its peculiarities for a long period of years, I incline to think that an instruction embodying the principle evidently intended to be contained in the one asked should have been given. 1 Greenl. Ev., § 42; 2 Bish. Crim. Proc., § 674; 2 Greenl. Ev., § 689; 1 Whart. Crim. Law, § 63; *People v. Francis*, 38 Cal. 188; 1 Whart. & S. Med. Jur., § 61; *Crouse v. Holman*, 19 Ind. 30; *Armstrong's Lessees v. Timmons*, 3 Har. (Del.) 842. If the instruction was not properly worded it was the duty of the court, under our practice, to give a correct instruction on the point. This habitual, permanent or chronic state of insanity being shown to exist, its continued existence will be presumed, and the burden of establishing a subsequent lucid interval at the time of the act, either civil or criminal, being done lies on him who asserts it. Best Ev. (Chamberlayne's ed.), § 405; *Menkins v. Lightner*, 18 Ill. 282; Whart. Crim. Ev., § 730, and cases above cited; *Attorney-General v. Parnther*, 4 Brown Ch. 409. Indeed the bare assertion that a man has lucid intervals is tantamount to the assertion that he is not cured of his lunacy, but has intervals of reason. *Saxon v. Whitaker*, 30 Ala. 287; *Ripley v. Babcock*, 13 Wis. 425. In *State v. Wilner*, 40 Wis. 304, where the circumstances tending to show insanity or delusion were not nearly so strong as in the case at bar, it was held error to refuse an instruction similar to the one under discussion. For the reasons stated, error was committed in giving the seventh instruction on the behalf of the State, which was as follows: '(7) If the jury shall believe from the evidence in the case that from the year 1862 up to the time of the killing of the deceased, Andrew Roan, the defendant, was for certain periods insane, and for certain other periods sane, then before the jury can acquit the defendant they must be satisfied from the evidence in the case that defendant was insane at the time of the killing, and the burden of establishing such insanity rests upon the defendant.'

#### MORTGAGES AS CHOSE IN ACTION.

IT has been repeatedly decided in this State, that a mortgage is a chose in action, and as such is when assigned subject to equities. Most of these decisions are unquestionably correct on the facts, but it may be doubted whether the reasons given for them have always been the right ones, and whether there is not danger of some confusion and error being brought into the law on that account.

It seems to the writer, that in this class of cases, catchwords and phrases have been made to do duty instead of principles, and that in some of them the courts have fallen into error, through having failed, owing to insufficient analysis and a faulty nomenclature, to detect the exact underlying principle.

Chose in action is the term used in our law to denote what the civilians call a right *in personam*, that is a right which avails against particular persons only as opposed to a right *in rem*, which latter, notwithstanding the implication contained in its name, does not mean necessarily a right in or over a thing, but simply a right which avails against all persons generally. The most important rights *in rem* are those of security and property, including under property not only full ownership but all the inferior sorts of property rights, such as easements and the "special property" of bailees. Among rights *in personam*, the chief are rights created by contract and purely equitable rights, as well as rights of action, which are secondary or remedial rights growing out of the commission of wrongs. A right of action must not be confounded with the primary right whose violation gives the ground of action. Thus if a person tortiously gets or keeps possession of a chattel, the owner has a right of action against the wrong-doer, which is a right *in personam*, a chose in action. But he also has left in him his right of property unimpaired, though he is deprived of the power of exercising it, and this latter right, as has been expressly decided in this State (*Hall v. Robinson*, 2 N. Y. 238), is not a mere chose in action. It is a right *in rem*, and like property rights in general freely assignable.

A mortgage at common law plainly was, and in those States where the mortgagee is still considered as taking the legal title continues to be, a right *in rem*, not a chose in action. In this State, and in some others, a mortgage is a mere lien, the general title remaining in the mortgagor.

There are three kinds of liens. In possessory liens, including pawn, the lien-holder takes the possession general with a power to sell; in hypothecations he takes regularly only a power to sell without possession or title; in a common-law mortgage he takes a defeasible title. Hypothecations were unknown to the common law, but the maritime law introduced them from the civil law. Mortgages in this State have been removed from the third to the second class of liens, and like maritime liens are mere hypothecations. In the civil law where it originated, *hypotheca* like *pignus* was a right *in rem*, and so was the right of a mortgagee at common law. It is submitted that a mortgage in New York also creates a right *in rem*, that is, that the mortgagee's right, although a mere hypothecation, yet like the Roman *hypotheca*, is a right against all the world and not merely against the mortgagor or any other specific person or persons. It is true that by statute an unrecorded mortgage does not avail against a subsequent *bona fide* purchaser for value; but the same is true of a conveyance of the fee simple, which is unquestionably a right *in rem*. It is a special statutory exception of no theoretical importance.

It would seem therefore that a mortgage, i. e., the

mortgagee's right, is not in strict theory and in its own nature a chose in action. However in most cases it is practically so for the following reasons: A mortgage is given to secure the performance of an obligation, and can only be enforced so far as is necessary for that purpose. If therefore the obligation is subject to equities, the mortgage, or at least the beneficial interest in it is practically subject to the same equities.

Whoever holds the legal mortgage holds it for the benefit of all interested in the obligation according to their respective interests, and it is a matter usually of no consequence whether the nominal mortgagee is one of those persons or not. However it is very important to notice—a point which seems to have been overlooked in some of the cases presently to be mentioned—that the equities which thus indirectly affect the mortgage are, or should be, only those which attach to the very obligation to secure which the mortgage is made.

A chose in action when assigned is subject to equities. In this State it is settled that this means not only equities between the original parties, but collateral equities in favor of third persons. *Greene v. Warwick*, 64 N. Y. 220; *Bush v. Lathrop*, 22 id. 535. It is in connection with this rule that some confusion has arisen, so that some analysis, and explanation of terms, and a restatement of the principle of the rule in these terms is needed.

Assignments are of two kinds, so-called "legal" assignments and so-called "equitable" ones. The distinction between them has no reference to the nature of the right assigned, which we will hereafter for convenience's sake call the "basis-right." A legal assignment is an assignment in the proper sense, that is, a transaction by which the already existing basis-right, whether that be legal or equitable in its own nature, is transferred from the assignor and vested in the assignee. There is no creation of any new right. But in an equitable assignment the basis-right is not transferred, but remains vested in the assignor as before, but a new right which constitutes a claim upon the basis-right in favor of the assignee is created by the transaction. In this article the simple word assignment will be used to denote only a legal or true assignment.

An "equity" in this connection means any claim upon the basis-right, whether the claim be enforceable exclusively in a court of equity or can be taken cognizance of by a court of law. As such claims, so far as the rule in question is concerned, are usually, or were before choses in action were made assignable, enforced in equity, they naturally came to be all called equities. The distinction between the "legal title" and an "equity," however is in this connection, simply that between the basis-right itself, and a claim upon it. The basis-right is often called the "legal title" and claims upon it "equities." Such a claim may be a separate legal right, having duties corresponding to it and capable of supporting an action if violated, or it may not. In an equitable assignment or in an ordinary trust the claim is such a distinct and complete right. But a right or legal power to rescind a transaction for fraud is a right of a different kind. Imperfect inasmuch as it has no duties corresponding to it, and cannot be violated so as to produce an actionable wrong. A *bona fide* purchaser of property for value, who has had the title actually conveyed to him may also be said for our present purpose to have a claim upon the basis-right—i. e., upon the ownership—though he can hardly be said in strictness to have any right distinct from the ownership itself. As to when equities or claims are equal or when one is to be considered superior to the other nothing need be said here. The matter is well enough understood by all lawyers.

Where two persons have equal equities—i. e., equal claims upon the same basis-right—it is impossible to decide between them upon any ground of justice or reasonableness, since by the supposition their claims are equally just and reasonable. Consequently in such cases we are driven back upon artificial and technical rules, and the only possible grounds of decision must be found in considerations of symmetry and logic.

We must deduce rules from admitted principles by mere logic, and not hesitate to follow them, though they may result in distinctions between closely analogous cases that seem at the first blush over refined and not in accordance with common sense. For example, if A. induces B. by fraud to make an absolute deed of land to him, and then reconveys the land to C., a *bona fide* purchaser for value, C. can hold the land against B. But if the subject matter of the conveyance, instead of being the fee in the land, had been a debt secured by mortgage on the land, B. could rescind and throw the loss on C. This is no reason in justice or common sense for protecting the *bona fide* buyer in one case and not in the other. Nevertheless the difference is a proper one. Justice being equally balanced, the principles presently to be mentioned become our best guide, and followed out logically they give the above results.

Three simple principles cover all cases of equal equities.

I. If several persons have equal claims on the same basis-right and one of them actually has the right vested in him, the holder's claim will be preferred. This is usually expressed by saying that where equities are equal, the legal title will prevail, which is a less accurate way of stating the rule, because the true distinction is not between legal and equitable rights, but between the basis-right, whether that be legal or equitable, and claims upon it.

II. If several persons have equal claims on the same basis-right and neither has the right vested in him, the earlier claim is the better—*prior in tempore potior in jure*.

III. When a non-negotiable chose in action is assigned, the assignment is regarded for the purpose of the application of the two foregoing rules as a mere equitable assignment, notwithstanding the statutes allowing the assignment of choses in action. In those States where the assignment is only subject to equities between the original parties, this third principle would have to be stated in a somewhat different form.

The case of *Bush v. Lathrop*, 22 N. Y. 535, falls under the second and third rules. There Noble, the plaintiff's intestate was the assignee of a bond and mortgage originally made by Addis to Cole, Noble being indebted to Preston, assigned to him the bond and mortgage by an assignment absolute in form as security for the debt. Preston assigned the bond and mortgage to Smith and Newton, and they to the defendants, who paid the full value of bond, not knowing of Noble's right to redeem. It was held that the plaintiff might redeem from the defendant by paying the amount of Noble's debt to Preston. Here it makes no difference whether we regard the debt created by the bond—a chose in action—or the right *in rem* in the land created by the mortgage or not as the basis-right, since the mortgage was subject to the same equities as the debt and was presented by a chose in action, as above explained. In fact the basis-right was vested in the defendant, but under the third of the above rules it must be treated as if still vested in Cole, the original obligee. The plaintiff and defendant then each had a claim on the basis-right, and the plaintiff's claim being the older was preferred under rule II. Had it not been for rule III, the defendant would have had the better right under rule I. The above case was overruled in *Moore v. Metropolitan Nat. Bank*, 55 N.

Y. 41, but on another point; as to the points above mentioned it is still good law. *Greene v. Warwick*, 64 N. Y. 220.

In *Greene v. Warwick*, *supra*, Brown made two mortgages at the same time to Deal and Green, and it was agreed between the three that they should be equal liens on the land. The mortgage to Green was recorded fifteen minutes earlier than the other, Warwick was a *bona fide* holder for value of the Green mortgage, believing it to be prior to the other. It was held that Warwick's mortgage had no preference over the other. The court said that the registry law had no application, since they only protested against subsequent purchasers. In this case the choses in action secured by the mortgages were not subject to any equities; they were absolute, unqualified debts. The equities, if any, only affected the mortgage liens, the rights *in rem*, as distinguished from the debts secured by them, so that this is not a case where the mortgage becomes practically a chose in action. The right *in rem* was in fact vested in Warwick, so that if this were really a case of conflicting equities, the first rule would apply and the decisions would have been incorrect. But since the two mortgages were in fact made at the same time, the two rights *in rem* were equal liens, and the decision was right.

In *Schafer v. Reilly*, 50 N. Y. 61, John Reilly made a mortgage to Peter Reilly, dated March 29, and recorded April 22. On August 26, Peter assigned the mortgage to the defendant who took *bona fide* and for value. On June 9, the plaintiff acquired a mechanic's lien, a right *in rem*, on the premises. The mortgage was not given for any debt, but to raise money for the mortgagor. It also appeared that there was in fact no delivery of the mortgage deed till August 26. In those circumstances the court held that the supposed mortgage had no existence at all, that is the right *in rem* in the land did not begin to exist until August 26, and before that time the plaintiff's lien had attached. There was a good deal said about mortgages being subject to equities when assigned, but really there was nothing of the sort in the case. It was not a case of a conflict in equities, of two claims upon the same right, but two rights *in rem* to the same thing; and among rights *in rem* the earlier, except in maritime liens, prevails. The decision therefore was plainly correct, but has nothing to do with our present subject.

In *Trustee of Union College v. Wheeler*, 61 N. Y. 88, Aspinwall and Stevens held the legal title to land for their own benefit and that of Nott, Nott having an equitable one-third interest. Afterward Stevens acquired Aspinwall's rights. Aspinwall and Stevens, and afterward Stevens alone, contracted to sell parts of the lands. Nott knew of and assented to this, and received a part of the price. Afterward Nott quit-claimed to Stevens, and took back a mortgage on the whole land, of which Stevens was now sole owner, to secure the purchase price. This mortgage was assigned to the plaintiffs who were *bona fide* holders for value. It was held that the mortgage was subject in equity to the previous contracts of sale, and that since the mortgage was a mere chose in action, the plaintiffs took it subject to the same equities. Dwight, C., said that a mortgagee's assignee never stands in any better position than the mortgagee himself; he takes subject to all equities in favor of third parties, because "the holder of a chose in action cannot alienate any thing but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. In this case the purchasers had claims upon the fee simply. When the mortgage was made, the right of the mortgagee, which became the basis-right, being derived out of the fee, was subject to the

same claims. Nott, the original mortgagee, had of course also a claim upon the mortgage right, but he having consented to the sales, his equity was not equal to that of the purchasers, but inferior to theirs, so that his claim is of no importance. It must be carefully noted here that the debt secured by the mortgage was not subject to any equities. It was an absolute debt, enforceable by Nott without any deductions in favor of the purchasers or anyone else. This therefore was not one of the cases where the mortgage becomes practically a chose in action through its relation to the debt. The claims of the purchasers were not claims on the chose in action secured by the mortgage, but on the mortgage right only. When the mortgage was assigned to the plaintiffs they acquired a claim both on the debt secured by the mortgage and also on the mortgage right. The former claim is of no importance here, since the purchasers of the land had no claim conflicting with it. As to the mortgage right, the purchasers and the plaintiffs had equal claims on it, and the purchasers' claims were the earlier. After the case was decided a motion was made to reargue it, and on the reargument, Dwight, C., said that there was no evidence that the "legal estate," *i. e.*, the mortgagee's right *in rem*, had ever been conveyed to the plaintiffs, which of course could only be done by a formal deed duly witnessed and acknowledged. On that view the case falls under rule II, and the decision was correct. The basis-right would then be in Nott, and the purchasers and the plaintiff had only claims. But on the original decision it was assumed that the assignment to the plaintiffs was a complete and proper assignment, so that all the rights of Nott, both the debt and the mortgage right, passed to them. On that supposition the case fell under rule I, and the decision was wrong. The fault in the argument of the court, which was also approved on the reargument, was in not distinguishing between equities that attached to the debt, which would also affect the mortgage right, and equities that attached to the mortgage right only, which latter right is not subject to rule III, it not being in its own nature a chose in action. Therefore though the decision was correct, the views advanced by the court in this case and the last preceding one, as to the nature of mortgages as choses in action and their being liable to equities on assignment, are likely to make those cases misleading precedents.

HENRY T. TERRY.

#### OFFICE AND OFFICER — JUDGMENT — VALIDITY — DE FACTO JUDGE.

SOUTH CAROLINA SUPREME COURT, OCTOBER 29, 1887.

#### CROMER V. BOINEST.

On December 6, 1886, a decree was rendered in an action tried November 30, the term of court having begun November 8, and continued until December 6, on which day the decree was dated and filed. It transpired that the term of office of the judge who signed the decree expired on December 2. *Held*, that the judge was an officer *de facto*, and his decree valid as a decree of the court.

**A** PPEAL from Common Pleas, Circuit Court of Newberry county.

*Suber & Caldwell*, for appellant.

*Moorman & Simkins*, for respondents.

McIVER, J. The question of jurisdiction raised by this appeal is one of the greatest importance, and must necessarily be first determined before any of the other questions presented can be properly considered; for if Judge Fraser, when he rendered the decree appealed from, was neither a judge *de jure* nor *de facto*,



then it is quite clear that the paper styled a "decree" is an absolute nullity, and cannot present any question proper to be considered by this tribunal; and if it is an absolute nullity, then all the so-called decrees and judgments rendered by Judge Fraser, as well as every official act done by him after the termination of his term of office and before his re-election, are likewise nullities, and may be so treated wherever met with. This gives the question presented for determination far-reaching consequences of such a serious and important character as to demand the most thorough and careful consideration.

The facts out of which the question of jurisdiction arises are few and undisputed, and may be stated as follows: The case in which the alleged decree was rendered was heard on the 13th of November, 1886, during a term of the court commencing 8th of November, 1886, and held continuously until and including the 6th of December, 1886, on which day the alleged decree was dated and filed, which was the first announcement of publication of the same, though it was actually prepared and written out prior to the second day of December 1886, the day on which Judge Fraser's term of office expired. He was however re-elected a few days after the 6th of December, 1886, and after his re-election, at an extra term of the court, held on the 31st of December, 1886, he "called this case for the purpose of re-signing his decree as of that date, as he did in other cases, but upon objection of the plaintiff to his considering this case then, he did not change the date, but returned the decree to the clerk." Upon this state of facts there can be no doubt that at the time the decree in question was originally filed and announced Judge Fraser was not a judge *de jure*, inasmuch as he was then out of office by the expiration of the term for which he was elected, and the important inquiry is whether he was a judge *de facto*; for the mere fact that Judge Fraser had prepared and written out his decree before the expiration of his term of office cannot affect the question.

The question as to what will constitute a *de facto* officer has been the subject of judicial inquiry in very many cases, both in England and in this country, and while it must be admitted that there is some conflict of opinion, it seems to us that the weight of authority, as well as argument, is against the view contended for by the appellant. According to that view, as we understand it, the mere fact that one is found in the exercise of the duties of an office, without question of his authority as such, is not sufficient to constitute him a *de facto* officer, unless he is such officer by some color of right or title, even though he may be apparently invested with all the insignia of office.

The *de facto* doctrine rests upon considerations of public policy and necessity. It was introduced into the law for the purpose of protecting the interests of the public, as well as those of private individuals, where those interests were involved in the official acts of one who may be found exercising the duties of an office, though without lawful authority. Hence where a person is called upon to deal with such an officer, he is not bound to inquire whether his title to the office is good; and for a like reason it seems to us that he should not be required to inquire whether such title is colorable. In fact he is not called upon to inquire into the title of such an officer at all, but may safely assume that he is what he appears to be, and what the public generally regard him to be. As is said by Devens, J., in *Petersilea v. Stone*, 119 Mass. 465; 20 Am. Rep. 335, "third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election."

The case of *State v. Carroll*, 88 Conn. 449; 9 Am.

Rep. 409, seems to be a leading case upon the subject. There Butler, C. J., subjects the authorities, both English and American, to an elaborate review, and shows that the idea that there must be some color of right, derived from some election or appointment, in order to constitute one a *de facto* officer, is without foundation, and is based upon what he characterizes as "a brief, inaccurate, and deceptive report" of the case of *Rex v. Lisle*, 2 Strange, 1090, as shown by a fuller and more accurate report of the same case in Andrews, 163. On the contrary he adopts the definition of a *de facto* officer given by Lord Ellenborough in *Rex v. Bedford Level*, 6 East, 356, generalized from a previous definition given by Lord Holt, in *Purker v. Kett*, 1 Ld. Raym. 658, as follows: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law;" which definition, he says, "has never been questioned since, in England, and is now the rule there." Without undertaking to go over all the cases cited in this elaborate opinion, it will be sufficient to refer to some, which seems to be more directly applicable to the question now under consideration.

In *Knowles v. Luce*, Moore, 109, Manwood, J., is reported as saying "that an officer continuing to exercise an office after his time had expired was a good officer *de facto*."

In *Rex v. Bedford Level*, *supra*, the question was whether a deputy recording officer, who continued to act after the death of his principal, was an officer *de facto*, and the court, laying down the definition of such an officer, as hereinbefore given, held the acts of the deputy to be good until the death of the principal was known, but not afterward, because after the death of the principal became known there was no longer any reason for the public to suppose that the deputy had authority to exercise the duties of the office, inasmuch as his appointment necessarily terminated with the death of his principal. That case is, in principle, identical with the case under consideration; for Judge Fraser's legal authority as a judge undoubtedly terminated with the expiration of his term on the 2d of December, 1886, just as the legal authority of the deputy in *Rex v. Bedford Level*, terminated with the death of his principal; and if the acts of the deputy after such termination, and before the fact which gave rise to it was known, were valid, surely the acts of Judge Fraser after the termination of his office, and before such fact was known, would also be valid. When it became known that Judge Fraser's term had expired does not appear on the record, and it surely was the duty of appellant, if his appeal depends upon that fact, as we think it does, to make it appear; for certainly the court could not assume that Judge Fraser would undertake to exercise any of the functions of his office after his term had expired. On the contrary, the court, it seems to us would much more readily assume what was no doubt the fact, that all parties, as well as the judge himself, were in ignorance of the fact that his term had expired when the decree was originally delivered to the clerk to be filed.

In *Wilcox v. Smith*, 5 Wend. 231, the question was whether a person acting as a justice of the peace could be regarded as a *de facto* officer. It seems that he was reputed to be a justice of the peace, and had acted as such for three years. For the first year the town in which he resided was a part of the county of Genesee, and for the last two years it was a part of the county of Orleans. It was shown that he had not been appointed by the officers of the county of Orleans, nor did it appear that he had ever been appointed by the officers of the county of Genesee, though it was shown that he took the oath and acted as a justice while the town was a part of the county of Genesee. The court below charged the jury, that there being no color of title by



election or appointment, the process issued by him was absolutely void. But on appeal this ruling was reversed, the court holding that where the interests of third persons were involved, and for the protection of such interests, the acts of the officer must be validated as those of a *de facto* officer, even though no color of election or appointment had been shown.

In *Gillman v. Reddick*, 4 Ired. 388, the question was whether an official act done by the register of Gates county, after the expiration of his term of office, was valid, and the court held that it was. In that case, like the present, the register was appointed for a fixed term of four years, without any provision for holding over. In that case the court refers to the previous case of *Burke v. Elliott*, 4 Ired. 355, in which the court said there must be at least some colorable election and induction into office *ab origine*, in order to constitute one a *de facto* officer, or so long an exercise of the duties of the office, and acquiescence therein by the public authorities, as to afford the individual citizen strong presumption that the officer was duly qualified to act.

In *Brown v. Lunt*, 37 Me. 423, the question was whether the official act of a justice of the peace, done after his term of office had expired, could be sustained as the act of a *de facto* officer, and it was held that it could. In that case the justice was appointed for one year, without any provision for holding over. He had been a justice for many years in succession, was not reappointed, but continued to act, and took the acknowledgment of a deed about two years after his term of office had expired. One of the grounds upon which this decision seems to have been placed, although others are also stated, seems to have been that the fact of the justice having been originally lawfully appointed, his continuing to exercise the duties of the office without question after the expiration of his term of office afforded such color of right as seems to be required by some of the cases in order to constitute a *de facto* officer. The same principle seems to have been recognized by the Supreme Court of the United States in *Cooke v. Halsey*, 16 Pet. 71. It will be observed that this ground is especially applicable to the case in hand. It is conceded that Judge Fraser was originally lawfully elected and duly qualified as judge, and that he had been for many years in the lawful exercise of the duties of that office, and was so at the time this case was heard by him; and this may be regarded as affording such color of right as seems to be thought necessary by some to constitute a *de facto* officer. It is true that it seems somewhat paradoxical, not to use the stronger term employed by the distinguished judge in the opinion from which this is largely drawn, to say that an appointment to an office for a specified term can afford any color of right or title to such office for a longer period than the term specified; yet when we consider the origin and foundation of the *de facto* doctrine, and that it was introduced for the purpose of protecting and preserving the interests of those who have been induced to submit their rights to one who has the apparent authority to determine them, the paradoxical character of the expression, which the terms used, considered apart from the subject to which they are applied, might seem to imply, will disappear.

Now while strictly speaking, an appointment to an office for four years cannot well be considered as conferring even color of title for any longer period, yet it may well be so regarded in the connection and for the purpose for which the words "color of right and title" are used in discussing this subject. As we understand it, those words are used to mark sharply the line between one who intrudes himself into an office without any shadow of right — a mere usurper — and one who enters upon an office or continues in it under an

honest, though mistaken belief of his legal right so to do, shared in by the public. It seems no more paradoxical to say that one who continues in the discharge of the duties of an office to which he has been legally elected or appointed, after his term had expired, in ignorance of that fact, is being in said office under color of right, than it is to say that one who exercises the duties of an office under an appointment not authorized by law, though supposed to be so, does so under color of right; and yet it has been held in this State (*Taylor v. Skrine*, 3 Brev. 516), as well as elsewhere, that one who is in office by virtue of an election or appointment afterward declared to be unconstitutional, is in such office under color of right, and therefore his official acts are valid as those of a *de facto* officer. Now if as in the case just cited, the act authorizing the appointment was unconstitutional, it was absolutely null and void, and therefore could confer no authority whatever to hold the office, and at most, was only supposed to do so; and this was what gave the color of right which invested the judge, whose official act was there brought in question, with the character of a *de facto* officer. The same principle applies with increased force to the case of Judge Fraser. It is conceded that he was in office originally by legal authority, and the act which is now brought in question was done by him under the belief, shared in by the public, which afterward proved to be a mistake, that such authority still continued. It was therefore done because of an authority originally legal, which however was mistakenly supposed still to exist, and it may therefore be said to have been done under color of such authority; for it cannot be doubted that Judge Fraser never would have undertaken to exercise the duties of an office after he knew that his term had expired, and his authority so to do had terminated. His act must therefore be referred to such authority, as done by reason of the belief that such authority still continued, that such authority was the color of right under which he acted. If as in *Taylor v. Skrine*, an appointment to an office without any legal authority whatever should be regarded as sufficient to invest the appointee with color of right to the office, solely because it was honestly, though erroneously, supposed that the appointment was lawful, surely an appointment originally made by lawful authority, and honestly, though erroneously, supposed still to continue, ought to be sufficient for the same purpose.

In *Sheehan's case*, 122 Mass. 445; 23 Am. Rep. 374, the accused, having been convicted before the police court, applied to be discharged under a writ of *habeas corpus*, resting his claim upon the ground that Hawkes, the justice before whom he was tried, was disqualified to hold the office under the Constitution of Massachusetts, by reason of the fact that he had accepted a seat in the Legislature. Gray, C. J., in delivering the opinion of the court, used this language: "But if Mr. Hawkes, upon taking his seat in the House of Representatives, ceased to be a justice *de jure*, he was, by color of the commission which he still assumed to hold and act under, having the usual signs of judicial office, sitting in the court, using its seal, and attended by its clerk, no other person having been appointed in his stead, a justice *de facto*." This language may very appropriately be applied to the present case, *mutatis mutandis*.

In *Petersilea v. Stone*, *supra*, the question was whether the service of certain process by one who had previously been appointed constable, but whose term of office had expired, and nevertheless continued to act, was valid. The court held that it was, the constable being a *de facto* officer, using the language hereinbefore quoted from the case. It is now again cited for the purpose of saying that it distinctly repudiates the idea, that in order to constitute a *de facto* officer, he

must have some color of right arising from some election or appointment, and declares that the general terms used in the previous case of *Railroad Co. v. Railroad Co.*, 1 Allen, 552, from which such an idea might be inferred, must be confined to that particular case, and cannot be regarded as stating fully and accurately the elements necessary to constitute a *de facto* officer.

In this State there does not seem to be any authoritative decision on the point under consideration. But there are judicial utterances which seem to us to be in accordance with the view herein presented. In *McBee v. Hoke*, 2 Spear, at page 145, O'Neill, J., in discussing this subject, uses this language: "But I take the broad ground, that being found in an office of which he had been the incumbent for many years, the plaintiffs had the right to regard him as coroner, and his acts for them are good. \* \* \* One in office and transacting its duties is supposed to be rightfully there, and so far as third persons are concerned that presumption legalizes his acts." It is true, as said by Evans, J., in the subsequent case of *Kothman v. Ayer*, 3 Strob. 92: "These propositions, although not absolutely necessary to be affirmed in that case, and which may be supposed to be mere *dicta*, I propose to show are supported by all the authorities." This too may also be regarded as a mere *dictum*, inasmuch as the question involved in *Kothman v. Ayer* did not necessarily call for such a declaration of opinion. But when we find two such distinguished judges uniting in thus laying down the general doctrine of a *de facto* officer, no small support is afforded the view herein adopted. It seems to us therefore that Judge Fraser must be regarded as a *de facto* judge on the 6th of December, 1886, when the decree was originally filed in the clerk's office, and consequently that the decree must be regarded as a valid decree of the court of common pleas.

[Omitting other points.]

Judgment affirmed.

Simpson, C. J., dissented.

### NUISANCE — WHAT CONSTITUTES — OBSTRUCTION OF SIDEWALK—SKIDS.

NEW YORK COURT OF APPEALS, NOV. 20, 1887.

#### CALLANAN V. GILMAN.

Defendant, a wholesale grocer, was accustomed to place skids, planked over, from the stoop of his store across the sidewalk to a wooden horse. Over this bridge goods were conveyed from the store to trucks in the street, obstructing the sidewalk from four to five hours of each business day. Held, that he was guilty of a public nuisance.

**A** PPEAL from General Term of the Superior Court of the city of New York. Bill to enjoin defendant from obstructing a sidewalk. The trial court awarded an injunction, which the General Term affirmed. Defendant appealed.

John E. Parsons and Edwin M. Wright, for plaintiffs.

Henry Schmitt, for defendant.

**EARL, J.** The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street, or encroachment thereon, which interferes with such use, is a public nuisance. But there are exceptions to the general rule, born of necessity, and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may con-

vey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. But it is not sufficient that the obstructions are necessary with reference to the business of him who creates and maintains them; but they must also be reasonable with reference to the rights of the public, who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact, to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

*Rez v. Russell*, 6 East, 427, where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said "that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public: that the primary object of the street was for the free passage of the public, and any thing which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."

In *Rez v. Cross*, 3 Camp. 224, the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable-yard. \* \* \* A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another."

In *Rez v. Jones*, 5 Camp. 230, the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "It an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to be excused the inconvenience of his own premises by taking in the public highway with his lumber-yard; and if the street be too narrow, he must move to a more convenient place for carrying on his business."

In *Com. v. Passmore*, 1 Serg. & R. 217, the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city, and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: "It is true, necessity justifies actions which would otherwise

be nuisances. It is true also that the necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried into his house, and it may be there a reasonable time. So because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. \* \* \* I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street, because it saves the expense of storage; but there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business."

In *People v. Cunningham*, 1 Denio, 524, the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in *Russell's* case, above cited: 'They must either enlarge their premises, or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest in the community."

In *Walsh v. Wilson*, 101 N. Y. 254; S. C., 54 Am. Rep. 698, a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: "The defendant had the right to place the skids across the sidewalk temporarily for purposes of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right, to be exercised in a reasonable manner so as not to unnecessarily incumber and obstruct the sidewalk."

In *Mathews v. Kelsey*, 58 Me. 56, the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street), as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."

Now what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers, having stores near to each other on the south side of Vesey street in the city of New York, and a large portion of the plaintiff's customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks

were placed in the street adjoining the sidewalk, and then a bridge, made of two skids, planked over, so as to make a plank-way three feet wide and fifteen feet long, with side-pieces three and one-half inches high, was placed over the sidewalk, with one end resting upon the stoop of the defendant's store, and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches, and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store when the bridge was in place were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position when not in use for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half, and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of 9 A. M. and 5 P. M., and that it obstructed the sidewalk the greater part of every business day. Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use, in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more, and even less than it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place or enlarge the premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no time obstructing the street for any considerable length of time. But there is no authority and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was therefore guilty of a public nuisance.

[Omitting minor questions.]

It is further objected on the part of the defendant, that some of the material findings of fact made by the trial judge were not upheld by any evidence. A careful scrutiny of the evidence fails to satisfy us that this objection is well founded. On the contrary, the undisputed evidence showed the nuisance, the special damage, and the right of the plaintiffs to a judgment restraining such nuisance. The evidence of defendant was directed mainly to show that the bridge was necessary in his business; that skids and other similar appliances were in common use by merchants in the city; and that he left a passage-way for pedestrians on and over his stoop. The alleged necessity, as we have shown, furnished the defendant no justification for the nuisance, and it may be conceded that similar appliances are quite common in New York. It is not the nature of these appliances that furnishes the basis of our judgment, but its unreasonable use. The defendant could not justify his unreasonable obstruction of the sidewalk by showing that he allowed pedestrians to pass around or through his store or over

his elevated stoop between moving barrels and packages. The stoop is no part of the sidewalk, and the defendant could not appropriate that to his private use, and substitute his stoop for the public convenience. While temporarily obstructing the sidewalk, he should give pedestrians the best passage he can over his stoop. But this should be a temporary, and not a permanent, shift. He cannot justify the obstruction of the sidewalk for hours because he gives the public a less convenient passage over his stoop.

The judgment entirely prevents the defendant from using the bridge or other like obstruction. We find nothing in the evidence which justifies this. We cannot perceive that the bridge is in any material degree a greater obstruction than skids would be if similarly used. The judgment should be so modified as to read as follows: "It is ordered and adjudged that the defendant, his agents, servants and employees refrain from unnecessarily or unreasonably obstructing the southerly sidewalk of Vesey street, in front of the premises Nos. 35 and 37 Vesey street, by any plank-way or bridge or other like obstruction elevated above the sidewalk, and reaching from said premises, or from the stoop in front of the same, to the roadway of said Vesey street, or from unnecessarily or unreasonably hindering or preventing the plaintiffs, or their employees, servants and customers from having the convenient use of and passage along the sidewalk of said Vesey street in front of said premises Nos. 35 and 37 Vesey street, by any like obstruction; and it is further adjudged that the plaintiffs recover of the defendant one hundred and sixty-four 20-100 dollars costs of this action," and as so modified it should be affirmed without costs to either party in this court.

It is difficult to frame the judgment by the use of general language so as to protect and secure the rights of the parties. But the rules we have laid down in this opinion will probably be found sufficient as a guide if it should be necessary to enforce the judgment as modified, and therefrom the meaning and scope of the important words "unnecessarily" and "unreasonably" may with sufficient accuracy be ascertained.

All concur, except Rapallo, J., absent.

### CRIMINAL LAW—FORGERY—OF NATIONAL BANK PAPER—JURISDICTION OF STATE COURTS.

SUPREME COURT OF ILLINOIS, NOV. 11, 1887.

#### HOKE V. PEOPLE.

Upon trial of defendant for forgery it appeared that a draft was drawn by one national bank upon another; that defendant was a bookkeeper in the bank, and without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime.

*Held*, that the punishment of the crime was within the jurisdiction of the State courts, notwithstanding the provision of Rev. Stat. U. S., § 5209, that every president, clerk, or agent of any national bank, who without authority from the directors draws any order or bill of exchange,

\* \* \* shall be deemed guilty of a misdemeanor, and act of Congress passed March 3, 1875, which provides that the Circuit Courts of the United States shall have exclusive cognizance of all causes and offenses cognizable under the authority of the United States, except as otherwise provided by law.

**E**RROR to Circuit Court, Peoria county.

SHELDON, C. J. The plaintiff in error, John Finley Hoke, was convicted of the crime of forging a draft

for \$1,000, purporting to be drawn by the Merchants' National Bank of Peoria upon the Merchants' Exchange National Bank of New York, of the date of September 1, 1886, and was sentenced to imprisonment in the penitentiary for the term of five years. It appears from the evidence that Hoke was a bookkeeper in the Merchants' National Bank of Peoria, a corporation organized under the National Banking Act, and that he, without authority, filled up in his handwriting the draft in question, which had been signed in blank by the assistant cashier, and delivered the same to one G. J. Brown, in payment of margins upon certain deals of Hoke on the board of trade, and that no money was paid therefor by Brown to Hoke or the bank. Hoke at the time made false and untrue entries in the books of the bank in order to conceal the fact of the unlawful issuance of the draft. The draft was afterward paid by the Merchants' National Bank in the ordinary course of business. Plaintiff in error's counsel, in the opening of their written argument, say: "We desire expressly to restrict the review of this case to but one question, viz.: Did the court have jurisdiction, and did it err in refusing appellant's instructions on that point? We contend that the offense charged in the proof against appellant was cognizable in the Federal courts, and was therefore excluded from the jurisdiction of the State court."

Section 5209 of the Revised Statutes of the United States is as follows: "Every president, director, cashier, teller, clerk or agent of any association (referring to national banks) who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who without authority from the directors, issues or puts in circulation any of the notes of the association; or who without such authority issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section—shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

It is urged that the offense established by the proof upon the trial of this case is an offense under this section of the statutes of the United States, and that being an offense thereunder, it is punishable in the United States courts alone. The act of Congress, March 3, 1875, § 1 (Sup. Rev. Stat. 173), provides "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds," etc., " \* \* \* arising under the Constitution or laws of the United States, or treaties made," etc.; " \* \* \* and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law." Chancellor Kent, in respect of the concurrent power of the States in matters of judicial cognizance, observes: "In the judicial act of 1789 the exclusive and concurrent jurisdiction conferred upon the courts by that act were clearly distinguished and marked. The act shows, that in the opinion of Congress, a grant of jurisdiction generally was not of itself sufficient to vest an exclusive jurisdiction. The judicial act grants exclusive jurisdiction to the Cir-

cuit Court of all crimes and offenses cognizable under the authority of the United States, except where the laws of the United States should otherwise provide;" and this accounts for the proviso in the act of 24th of February, 1807, ch. 20, and in the act of 10th of April, 1816, ch. 44, concerning the forgery of the notes of the Bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offenses made punishable by that act. There is a similar proviso in the act of 31st of April, 1806, ch. 49, concerning the counterfeiters of the current coin of the United States. Without these provisos the State courts could not have exercised concurrent jurisdiction over those offenses consistently with the judicial act of 1789. 1 Kent Com. (12th ed.) 373.

And yet in *Prigg v. Pennsylvania*, 13 Pet. 627, in asserting the exclusive power of Congress over the subject of fugitive slaves, Justice Story observes: "To guard however against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

And in *City of New York v. Miln*, 11 Pet. 138, it was said "that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States:

\* \* \* that all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and that consequently in relation to these the authority of the State is complete, unqualified and exclusive."

In *Eells v. People*, 4 Scam. 498, Eells had been indicted under a statute of this State making it an offense to harbor and secrete any negro slave, or to hinder or prevent the lawful owner of such slave from retaking him, and the point was made in the defense, but not sustained, that the offense described in the indictment was precisely such an offense as was indictable under the fugitive slave law of Congress of 1793. The court, by Shields, J., there said: "This (the State) law prescribes a rule of conduct for our own citizens. If the State can do this, and I hardly think the power questionable, it can punish those who violate the rule. If a State has power to regulate its own affairs, it has the power to define offenses and punish offenders." And again: "It is also said that this law may punish a man twice for the same offense. There is no force whatever in this objection. The offenses are separate and distinct; violations of distinct and different laws and the punishments inflicted by different sovereignties."

The conviction in the case was affirmed by the Supreme Court of the United States in *Moore v. People*, 14 How. 13, Moore being the executor of Eells. It was there said by the court: "But admitting that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. \* \* \* The same act may be an offense or transgression of the laws of both (State and United States)," for which, as afterward said, the offender is justly punishable. And it was there further said: "The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and

of the public peace, has never been surrendered by the States or restrained by the Constitution of the United States."

The indictment in this case is for the crime of forgery. In the offense described in section 5209 above of the United States law, which is claimed as being the same as that shown by the proof here, the offender is an officer or clerk of a national bank, who without authority from the directors draws an order of bill of exchange with intent to injure or defraud, etc. The offenses do not appear to be the same. Under this indictment for forgery there could not, we apprehend, be a conviction for the offense described in section 5209. Nor would an indictment charging merely the offense described in that section sustain a conviction for forgery. The objects of the United States law and the State law appear to be different. The purpose of the former seems to be for the protection of national banks; to punish breaches of trust on the part of those holding fiduciary relations toward such banks; to punish what is of the nature of a private crime. The State law is for the protection of the public against the public mischief to the people of the State from the perpetration of forgeries. The United States statutes is not levelled against the crime of forgery, but against a breach of trust. The offense is called but a misdemeanor. There is no apt language in section 5209 to describe forgery. Whenever Congress has legislated with respect to that offense it has used the language which is appropriate for its description. Thus under title 70, Rev. Stat. U. S. § 5414, provides: "Every person who with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation, etc., of the United States shall be punished by a fine of not more than \$5,000, and by imprisonment at hard labor not more than fifteen years."

Section 5415: "Every person who falsely makes, forges, or counterfeits, etc., any of the circulating notes of any banking association now or hereafter authorized and acting under the laws of the United States, shall be imprisoned at hard labor not less than five nor more than fifteen years, and fined not more than \$1,000." And so of other sections providing for the punishment of forgery, where the United States may be injured, the description of the offense is in the like apt language. The punishment there denounced against the crime of forgery is greater than that prescribed in section 5209 for the breach of trust there made punishable, exceeding it by five years in extent of imprisonment. And section 5328, under this same title (70), declares: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." There is thus manifestation in the legislation of Congress that section 5209 is not directed against the crime of forgery; that the offense provided against in that section is of less degree than that of forgery; and that it was not the intent to suspend in any respect the jurisdiction of the State courts over the crime of forgery under State laws, inasmuch as the United States law providing for the punishment of forgery declares that nothing therein shall be held to take away or impair the jurisdiction of the State courts under State laws. The State law is in no way repugnant to section 5209, and is not at all in the way of supplement to the legislation therein. It is but a statute for the punishment of the common-law crime of forgery. Because it happens to appear in the proof in this case that the wrong-doer was the clerk of a national bank, and that the draft was drawn without authority from the directors of the bank, thus presenting the peculiar elements which constitute the offense in said section 5209, and because, may be, the proof shows nothing more than what amounts to the

offense described in that section, we do not think that thereby the jurisdiction of the State court over the crime of forgery should be taken to be suspended. The cases cited in behalf of the plaintiff in error are mostly cases relating particularly to the execution of some Federal statute, or to some act done within some Federal tribunal. The distinction is taken in *State v. Pike*, 15 N. H. 83, between cases where the alleged criminal act is done in the course of the execution of the laws of the United States, and where not so done, and favoring the idea that the exclusive jurisdiction of the Federal courts may exist in the former class of cases, and not in the latter. The same distinction was recognized in *People v. Kelly*, 38 Cal. 145, as one properly taken. The offense here charged was not committed in the course of the administration of any law of the United States.

In *Com. v. Luberg*, 94 Penn. St. 85, a conviction in the State court of the offense of making false entries in the books of a national bank by the receiving teller of the bank was sustained.

But in *Com. v. Felton*, 101 Mass. 204, it was held that the offense of the embezzlement of the funds of a national bank by its cashier was exclusively cognizable by the courts of the United States, and that it was taken out of the jurisdiction of the State court by the acts of Congress.

While the case does not seem to be entirely clear upon the authorities, we are disposed to hold that the crime charged in the indictment, or that established by the proof, is not excluded from the jurisdiction of the State court.

The judgment will be affirmed.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**APPEAL—WHEN LIES—SPECIAL PROCEEDING—COUNTY COURT.**—Plaintiff obtained a judgment by confession before a justice of the peace, a transcript of which was filed in the county clerk's office. After the expiration of five years, plaintiff still claiming to own the judgment, moved for leave to issue execution. Upon the hearing the contestant appeared, and by affidavit alleged that he was the owner of the judgment by assignment from the plaintiff. The matter was referred to a referee, who reported adversely to the plaintiff. The report was confirmed by the County Court, and plaintiff appealed to the General Term of the Supreme Court, which court dismissed the appeal as not appealable. The defendant did not appear at any stage of the proceedings. *Held*, a special proceeding within N. Y. Code Civil Proc., § 1357, which provides that "an appeal may \* \* \* be taken to the Supreme Court from an order \* \* \* made by a court of record possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court," etc. Nov. 20, 1887. *Ithaca Agr. Works v. Eggleston*. Opinion by Peckham, J.

**CONTRACT—AGENT'S PROMISE TO PAY—PERSONAL LIABILITY—STRANGER—STATUTE OF FRAUDS.**—Defendant had acted as agent for his wife in the sale to her of the business of a certain firm, against which plaintiffs had claims. In the course of negotiations which resulted in the execution of a written instrument transferring the business to his wife, defendant was alleged to have said that he "would see that the creditors were paid." Plaintiffs sued to recover their claims from defendant, on the ground that he had become personally responsible for the debts of the firm. *Held*, (1) that the expressions, if made by defendant as alleged, should be construed as made by him as agent for his wife, and that he was not personally responsible; (2) that plaintiffs were strangers to the

agreement, if made, and could not enforce it; (3) that the agreement, if any, was void under the statute of frauds, as an agreement to answer for the debt of another. *Mallory v. Gillette*, 21 N. Y. 412; *Belknap v. Bender*, 75 Id. 446. Nov. 29, 1887. *Berry v. Brown*. Opinion by Earl, J.

**— UNDER SEAL—CONSIDERATION—EVIDENCE—PAROL—TO VARY LICENSE—LICENSE—TO MAKE REPAIRS—REVOCATION.**—(1) Plaintiff sued her landlord for breaking into her rooms and injuring her furniture while altering the house. Defendants alleged an agreement, not under seal, signed by plaintiffs and eight other tenants, "for the consideration of \$1 to us paid, the receipt of which we hereby acknowledge," to permit the landlord to make such changes in the house as he thought necessary. Plaintiff, on trial denied receiving the money, or that there was any other consideration for the agreement. N. Y. Code Civ. Proc., § 840, provides that an instrument not under seal is not entitled to the presumption of consideration. *Held*, that as the plaintiff was nonsuited, her evidence must be taken as true, and the agreement was invalid, and was no justification to defendants. (2) Plaintiff testified that the license she gave was for alterations to be made on another part of the house, and that they were completed before the trespass complained of. *Held*, that the writing could be explained or contradicted by oral testimony. (3) A tenant who gives her landlord a license to make such alterations as he wished, may revoke it any time before he has entered upon the work. Nov. 29, 1887. *Fargis v. Walton*. Opinion by Earl, J.

**CRIMINAL LAW—HOMICIDE—EVIDENCE—DECLARATIONS—RELEVANCY.**—(1) In a trial for murder it was in evidence that deceased, with defendant, had on the night of the homicide been from saloon to saloon drinking; that deceased was heard to say to him, "You kill him, and I'll stick by you;" that with no apparent reason they went to the house of one M., with whom defendant had lately had a difficulty; that defendant, with deceased, attempted to open a door of a room in which M. and others were; that deceased got in, but defendant was pushed out, and then shot through the door, and then through the door of a room connecting with the first; that deceased was shot; that M. fled by the window, but shortly returned; that deceased, lying wounded on the bed, said M. killed her, which M. then denied, and gave up his pistol to the police; that it was loaded and the barrels were cold; that before her death that afternoon deceased told her mother defendant shot her; that defendant fled after the shooting with his right hand in the pocket of his coat; that he was caught soon after in a room without his coat; that he said he had not been at M.'s that night, nor out at all. *Held*, that a verdict of guilty of murder was justified by the evidence. (2) A witness had testified to hearing M. state in a conversation shortly after the killing that he did not shoot deceased; M., on the stand, testified he did not discharge a pistol that night. Defendant had shown that deceased had charged M. in his presence with killing her, and the declaration of M. denying it was made at that time. *Held*, that it was properly admitted as a part of the conversation introduced by defendant. (3) It was in evidence that M., after the shooting, gave up his pistol to an officer; that it was loaded, and the barrels were cold. Defendant, when another witness attempted to show the same facts, objected, and asked to have it stricken out. *Held*, that as the same evidence was already in, without objection, it was useless to grant the motion, and it was competent to rebut an effort to fix the guilt on M. (4) A witness testified, without objection, that M. had, after the homicide, given up his pistol to

an officer; that it was loaded, and the barrel was cold. The court repeated the testimony, and asked the witness if that was right. He answered "Yes." *Held*, proper. Nov. 29, 1887. *People v. Driscoll*. Opinion by Ruger, C. J.

**EVIDENCE—DOCUMENTARY—HISTORIES—EVIDENCE OF TITLE TO LAND—EASEMENT—REMOVAL OF BRIDGE.**

—(1) In an action for trespass to land, the title of which was in dispute, plaintiffs offered and read in evidence, under objection, an extract from a work on the history of Long Island, with a view of establishing superior title in themselves. *Held*, error. *McKinnon v. Bliss*, 21 N. Y. 206. (2) In an action for damages and the removal of a bridge and wharf erected by defendants under authority of the town of Brookhaven, it appeared that title to that part of the shore of Setauket harbor on which the bridge was erected was originally vested in the town, under a patent granted by the colonial government in 1666. Plaintiffs proved a deed dated June 21, 1768, to plaintiffs' grantors, which purports to convey "a certain piece of salt thatch," by lines including the *locus in quo*, and proved in addition, that from time to time, grantees under this deed out the salt thatch growing on the premises, and that one of them leased to one R. the right to cut the thatch. There was no evidence that the title of the town had been divested, or that it recognized or had notice of the claim of the grantees under the deed of 1768 to the shore. *Held*, that a title in fee will not be implied from user, where an easement only will secure the privileges enjoyed. (3) Plaintiffs own fifty acres of land, and claim the uplands on Setauket harbor, and up to high-water mark. Defendants erected a bridge and wharf in front of plaintiffs' premises, under authority from the town of Brookhaven, in which, under a patent by Governor Nichols, dated March 7, 1666, the title to the land in question was originally vested. There was no satisfactory evidence to establish plaintiffs' title to the land over which the bridge was built, nor of any injury to their rights of riparian owners. *Held*, that plaintiffs are not entitled to judgment for removal of that part of the bridge extending below high-water mark. Nov. 29, 1887. *Roe v. Strong*. Opinion by Andrews, J.

**LANDLORD AND TENANT—HOLDING OVER—LIABILITY—BONDED WAREHOUSE.**—In a lease for one year of a bonded warehouse the lessee covenanted to pay "also for such further time" as he might hold the same. Certain bonded goods, which could not be removed without the consent of the government officials, having been placed in the store before the expiration of the lease, the lessee held the premises for about two months over the term, when the government locks were removed and his bond as warehouseman cancelled. In an action to recover rent as upon an implied promise to hold over for a second year, *held*, that the implied promise must yield to the express covenant to pay rent for such time as the lessee held over, executed in anticipation of that fact. The lease related to a bonded warehouse, which by the provisions of law must while occupied in that character, be used solely for the purpose of storing warehoused merchandise, and be placed in charge of an officer of the customs, who together with its owner and proprietor, should have the joint custody of all the furniture stored therein. Rev. Stat. U. S., § 2960. Its use was subject to governmental regulation, and it was as to receipt, storage and delivery of merchandise from it altogether removed from the control of the lessee. It may well be that these considerations furnished a reason for the clause which purports to limit the lessee's liability for rent to such time beyond the year as he should actually hold the premises.

The plaintiff relies upon an implied promise; but the lease contains an express covenant, and to it the implied promise must yield. The lease does not continue in force beyond the term of one year specified in and created by it, and the holding over must be deemed to have been on the defendant's covenant solely. For the term of one year he agrees to pay the specified rent, and also to pay the rent for such further time as he may hold the premises. Thus the parties anticipated a holding by the tenant beyond the term, and expressly provided for it by agreement. It therefore was not wrongful, nor such a holding over as makes the tenant a wrong-doer and enables the landlord, at his option, to treat him as a trespasser, or hold him for the rent of a second year. *Schuyler v. Smith*, 51 N. Y. 300; *Transportation Co. v. Lansing*, 49 id. 499, distinguished. Nov. 29, 1887. *Pickett v. Bartlett*. Opinion by Danforth, J.

**MARRIAGE—AGENCY—SPECIAL AGENT—NOTICE OF AUTHORITY.**—Husband and wife executed a deed, absolute in form, of land owned by the wife, who delivered the deed to her husband, to be by him delivered as an equitable mortgage for a certain amount. Contrary to the instructions of his wife, the husband delivered the deed in payment of a larger sum than he owed the grantee, who was aware that the deed was to be delivered by the husband as a security, and not as an absolute conveyance. *Held*, that the grantee was bound to ascertain the conditions of delivery imposed by the wife. Nov. 29, 1887. *Gilbert v. Deshon*. Opinion by Finch, J.

**PARTNERSHIP—BREACH OF AGREEMENT FOR DAMAGES—EVIDENCE—HARMLESS ERROR.**—(1) Plaintiff sued for a breach of partnership agreement for one year, broken after four months by the defendant, and showed that during that time business steadily increased, and that the prospects for the future were good; that the books showed about \$1,600 profits if all the accounts were collected. The defendant proved by an expert that some time after dissolution the books showed a loss of \$2,600, but it was proved that this was caused by the sale of the partnership property at a loss, and that many small accounts were uncollected, owing to the sudden winding up of the business. *Held*, that there was evidence enough to go to the jury on the question of probability of profits for the unexpired eight months. (2) Plaintiff introduced a copy of a letter written by defendant, stating that the books showed a profit of \$400 per month if the accounts were collected. Defendant introduced the books, showing the same state of facts. *Held*, that even if the copy was improperly admitted, it worked no harm to defendant. Nov. 29, 1887. *Dart v. Laimbeer*. Opinion by Peckham, J.

**—RETIRING AND INCOMING PARTNER—LIABILITY FOR DEBTS.**—Defendant, upon the death of one of the members of a partnership, entered into an agreement of partnership with the surviving members to continue the business, and it was thereby agreed that defendant should pay a certain portion of the liabilities of the late firm. Plaintiff was a creditor of the old firm, and it appeared there had been no change of credit, or communication of any kind between plaintiff and defendant. *Held*, that defendant was not liable for the debts of the old firm as of course, and that plaintiff could not maintain an action against defendant on her agreement with her partners to pay a certain portion of the debts of the old firm. *Wheat v. Rice*, 97 N. Y. 296, followed. Nov. 29, 1887. *Seviss v. McDonnell*. Opinion by Danforth, J.

**STATUTE OF LIMITATIONS—TRUSTS—EXPRESS AND IMPLIED—FRAUD—DISCOVERY.**—(1) Defendants had been partners in business, and one of them had



been at the same time county treasurer, and while holding that office, in 1868, had abstracted funds standing to the credit of a certain cause, and with them had purchased a certain certificate of indebtedness held by his firm, and had applied the money in satisfaction of a debt due to him from the firm, and had credited the cause with a certificate. Complainant, who had become entitled to the funds, brought action in 1883, praying that defendants might be declared trustees of the money for her. *Held*, that as the money had been received by the firm, not on an express trust, but only under circumstances from which the law could imply a trust, the action was barred as to the answering defendant under the statute of limitations. As an action for money had and received, there can be no doubt that the statute of limitations was a perfect defense. It was not less a defense although it had been received under circumstances from which the law would imply a trust. The case of an express or direct trust would be different. A trustee so appointed would be bound to take care of his *cestus que trust* so long as the reason existed, and he could do nothing adverse to it. But when one receives money in his own right, and is afterward, by evidence or construction, changed into a trustee, he may insist on the same lapse of time as a bar. *Kane v. Bloodgood*, 7 Johns. Ch. 89; *Lamner v. Stoddard*, 103 N. Y. 672. (2) *Held*, that Code Civil Proc. N. Y., § 382, subd. 5, did not apply, which enacts, that in "an action to procure a judgment other than for a sum of money on the ground of fraud, \* \* \* the cause of action \* \* \* is not deemed to have accrued until the discovery \* \* \* of the facts constituting the fraud." (1) The action is not to procure a judgment other than for a sum of money. The only judgment asked is for a specific sum of money, the amount of the Barry certificate with interest, and such was the verdict of the jury and the judgment. The action was founded upon an implied contract obligation or liability, and upon nothing else. (2) Fraud is not stated as a ground of relief, nor does the complaint contain any allegations to bring it within that subdivision. (3) Nor was fraud of any kind, or facts from which fraud on the part of Mulford might be implied, proven against him. The fact assumed therefore by plaintiff's counsel cannot be admitted. Mulford's character and liability as trustee, if there were any, results not from any act of his own, or of the plaintiff, or her assignors, but from the application of the doctrines of equity, which regard him as standing in that relation in order to give the plaintiff a remedy. There was a misapplication of the plaintiff's money; but it was a misapplication by the county treasurer, and not by the defendant. He was held liable, because the firm of which he was a member received the benefit of money derived from the certificate, after the other defendant made such misapplication of the trust fund. From that, and not from any fraud, or knowledge of fraud, or misapplication, a contract liability to make restoration was implied. Fraud was not the ground of action, nor was it established by proof; and the limitation of six years, provided for by section 382, subd. 1, applies. *Carr v. Thompson*, 87 N. Y. 160, Nov. 29, 1887. *Price v. Mulford*. Opinion by Danforth, J.

**WATER AND WATER-COURSES—ILLEGAL DRAINAGE—ACTION FOR DAMAGES.**—Plaintiff sued defendant to restrain him from digging a ditch and turning upon his farm water which never ran there before, but naturally flowed elsewhere. *Held*, that where it was conclusively shown that the ditch had only increased the natural flow of water, but had caused no damage, and had added no new drainage area, the action must be dismissed. Nov. 29, 1887. *Jeffers v. Jeffers*. Opinion by Finch, J.

## ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CARRIER—DUTY TOWARD INFIRM PASSENGERS—NEGLIGENCE.**—A passenger on a railroad train, who had been suffering from rheumatism of the hip, was thrown from his seat in a car by a collision of the train, and his hip broken. In a suit for damages, counsel for the railroad asked the court to instruct the jury: "Although the jury believe from the evidence that the injury complained of in the declaration was inflicted by the defendant upon the plaintiff in the manner therein set out, yet the plaintiff is not entitled to recover if they shall further believe from the evidence that he was in a feeble and infirm state of health, and such as would have prevented a prudent man from running the risk of travel, and that but for his disease and helpless condition the plaintiff would not have suffered the injury so inflicted by the defendant." *Held*, properly refused. It not only assumes that the plaintiff was helplessly infirm, but that such assumed infirmity was equivalent to contributory negligence on his part which bars a recovery. It thus ignores an important qualification of the general rule as to the legal effect of contributory negligence, which is this, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This qualification was clearly stated in the case of *Tuff v. Warman*, 5 C. B. (N. S.) 573, so often referred to, and is the established doctrine in England, and certainly in this State. Indeed it is nothing more than the application of the maxim *sic utere tuo ut alienum non laedas*. *Broom Leg. Max.* 385; *Radley v. Railway Co.*, L. R., 1 App. 754; *Railroad Co. v. Anderson's Adm'r*, 81 Grat. 812; *Dunn v. Railroad Co.*, 78 Va. 645; *Farley's Adm'r v. Railroad Co.*, 81 id. 783; *Railroad Co. v. Kellam's Adm'r*, which was decided at present term. Hence even if the conclusion could be fairly drawn from the evidence that it was imprudent on the part of the plaintiff to travel in his then condition, and even if such imprudence could be said to be contributory negligence, and might have been so found by the jury upon the evidence before them, yet if notwithstanding the plaintiff's negligence, the accident which caused the injury could have been avoided by the exercise of ordinary care on the part of the defendant, the latter is liable. Nor are these the only objections to the instructions. There is another equally fatal. To defeat an action on the ground of contributory negligence, there must have been a causal connection between the negligence of the plaintiff and the injury complained of; that is to say, the plaintiff's negligence must have been the proximate cause of his injury; or in the language of a philosophical writer, "to make the act of a moral agent the judicial cause (which means, he says, the proximate cause) of an event, the act in question must be of such a character, that if not interrupted by causes independent of the actor's will, or by the intervention of other persons, it will under ordinary circumstances produce the event in question." *Whart. Neg.*, § 302. This principle is decisive here; for obviously there was no connection, and in the nature of things could not have been, between the physical condition of the plaintiff and the injuries produced by the collision of the train upon which he was travelling when hurt. As well might it be contended that a passenger suffering with a violent affection of the throat, which renders travel on his part imprudent, and whose leg is broken in a railroad accident, cannot recover damages for his injury until he has first formally satisfied the jury that the injury



was not caused by the condition of his throat; yet such, in substance is the contention of the plaintiff in error. The principle above alluded to is illustrated by a recent case in the Supreme Court of Pennsylvania. There the plaintiff, when injured, was riding on the rear platform of a crowded street car in the city of Philadelphia. He was injured by being struck in the back by the pole of a following car. The defense was that the plaintiff, by reason of his standing on the platform, was guilty of contributory negligence, which barred the action. But the defense was not sustained. The court said: "When the plaintiff was struck, his post was a condition, but not a cause of his injury. It neither lessened the speed of the car he was on, nor increased that of the other. His presence was not a cause of the broken chain and the reckless driving of the following car." *Railway Co. v. Boudrou*, 92 Penn. St. 476. In *Sawyer v. Dulany*, 30 Tex. 479, the plaintiff, a pregnant woman, was injured, and a miscarriage produced by the negligent overturning of a stage-coach in which she was travelling. The defendants contended that they were not responsible for injuries resulting from the peculiar condition of the plaintiff, but only for such as would have ordinarily resulted to a person not so circumstanced. But to this the court answered that the carriers of passengers do not undertake to carry persons of strong constitutions only, and that their liability depends, not upon the physical ability of their passengers, but upon their own conduct. Accordingly the judgment in favor of the plaintiff was affirmed. Nor is there any thing in *Railway Co. v. Eckhart*, much relied on by the plaintiff in error, which is in conflict with these views. That too was a case in which a pregnant woman sustained an injury which resulted in a miscarriage, and of which she complained. The injury was caused by the derailment of a street car on which she was riding. At the trial it was proved that she was in delicate health at the time of the accident; that for a number of years prior thereto she had been treated for womb disease; that she had hemorrhage of the womb, and had been neglected by a physician in a former confinement. It was therefore left to the jury to say whether or not, under these circumstances, she could have prudently ridden on the car; and whether her injury was caused by the ordinary running of the car, or by the casualty that happened. "The law," said the court, "did not require her to expect extraordinary events, but only the effects of the ordinary running of the road; nor did it require her to be in such a bodily condition as to be able to withstand any thing more than the effects of the usual and ordinary running of the cars." There was a verdict for the plaintiff, which was sustained by the Supreme Court. Now there is a broad distinction between that case and the present. In the former the circumstances were peculiar. The jury might have found that the plaintiff, a delicate woman, four or five months advanced in pregnancy, and predisposed to miscarriage, was not in a condition to have prudently travelled at all; that her act in taking passage in a street car was of itself negligence; and therefore that she was the author of her own misfortune. In other words, there may have been a causal connection between her own act and the event that happened, namely, her miscarriage. But very different is the present case. Here the rheumatism of the plaintiff, who was quietly seated in a Pullman car, could not by possibility have brought about or contributed to the breaking of his thigh bone in the collision that occurred. A causal connection between his condition, or any act of his own, and the injuries he received, was wholly wanting; and there was nothing in the case upon which the jury could have found otherwise. Were the position well taken for which the plaintiff in error contends, the aged and infirm would be less

protected while travelling on a railroad than the robust and strong. But the position is not well taken, and further discussion of it is unnecessary. *Va. Sup. Ct. App.*, Nov. 10, 1887. *Shenandoah Val. R. Co. v. Moore*. Opinion by Lewis, P. J.

**CONSTITUTIONAL LAW — EXCLUSIVE PRIVILEGES — RAILROAD AT SEA-SIDE RESORT — RECEIVER.**— The Constitution of New Jersey provides that the Legislature shall not pass any private, special, or local law "granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." A statute provides that any railroad company whose road is constructed at any sea-side resort not exceeding four miles in length, etc., shall be exempted from the provision of a previous statute, that if any company fail to run its trains on any part of its road for ten days, the chancellor may appoint a receiver, etc. *Held*, unconstitutional. Without fully discussing the question, I cannot but ask what general principle is involved in the idea of a road less than four miles in length? What general good would such an enactment promote? If such a law is not in conflict with the Constitution, then any railroad company can secure to itself such rights and immunities, whatever its length may be; for if the power exists in case the road is less than four miles, it certainly exists in every conceivable case when distance only is concerned. But it is said that another fact is to be noticed, *i. e.*, that the law under consideration provides that it shall apply to roads built "at sea-side resorts," and "merely for the transportation of summer travellers and tourists," and that these are such general phrases as fairly to avoid the prohibition of the Constitution. The first phrase quoted may well enough be construed to apply to all sea-side resorts, but leaving the court to define what is or is not comprehended therein, whether a place wholly or only partially abandoned during a part of the year. I cannot but think that every court would say that it must appear affirmatively in every such case that the place was wholly abandoned at the time the company ceased its operations. But it seems to me that it is enough to say that the road in question was not established or organized on any such principles, for when so organized there was no law authorizing such a corporation. *N. J. Ct. Chan.*, Nov. 16, 1887. *In re Petition for Receiver of Delaware Bay & C. M. R. Co.* Opinion by Bird, V. C.

**CORPORATION—LIABILITY FOR MALICIOUS PROSECUTION—ULTRA VIRES.**— A corporation is liable in an action for malicious prosecution, and the plea of *ultra vires* is no defense. It was long thought that as the corporation has no mouth with which to utter slander, or hand with which to write libels or commit batteries, or mind to suggest malicious prosecutions or other wrongs, as it was an artificial person, and could speak and act only through and by the agency of others, it was therefore not liable for any torts, except such as resulted from some act of commission or omission of its agents or servants, while acting within the scope of granted powers, or wrongfully omitting or neglecting some duty imposed by its charter or by-law; and consequently it was necessary to allege that the act committed was while acting within the scope of the power and authority of the company, or that the act omitted was required to be performed. Whether it was wise to depart from this rule that exempted corporations from liability for the acts of agents in cases where the character of the act depended upon motive or intent, seems no longer an open question. The old idea, that because a corporation had no "soul," it could not commit tort, or be the subject of punishment for tortious acts, may now be regarded as obsolete. The rights, the powers, and the duties of corporate bodies have been so enlarged in modern times, and these

"artificial persons" have become so numerous and entered so largely into the everyday transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons; and this liability is not restricted to acts committed within the scope of granted power, but a corporation may be liable to an action "for false imprisonment, malicious prosecution, and libel." *Pierce, R. 273.* "The doctrine which once obtained, that the master is not liable for the willful wrong of his servants, is now understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. \* \* \* Whether the servant did the act with a view to the master's service, or to serve a purpose of his own, is a question for the jury." *Id. 279.* Whether the corporation authorized or participated in the tort is matter of proof, and the defense of *ultra vires* is not admitted. *Id. 520.* It is true that it was held in *Orr v. Bank, 1 Ham. (Ohio), 25*, that a corporation could not be sued in an action for assault and battery, nor could it be joined in such an action with other defendants, and in *Gilbert v. Railroad Co., 55 Mo. 315*, it was held, by a divided court, that a railroad corporation was not liable for a malicious prosecution in the name of the State for alleged embezzlement of its funds, but a different doctrine seems now well established. "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel." *Bank v. Graham, 100 U. S. 699*, and many authorities there cited; *Bank v. Bank, 10 Wall. 645*; *Ang. & A. Corp., §388.* "It is no defense to legal proceedings in tort that the torts were *ultra vires*." *Gruer v. Railroad Co., 92 N. C. 1.* *Railroad Co. v. Quigley, 21 How. 202*, was an action against the defendant (plaintiff in error) for libel. It was insisted that the railroad, being a corporation with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; and the action should have been instituted against the natural persons concerned in the publication of the libel." But a different view was taken by the court, and it was held that a corporation could be held liable *ex delicto* as well as *ex contractu*, and that this view was in consonance with the legislation and jurisprudence of the States of the Union relative to "these artificial persons." The subject is discussed at length in *Williams v. Insurance Co., 57 Miss. 759*, and the note to the case as reported in *34 Am. Rep. 494*, in which the authorities are collated, from which the conclusion is fully warranted that a corporation is liable for malicious prosecution conducted by one of its agents. In the still more recent case of *Railway Co. v. Harris, 122 U. S. 597*, in an elaborate opinion, in which many authorities are cited, it is said: "If a corporation itself has no hands with which to strike, it may employ the hands of others. It is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiltiter* for all torts committed by its servants or agents by authority of the corporation, express or implied. \* \* \* The

result of the modern cases is that a corporation is liable *civiltiter* for torts committed by its servants or agents, precisely as a natural person; and it is liable as a natural person for the acts of its agents done by its authority, expressed or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act." "The corporation and its servants, by whose act the injury was done, may be joined in an action of tort in the nature of trespass." *Pierce Railr. 292.* *N. C. Sup. Ct., Nov. 28, 1887. Hussey v. King.* Opinion by Davis, J.

EVIDENCE—WITNESS—IMPEACHMENT—REBUTTAL.—An attack by the defense on the veracity or credibility of a State witness may be legally met in rebuttal by the State by testimony to sustain the assailed witness. If the attempt is to show that the witness had previously made statements or declarations contradictory to his testimony on the trial, it is competent for the State to show, that soon after the occurrences which he relates, he had made to persons other than the impeaching witness declarations in harmony with his testimony on the trial, although the particulars of his statements thus made are not admissible. The party who offers a witness whose testimony is impeached by the other side cannot be confined, in his warranted effort to sustain his witness, within the narrow bounds of an examination of the witnesses whose testimony was sought to be used in the attack. The question raised by the defense in the course of examination which it had followed was the credibility *vel non* of the boy as a witness in the case, and the door which it had thus opened could not be closed against the State. As a rule of evidence the right of a party to uphold and sustain his witness, whose veracity has been assailed, rests on sound principles of justice and fairness as well as of law, and it finds ample sanction in jurisprudence. The object of the defense was to impair the force and effect of the boy's testimony by showing that he had previously denied any knowledge of the homicide, and that his statements on the trial were the result either of corrupt influences or motives or of malice toward the accused. It was therefore competent for the State to repel the attack by showing that his present statement was consistent with his previous declarations made at a time not suspicious. It is to be noted that the mother did not state the details of his declarations to her, but testified to the simple fact of his telling her that he knew who had shot his father. Wharton, in his valuable work on Criminal Evidence, thus comments on this subject: "On the other hand, when the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence be rebutted. Thus where on an indictment for perjury, a witness for the prosecution swore that B. (the defendant in a trial for arson) was not at the place of the burning at the time of the fire, but was confronted at his cross-examination by his testimony to the contrary on the arson trial, it was held, that as he had been discredited, he might be sustained by showing that he had made to C., immediately after the arson, a statement in harmony with that made by him on the perjury trial, though the particulars of the statement were inadmissible." Section 492. In the same line of thought this court said, in the case of *Fahey, 35 La. Ann. 12*: "The veracity of a leading State witness having been assailed by the defense, it was not only legal, but incumbent, on the part of the prosecution to attempt by testimony to maintain his good character." The same line of conduct was justified in the case of *Robertson, 38 La. Ann. 618*, in which the court said: "The object in calling this witness was not to

furnish original or independent proof to support the charge itself, but the sole purpose and effect of such evidence was to sustain the testimony of the prosecution, the principal witness." See also *State v. Melton*, 37 La. Ann. 77; Phil. Ev. 303, 304. La. Sup. Ct., Oct. 21, 1887. *State v. Waggoner*. Opinion by Poche, J.

**MUNICIPAL CORPORATION—RIGHT TO REMOVE SOIL AND MINERAL FROM STREET.**—The public acquires in a street only a right of way, with the powers and privileges incident thereto. Subject to this right, the soil and mineral belong to the owner of the fee. Hence the public easement justifies only the taking and removing of material which the process of the construction or repair of the street requires. When a city, acting within its general powers to improve streets, makes a contract for the grading of a street, by the terms of which the contractors, in consideration of doing such grading, are to receive and appropriate to their own use all the stone in the street; and under and in accordance therewith the contractors proceed and remove the stone, they are the agents of the city in the premises, and the city is responsible for their acts. When the surface of the land is above the grade line, so that in order to grade and improve the street it is necessary to remove superincumbent materials, this may be done, and probably such material may be used, if necessary, in improving other parts of the street; but the public easement justifies only the taking of material which the process of construction or repair of the street requires. *Althen v. Kelly*, 32 Minn. 280; *Robert v. Sadler*, 104 N. Y. 229; *Sewall v. City of St. Paul*, 20 Minn. 511. Minn. Sup. Ct., Nov. 8, 1887. *Rich v. City of Minneapolis*. Opinion by Mitchell, J.

**SUNDAY—CONTRACTS—VALIDITY—BARBER'S SERVICES.**—In suit for compensation for services in shaving defendant's intestate, who was an old man, whose shoulder had been injured, so that he could not well shave himself, the work being done in the house of the intestate on Sundays, *held*, that the plaintiff could recover. Mass. Sup. Jud. Ct., Nov. 23, 1887. *Stone v. Graves*. Opinion by Field, J.

MEMORIAL OF JUDGE RAPALLO, BY THE  
COURT OF APPEALS—READ BY  
JUDGE ANDREWS, JAN-  
UARY 16, 1888.

THE death of Judge Rapallo has made a wide gap in the membership of this court. There is more than a vacant chair, for he stood for more than one of seven. It can scarcely be expected that his place will be filled, however wise and fortunate may be the selection of his successor.

Judge Rapallo took his seat on this bench on the organization of the court in July, 1870. He was then a man in the prime of life, forty-six years of age. His selection was due to the suggestion of one who, himself pre-eminent on the bench and at the bar, had taken a leading part in framing the present judicial system of the State, and who, having been associated with Judge Rapallo in important litigations, had come to know and appreciate his great ability. Judge Rapallo, up to the time of his election to this bench, had no judicial experience. He was not generally known among the profession outside of the city of New York. He came untried into the work of a judge, and year by year during his seventeen and more years' of service he grew in the estimation of the bench and bar, and at the time of death was recognized as one of the ablest judges in the long line of

able and eminent men, who have adorned the judiciary of the State. His career is an illustration of a fact full of encouragement that there are many men in every community who, though little known, are competent to take up and carry forward the work of the world, as the workers fall out by the way, and to fill with credit to themselves and advantage to the public places of trust and influence. Judge Rapallo came to the bench well equipped for the high duties of his office. His reading had not been confined to the literature of the law. He was a good classical scholar and was familiar with the work of the best English authors. His attention at the bar had been chiefly occupied with questions relating to real property and questions of commercial law and the law of corporations, which are the foremost subjects with which a lawyer in a great metropolis has to deal. The first volume of New York Reports published after his accession to the bench contains an opinion of Judge Rapallo in the important case of *Mantoe v. Mantoe*, which was argued by eminent counsel and involved perplexing questions relating to the law of uses and trusts and executory limitations of land. The opinion in this case exhibits a mastery of the subject, a profound knowledge of the intricate branch of the law with which it deals, and the case at once became a leading one in this State, and is constantly referred to in cases involving the construction of limitations in wills and the validity of trusts under the Revised Statutes. Each successive volume of reports contains important opinions by Judge Rapallo, embracing a wide range of subjects and displaying the resources of a powerful mind informed by reading and reflection, and above all, the absolute sincerity of the author in the search for the true governing principle underlying the discussion. This is not the place to enter into an extended notice of Judge Rapallo's judicial work. He was not a voluminous writer. He was not so much a student of cases as of principles. His opinions are not repertoires of authorities and authorities are but sparingly cited. The philosophy of the law was the matter which attracted and engaged his attention, and his distinction as a judge will rest, I think, upon the largeness and breadth of view which characterizes his judicial opinions. He dealt with every subject in its broad aspects. He was not given to over-subtlety and refinement, unless it might be, though rarely then, when the over-mastering equities of a case seemed to compel this treatment. Judge Rapallo pre-eminently possessed the judicial mind and temper. His intellect was cast in a massive mould. He had great intellectual strength and at the same time great quickness of perception. But this latter quality was so subordinated by his habit of reflection and deliberation that although he readily appreciated the point of a case and the bearing of arguments, he was slow in reaching his conclusions. When finally reached, he was firm and unyielding. But no judge ever came to the consideration of a case with more openness of mind or with greater freedom from prejudice of prepossession. He never rejected an opposing view, not manifestly groundless, without consideration. He frequently surrendered his own impressions and adopted the views of his associates. In consultation he was always helpful and suggestive, and his experience at the bar had made his judgment on commercial and other questions of the greatest value. Judge Rapallo possessed great fairness of judgment. He saw the question presented and nothing else. He however had a strong sense of equity and sought to reach, if possible, the very justice of the case. But he never permitted his desire to do equity, to subvert the settled law. He recognized the guiding principle of courts, that their province is confined to doing justice within the limitations of the law, and that if courts should exercise the

right to bend the law to meet the exigencies of a particular case the judicial power would become an odious and intolerable tyranny. He was most at home in the higher ranges of judicial argument, and took little interest in questions of procedure, or in the technicalities which are often interposed to bar the way to substantial rights. In cases which especially interested him his examinations were exhaustive and he did not stop until he had explored, not so much the decided cases, as the foundation principles upon which the right depended. His opinions, in my judgment, are models of judicial style. His style is simple, perspicuous, dignified; there is no amplification which obscures the sense; nothing which does not contribute directly to bring out and illustrate the point decided. In the combination of qualities which fit a man to be a judge, Judge Rapallo had few if any superiors. He possessed intellectual gifts of a high order, absolute integrity of purpose, a calm and dispassionate temper, great good sense, a solid judgment, and these, united with adequate learning and a power of philosophical analysis, constituted him, as I think, one of the first judges of our time. His death touches the members of this court, his associates for many years, more closely almost than any not connected with his immediate family. Sincere, courteous, manly, they have learned to love him as a brother. They will sadly miss him from the bench and in the unrestrained intercourse of social life. His death comes to some of us at least with a peculiar significance. It seems to make us feel more sensibly than ever the drawing of the current which is carrying us all to the inevitable end.

## CORRESPONDENCE.

### MODIFICATION OF RULES OF EVIDENCE.

*Editor of the Albany Law Journal:*

The strictures in your editorial of the 7th, upon my letter to the *Tribune*, are hardly consonant with the spirit of fair play, which you characterize as the dominant trait of the Anglo-Saxon race.

No one in his senses would advocate or desire a modification of the laws of evidence, so as to "procure the conviction of prisoners on compulsory testimony, suspicions, surmises, gossip, rumor," etc., etc.; and there is certainly nothing in my letter to authorize you in the remotest degree to infer that I suggested any thing so irrational.

What I did specifically advocate was a modification of the laws of evidence, so as to allow the admission of testimony which even under existing rules the most able judges of the Supreme Court admitted.

If you can find any analogy to lynch law in my suggestion it must equally exist in their rulings.

It seems to me that the assumption upon which the rules of evidence are founded is that juries are composed of men of the lowest order of intelligence.

If the jury system have any value at all, it is because the twelve men who are to render the verdict are supposed to be representative of the intelligence of the community, and as such should be quite capable of giving the proper weight to evidence of the character of that which the Court of Appeals rules as improperly admitted in the case of Sharp, and which the rules of evidence exclude.

As the law now stands, in almost every case much evidence bearing directly upon the point at issue is rigidly excluded, which if admitted could not fail, in connection with the more direct evidence, to elucidate the features of the case and present it in a far clearer light, perhaps to the advantage, perhaps to disadvan-

tage of the accused. (I am referring especially to criminal suits.)

No one better than you, with your wide experience and learning, knows the frequent cases of monstrous injustice which have resulted from too strict technical rules of evidence, more especially those relating to the exclusion of hearsay, even when it is the best and only evidence obtainable, as where the only witness is dead, or is too young to testify.

As to the proceedings in courts of justice upon the continent, I am not aware that they are open to the reproach of being "inquisitorial." They might more justly be accused of being guided by common sense and the enlightened and liberal spirit of the nineteenth century, rather than by fossilized precedents of the Feudal era.

W. MORTON GRINNELL.

NEW YORK, Jan. 9, 1887.

[We think Mr. Grinnell's sixth paragraph justifies what he quotes from us in the second.—ED.]

## COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, Jan. 17, 1887:

Judgment reversed, new trial granted, costs to abide event—Bertha Wuesthoff, appellant, and others v. Germania Life Insurance Company, respondent.—Order discharging prisoner reversed and prisoner remanded to custody of the superintendent to serve sentence, with costs to him against relator, who must now serve his term in the Syracuse penitentiary. It is a St. Lawrence county case—People ex rel. Hiram Sinkler, respondent, v. Irving C. Terry, superintendent, etc., appellant.—Order affirmed with costs—People ex rel. New York Electric Lines Company, appellants, v. Rollin M. Squire, commissioner, etc.—Appeal dismissed with costs. This affirms order of General Term holding that licensed hotel keepers under the laws of 1857 can serve wines to their table guests on Sunday—People ex rel. James H. Breslin and Charles N. Vilas, respondents, v. Abraham R. Lawrence, justice, etc., respondent and appellant.—Judgments in each action modified, and as modified affirmed with costs—Andrew Smith and John Dorr, respondents, v. Rector, Wardens, etc., of St. Philip's Church, New York, appellants.—Judgment of General Term on submitted case affirmed with costs. This saves the city full \$15,000, and compels the company to move its tracks to the east side of North Broadway—City of Albany, respondent, v. Watervliet Turnpike and Railroad Company, appellant.—Judgment affirmed with costs. This holds defendant liable for negligence in allowing the grounding and loss of plaintiff's barge laden with 275,000 brick while in defendant's tow—John Salisbury, respondent, v. Schuyler Towing Company, appellant.—Judgment reversed, new trial granted, costs to abide event—Mutual Life Insurance Company, appellant, v. Sarah E. Shipman and others, respondents.—Judgment affirmed with costs—Henry E. Fisher, respondent, v. Enoch H. Bishop and another, appellants.—Judgment affirmed with costs—Frank T. Stevens, appellant, v. Charles S. Butler and others, respondents.—Judgment of General Term affirmed with costs—John B. Smith, appellant, v. Abram T. Kerr, respondent.—Judgment reversed, new trial granted, costs to abide event—Horace B. Woodruff and others, respondent, v. Rochester and Pittsburgh Railroad Company, appellant.—Judgment affirmed with costs—Ruth M. McCormick, respondent, v. City of Brooklyn, appellant.—Order of General Term reversed; that of Special Term

affirmed with costs—George Taylor, respondent, v. City of Brooklyn, appellant.—Judgment affirmed with costs—George Slucovich and others, respondents, v. Oriental Mutual Insurance Company appellant.—Conviction and judgment affirmed. Judge Danforth wrote the opinion. As the Columbia Oyer and Terminer is now in session, Justice Edwards presiding, Beckwith will be at once resentenced and for the sixth time to hang for the murder of Simon Vandercrook—People, respondents, v. Oscar F. Beckwith, appellant.—Judgment affirmed with costs—Andrew J. Jones, appellant, v. George L. Kingsland and another, respondents.—Judgment reversed, new trial granted, costs to abide event—Charles G. Hoyt, respondent, v. Joseph A. Cross, respondent.—Judgment for the recovery of \$1,600 reversed, new trial granted, costs to abide event. This holds that a traveller on a free pass cannot recover against the issuer of said pass for injuries received while riding under it, even if he had paid for a chair in a parlor coach owned by a different company hauled in the train. Ulrich was injured in the train in which Senator Wagner was killed—Charles F. Ulrich, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment reversed, new trial granted, costs to abide event—Fannie L. Field, respondent, v. Robert M. Knapp, appellant.—Judgment affirmed with costs—John Francis, appellant, v. New York and Brooklyn Elevated Railroad Company, respondent.—Judgment affirmed with costs—M. E. Church Home, appellant, v. Wm. N. Thompson, respondent.—Judgment affirmed with costs—Eleazer A. Williams, respondent, v. Joseph Barton and another, appellants. Judgment affirmed with costs. The court held that a railroad company has a right to change its termini—Peter C. Moore and others, appellants, v. Brooklyn City Railroad Company, respondent.—Order affirmed and judgment absolute ordered for defendants on stipulation with costs—Wm. Flanagan, appellant, v. Benj. C. Hollingsworth and another, respondents.—Judgment affirmed with costs—Henry E. Wheeler, appellant, v. George R. Dullon and another.—Orders affirmed with costs—People ex rel. Matthew Tuck, appellant, v. Stephen B. French and others and Board of Police, etc., respondents.—Order affirmed with costs—Louis Sanders, respondent, v. A. E. Rhenbottom, appellant.—Order affirmed with costs—Julius Forstman and others, respondents, v. Ruth A. Shelting, C. B. Smith, her attorney, being appellant.—Three cases; appeals in each dismissed with costs—Charles H. Neil and others, appellants, v. Jacob Van Wagener, respondent.—Orders of General and Special Terms, so far as appealed from, reversed with costs to plaintiff in the Supreme Court and in this court and the case remanded to the Special Term for final action on plaintiff's motion. The parties lived in Troy—Sarah A. Galusha, appellant, v. Norman H. Galusha, respondent.—Judgment reversed, order of reference vacated, new trial granted, costs to abide event—Northwestern Mutual Life Insurance Company, respondent, v. Francis B. Mooney and others, appellants.—Judgment affirmed with costs—Sarah Decker, respondent, v. Hattie E. Decker and others, appellants.—Judgment of conviction reversed and defendant discharged. This is the Binghamton "resurrection" burglary case, to determine whether the body of Robert S. Phelps had been properly embalmed. Judge Peckham wrote the decision—People v. Dan S. Richards.—Judgment affirmed with costs—The People, appellant, v. John P. Allen, respondent.—Judgment affirmed with costs—Fannie H. Tauer, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment reversed, new trial granted, costs to abide event. This is a case of a drunken tramp who fell into an open cellarway

from a street. His recovery is reversed—Robert Corcoran, respondent, v. Village of Peekskill, appellant.—Judgment affirmed with costs—George Waterman and others, respondents, v. Gideon Webster and others, appellants.—Award affirmed with costs—Margaret Brown, administratrix, respondent, v. State of New York, appellant.—Judgment affirmed with costs—Ellen Mulcahey, respondent, v. Emigrant Industrial Savings Bank, appellant.—Judgment reversed, new trial granted, costs to abide event—Jesse W. Purdy, respondent, v. Morris Silberstein, appellant.—Judgment reversed, new trial granted, costs to abide event—Brice P. Walling, respondent, v. George W. Miller, appellant.—Judgment affirmed with costs—Hayden & Havens Company, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment affirmed with costs—Wm. O. Wheelock, respondent, v. Michael Norman, appellant.—Judgment affirmed with costs—Joab L. Clift, surviving partner, etc., respondent, v. George Barron, appellant.—Judgment affirmed with costs. This ends the Robinson-Burt legal war for the possession of the abandoned roadway of the old Albany Northern Railroad Company in favor of the latter's representatives, and affirms that a railroad corporation in this State cannot buy up a competing line, take up the track and hold the roadway against a new rival's using it—Troy and Boston Railroad Company, appellant, v. The Boston, Hoosac Tunnel and Western Railroad Company.—Three cases, judgments affirmed in each, with costs—Myron and Leonard Doelman and John Vandermuler, respondents, v. John Vandermuler, appellant.—Judgment affirmed with costs—Isaac H. Casey and another, respondents, v. Duplex Safety Boiler Company, appellant.—Judgment affirmed with costs—Second Street and Newtown Railroad Company, respondent, v. Long Island Railroad Company, appellant.—Judgment of divorce with alimony affirmed with costs. Defendant's Illinois divorce held not to be a bar to plaintiff's alimony in this action—Elizabeth Cross, respondent, v. John Arnold Cross, appellant.—Judgment affirmed with costs. The recovery was for \$1,500—Christopher G. Dunn, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Award of "nothing" affirmed with costs. Plaintiff's intestate attempted to cross the cross-cut lock gates at West Troy, fell into the canal and was drowned. Held that the State is not liable—Christina Splittorf, administratrix, appellant, v. State of New York.—Two cases; judgment affirmed in both cases with costs—Henry Tyson and others v. Henry A. V. Post, respondent.—Judgment reversed, new trial granted, costs to abide event—Matthew White, respondent, v. James Rintue, appellant.—Judgment affirmed with costs—Crooked Lake Navigation Company, respondent, v. Keuka Navigation Company, appellant.—Judgment reversed, new trial granted, costs to abide event—Joseph A. Brophy, appellant, v. Edward S. Bartlett and others.—Judgment affirmed with costs—Catherine R. Archer, respondent, v. Sixth Avenue Railroad Company, appellant.—Judgment affirmed with costs—Wm. C. Steenkampf, appellant, v. Peter Ballentine and others, respondents.—Judgment affirmed with costs—Wm. G. Rogers, respondent, v. Grand Trunk Railway Company, appellant.—Judgment affirmed with costs—The Copley Iron Company, respondent, v. Thomas J. Pope and another, appellants.—Judgment affirmed without costs—Garret C. Moore and another, appellant, v. Charles E. Appleby, respondent.—Judgment affirmed with costs—The Petrel Guano Company, appellant, v. Providence-Washington Insurance Company, respondent.—Judgment affirmed with costs—Commercial Bank of Keokuk, Iowa, respondent, v. Christian Pflaffer and others, appellants.

## A PAPER

UPON

## PARLIAMENTARY REPRESENTATION IN GREAT BRITAIN.

BY

Rt. Honorable JOHN W. MELLOR, Q. C.

PRESENTED ON THE INVITATION OF THE NEW YORK STATE BAR ASSOCIATION AT THEIR ANNUAL MEETING IN THE CAPITOL, ALBANY, TUESDAY, JANUARY 17, 1888.

THAT history repeats itself has now become a proverb; as time advances we begin to find a tendency to return to older and simpler forms.

This is now true in England of many things, but especially of two—the elective franchise, and the title to land. With regard to the first, we have now practically reverted to the most ancient franchise, that of the inhabitant householder; as to the other, we are about to enter on a campaign, the object of which is to sweep away those cumbrous devices which the ingenuity of lawyers in past times has produced to protect the inheritance, either for or from the descendants.

In early times the householder, and then the land-owners, seem to have been the voters. Soon towns began to acquire a corporate existence; when the nation was consulted, dwellers in such towns came to represent them, while land-owners appeared on behalf of the freemen living in the counties.

History tells us how kings began to interfere with these franchises, in order to weaken, and in some cases, destroy popular forces.

The Tudors deprived towns of their representation, and encroached upon all electoral rights; they were followed by the Stuarts in their efforts to crush a growing democracy.

Two revolutions occurred before the House of Commons succeeded in asserting its now undoubted right to the issue of all writs for elections, and in preventing the interference of the king with borough charters. In order to understand how the people came to be deprived of their ancient rights it is necessary to consider, not only the history of the elective franchise, but to a certain extent, the history of Parliament itself.

Although in ancient times great councils of the nation had been held, no council of representatives, properly so called, was ever held before the year 1265. At that time Henry III and his son (afterward Edward I) were in captivity, having been defeated by the Barons under Simon de Montfort. The king, unable to resist, was induced by his captors to summon the representatives of the English boroughs and counties, and these sat together in a national assembly. This however was short-lived, for on recovering his

liberty, the king refused to summon another, and it was not until his successor, Edward I, had been twenty-two years upon the throne that he was compelled by circumstances to summon a Parliament. On this occasion seventy-four knights of the shire, representatives of the counties, and 200 citizens and burgesses, representatives of boroughs, assembled in answer to the summons. Their difficulties were great, the journeys long and tedious, but the constituencies furnished their members with money.

At this time the franchise in nearly all boroughs was that of the inhabitant householder paying "scot and lot." "Scot" was an ancient term denoting a common fund; "lot" meant "share," and is used to this day in Derbyshire to denote the king's share in a mine. Paying "scot and lot" meant paying to the borough fund, and might be described in these days as paying rates. There were some boroughs in which the franchise seems to have been in the freeholders at large; in others, besides the freeholders, those were added who held tenements of the king or the lord of the manor at a fixed rent, or by service; such were termed free copyholders, or "burgage" tenants. In counties the franchise was in the freeholders at large, irrespective of the value of their freeholds. During the reign of Richard II (1380) complaint was made to Parliament that towns held of lords, containing many freeholders and free copyholders, did not contribute to the wages paid to the knights of the shire; showing that at this time free copyholders in counties, like burgage tenants in Parliamentary boroughs, claimed to vote. It seems that at this period the borough franchise was in the occupying inhabitants as a rule, while the county franchise was in those inhabitants only who had property in land. So far as the counties were concerned, the matter was finally settled by an act of the 8th Henry VI (1429), by which the right was limited to those who owned free land with forty shillings by the year above all charges.

From that time to the present the value of money has steadily declined. Bishop Fleetwood, at the beginning of the reign of Queen Anne, calculated that forty shillings in the reign of Henry VI was worth £12 in the reign of Anne, and a century ago it was estimated that this forty shillings was worth £20 of the

money of that period. In spite of all, forty shillings is still the qualifying annual value. It is worthy of note that this act not only limited the franchise by fixing this value, but it restricted it to the owner of free land, and so deprived copyholders of their votes; indeed many years after, in the reign of George II, copyholders were absolutely forbidden to exercise the franchise under a penalty of £50.

King Henry's act recites that elections had been made by very great, outrageous and excessive numbers of people, of small substance, whereof every of them pretended a voice equivalent with the most worthy knights and squires. This was evidently the view of the king and his advisers, and it is from this period that royal interference in elections began to be of frequent occurrence.

Later, in the reign of Edward VI (1550), letters were actually addressed to the sheriffs in the king's name, commanding them to return persons recommended by the Privy Council, and in some cases even persons mentioned by name. All elections at this time being by show of hands, it was easy for the sheriff to produce the desired result, and as the right to a poll was not settled until the seventeenth century, it was difficult to challenge their decision. Until the reign of Queen Anne (1704), no sheriff was bound to take any preliminary steps, nor to erect booths for polling. He also declared the result, and made his return by deed, expressed to be made between himself and the persons electing.

It is remarkable that from the passing of the act of 1429 until 1832 the county franchise depended entirely upon property; on the other hand, in many ancient boroughs the inhabitants, or some of them, were able to retain their right to vote as such, in spite of all the efforts made to deprive them of it. The Tudor sovereigns began, and the Stuarts continued, to grant representation to boroughs by royal charter. Many of these so-called boroughs were mere villages, and the king, while granting the charter, took care to give the corporation the power to select the voting burgesses. In this way many close corporations, as they were called, were brought into existence, and no less than 180 borough members were added to the House of Commons. If a borough proved refractory, it was promptly deprived of its charter, and so of its representation, unless it was powerful and important enough to be able to resist.

Oliver Cromwell, hoping to remedy this serious mischief, disfranchised some small boroughs, and gave their members to towns like Manchester, Leeds and Halifax, then without representation; but at the Restoration all his reforms were undone by Charles II. However after the revolution that brought William and Mary to the throne, the House of Commons took the matter into its own hands; no new boroughs were created by charter, and all writs were issued by order of the House alone.

At this time it was ascertained that the franchise in different boroughs varied very much. In addition to inhabitant householders, paying scot and lot, and burgeage tenants, other kinds of franchise had either been introduced by charter or had grown up by custom. The House, on the trial of election petitions, began to permit the right to be proved by long usage; freemen and burgesses by servitude, and those claiming by birth through them successfully established their claims to vote.

This right by servitude was in most places acquired by apprenticeship for a fixed number of years to a freeman engaged in some trade. The intending freeman was first admitted to the guild of the trade; this gave the inchoate right to the freeman, but it was always considered as essential to the right to vote,

that the name of the freeman should appear on the corporation roll, as having been duly admitted. No man was entitled to his freedom by birth, unless born after the admission of his father.

In other boroughs the franchise was in the inhabitants at large, while more rarely boroughs were found in which the franchise was in those who furnished their own diet; these last were termed pot-wallers, pot-wallopers, or pot-boilers.

Each borough returned two members, and each county the same number, and boroughs continued to return these members, even in cases where the voters had nearly all died out or gone away; where trade had left the town, and the voters had all sold their qualifications. Great neighboring proprietors bought the qualifying house, or contrived to place the whole representation in the hands of one, two, or three voters.

Corruption increased as the franchise became restricted, and opportunities for the sale of boroughs soon began to arise. The king and his ministers entered the market, and competed with rich merchants for seats. Many small boroughs fell into the hands of patrons, who invariably secured the return of their nominees. In 1767 the borough of Ludgershall was sold by its proprietor for £9,000. In 1768 the corporation of Oxford demanded from the sitting members the sum of £5,760; this was reported to the speaker of the House, and the mayor and ten aldermen were sent to Newgate prison. While there they contrived to sell the two seats to the Duke of Marlborough and the Earl of Abingdon, the town clerk destroying the books for fear of discovery.

In some boroughs the government used appointments in the customs in order to secure votes. Lord Rockingham, who in 1782 passed an act to disfranchise custom-house officers, mentioned one town, where out of 500 voters, 120 held places under the government.

In 1777, in the borough of New Shoreham, it appeared that the freemen had formed themselves into a society called "The Christian Club," ostensibly for charity; they were really bound together by oaths and bonds, their only object being the sale of the borough. The managing committee of this club did not vote themselves, but directed the other members of the club how to vote, and then shared the proceeds of the sale with them.

In Midhurst there were 1,073 inhabitants, and but a single voter. The qualifying tenements had all been bought by Lord Carrington, who returned the members. Much the same result followed in Old Sarum and in Westbury, while in Appleby the members were really returned by two peers. The patron of the borough of Wendover was Lord Verney; the voters lived rent-free on condition of their returning his nominees at elections. In 1768 they rebelled, and returned Sir Robert Darling, who had bought their votes. They were at once ejected from their houses, and had to live in tents for six months or more. On one occasion, at the next election, a stranger appeared, and on being asked where he came from, replied, "From the moon;" the bystanders then asked, "What news from the moon?" He replied, "Six thousand pounds," which he then delivered to the agent of the voters. His candidate defeated the patron, who then, thoroughly disgusted with it, sold the borough.

In Heyden, in Yorkshire, votes varied from £80 to £100 apiece; while in Grampond, in Cornwall, the mayor, aldermen and freemen generally secured £300 per man. In Poole, in Dorset, the right was in the corporation, and a single vote sometimes fetched £1,000. At Wareham the whole of the voters sold their qualifying properties to a single voter. The whole of



Heytesbury, in 1766, was burnt down, but the one voter of that borough went on returning two members to Parliament in spite of this catastrophe. The borough of Weymouth returned four members, and so did the parish of Aldborough, each as two boroughs. In Aldborough there were 110 houses, the larger number of which belonged to the Duke of Newcastle, who thereby secured the return of his four nominees.

Vast sums were spent in county elections. In 1807 the celebrated abolitionist, Mr. Wilberforce, was returned at the head of the poll in Yorkshire, but the contest cost the three candidates at that election half a million sterling amongst them. To put the matter shortly, up to 1832, in England and Wales, 87 peers returned 218 members; 90 commoners returned 187 members, and the government 16.

In Scotland the crown and great proprietors gradually deprived the voters of their rights, and raised the county franchise to a qualification of £800 per annum. At last in each of two counties there were only three real voters to be found; in seven not more than ten; while the county of Cornwall and its boroughs returned forty-four members, the whole of Scotland only returned forty-five. Practically twenty-one peers and peeresses returned thirty-one members, while sixteen commoners returned the remainder.

Turning to Ireland, we find that since the act of Union (1800), a somewhat similar franchise to the English prevailed in the Irish counties, while in the boroughs the franchise was generally confined to twelve burgesses, who elected each other. Out of 100 members, thirty-six peers returned fifty-one, and nineteen commoners twenty; no Roman Catholics being eligible before 1829.

This state of the representation in the United Kingdom had long caused serious scandal. Ministers, alarmed at the danger caused by excluding so large a proportion of the people from electoral rights, had attempted to deal with the subject. As early as 1766, Lord Chatham advocated Parliamentary Reform, while in 1785 his son, then Prime Minister, introduced a bill to disfranchise thirty-six decayed boroughs, and to transfer the seventy-six members to large counties and the metropolis. The bill was wholly permissive, and Mr. Pitt proposed to set aside the sum of one million sterling to compensate proprietors of boroughs, who would agree to it. This scheme was defeated in the House, and the king being strongly opposed to all reform, no further attempt was then made.

The excesses of the French revolution, which happened soon after, alarmed politicians, and postponed the question for several years. However after the war with Napoleon had concluded, agitation again revived; there was much agricultural and other distress in the country, which had caused more than one Parliamentary inquiry. The manufacturing and trading classes, increasing in numbers, enlightenment and property, would no longer allow their interests to be controlled by corrupt borough-mongers and their patrons, but insisted on obtaining their share of influence in the government.

At length Lord Grey, after great disturbance throughout the Kingdom, during which the anti-reforming peers and borough patrons nearly brought about a revolution, succeeded in carrying a reform bill through the House of Commons; it became necessary however to threaten the lords with a creation of peers sufficient to carry the bill, before they could be induced to allow it to pass. Ultimately the House of Lords gave way, and the first reform bill was carried amidst great rejoicing, on the 7th June, 1832. At this time the United Kingdom returned 656 members, which number remained unaltered, but fifty-six rotten boroughs, returning 111 members, were swept away,

and by taking away one member from others, 148 seats were left for disposal; forty-three new boroughs were created, chiefly large towns, while forty-four of the remaining seats were given to the English counties, eight to Scotland and five to Ireland. All close boroughs were opened to a new franchise, while old customary franchises were preserved. The £10 householder subject to conditions as to residence and rates, became the new voter in boroughs, while in counties, copy-holders, lease-holders and tenants at will paying £50 by the year were added to the old forty shilling free-holders. Three years before in Ireland, the annual value of the qualification for a county vote had been raised from forty shillings to £10; to these £10 copy-holders were now added.

This act produced a great change. It seriously diminished the influence of the great proprietors in boroughs, and placed a considerable share of the representation in the hands of the middle class, but except in these boroughs where the ancient franchises existed, it gave very little to the working classes. In the counties in England the influence of the great landlords was very slightly affected, as the admission of their tenants to vote rather increased than diminished their power.

This was felt for years to be a great grievance, and in 1867 the borough franchise was extended to all householders being rate-payers, subject to a year's residence, and to lodgers paying £10 by the year. At the same time the county franchise was conferred upon all £12 rated occupiers, and the limit of £10 fixed by the first reform bill, in cases of estates for life or lives, was reduced to £5. In Scotland, owing to the difference of the rating system, the county franchise was fixed at £14; while in Ireland all that was done was to reduce the borough franchise from £8 to £4. Four large towns, Liverpool, Manchester, Leeds and Birmingham, had three members each allotted to them and the city of London retained its four. In the first four mentioned towns, voters were permitted to vote for two candidates only, while in the city of London they were restricted to three.

This plan was supposed to effect the representation of minorities in these places, although it was obvious that it could only effect its purpose, if at all, at a general election; for in the case of a vacancy occurring during the existence of a Parliament, the system broke down. It lasted until the re-distribution act of 1885, when counties and boroughs were so altered as practically to give one member to about every 50,000 inhabitants, except in some few cases.

In 1884 the county franchise was further extended to all rated occupiers of dwelling-houses, including those who inhabited a dwelling-house by virtue of any office, or service, and this last qualification was extended to boroughs.

The two principal qualifications for the franchise now are therefore that depending upon occupation, and that depending upon property. No man can vote for a borough in respect of his property therein unless he is also the occupier. Before 1832 he would have had a vote for the county in respect of his property in his own house in a borough, although he occupied it. This is so no longer. He would now vote for the borough, but not for the county; on the other hand, a man may have a county vote in respect of his house in the country, and a borough vote in respect of the occupation of his office in a town. At the same time he may have votes for other county divisions in respect of his property in those divisions. This property vote has led to the creation of what are called "faggot" votes, by the subdivision of fields and tenements. This has enabled persons not residing in counties to affect considerably the numbers polled at elections. It was

found that the easiest way to create faggot votes was to create a rent charge and then split it up amongst several persons. An attempt was made in 1884 to prevent this, but so many other ways of creating faggot votes remain, that a demand has recently sprung up that no man should be allowed to have more than one vote.

Up to 1832 the returning officer, generally the sheriff in counties, or the mayor in boroughs, had to decide upon the right of an individual to vote, and previously to the 25th year of George III, there was no limit to the duration of the poll. In that year it was provided that the poll should not last more than fifteen days; it is now limited to one. Up to 1832, there was no register of voters; since that time it has been the duty of the overseers in each parish each year to make out lists of voters, which in England are submitted to barristers specially appointed, who hear claims and objections, and finally settle them, subject to an appeal to the High Court of Justice. These lists are then returned to the clerks of the peace in counties, and to the town clerks in boroughs, who print them in the form of a register; this comes into operation on the first day of each year.

The extension of the franchise, aided as it was by the ballot, sensibly diminished, but did not by any means extinguish corruption in boroughs. It is true that boroughs were no longer put up for sale, but a good deal of money was spent in some of them, both in bribery and treating. In counties since the first reform act, the elections have been comparatively free from bribery. However in 1883, Mr. Gladstone resolved to try and put a stop to all corruption, and Sir Henry James, then attorney-general, by a determined effort, in spite of difficulties surrounding the subject, succeeded in passing a bill, only second to the reform acts in importance. Its main feature was the limitation of all expenditure by the candidate to a sum in proportion to the number of voters in each constituency. This being accompanied by provisions making bribery, treating and intimidation crime in all concerned, has gone a long way to purify an election. It has enabled men of limited means to get into Parliament, and has secured to the honest voter the full effect of his electoral right. Much may still be done to diminish the expense of election contests, but upon the whole they are now fairly fought.

This gradual increase in the power of the workers has greatly aided their social and moral progress. It has given to the country many measures for the promotion of education and of health, and beyond all, it has taught the people to understand and appreciate the institutions under which they live.

#### SCHEDULE SHOWING THE PRESENT FRANCHISES.

##### *County Voters in Classes.*

I. Owners in fee simple or fee tail of lands or tenements (except rent charges in respect of which the owner was not registered prior to the 6th December, 1884), of the clear yearly value of forty shillings, if in actual possession or receipt of the rents and profits for six calendar months next previous to July 15, in the year of registration.

II. Persons having a life interest in lands or tenements of freehold tenure (except as aforesaid), of the clear yearly value of forty shillings who

- (a) actually occupy the premises, or,
- (b) were seized of such an estate on June 7, 1832, or,
- (c) having acquired such an estate after that day, have acquired it by marriage, marriage settlement, devise or promotion to a benefice or office.

If none of these conditions are fulfilled, the premises must be of the clear yearly value of £5.

III. Persons seized of any tenure for any estate not less than life of the clear yearly value of £5.

IV. Lessees of lands or tenements of whatever tenure for the residue of a term originally created for sixty years, such lands or tenements being of the clear yearly value of £5, in actual possession of the rents and profits for twelve months previous to July 15.

V. Lessees of lands or tenements of whatever tenure for the residue of a term originally created for twenty years, such lands or tenements being of the clear yearly value of £5, possession as in class IV.

VI. Occupiers of lands or tenements of the clear yearly value of £10.

VII. Inhabitant occupiers of dwelling-houses.

VIII. Lodgers in apartments of the clear yearly value of £10.

##### *Borough Voters in Classes.*

1. Occupiers of lands or tenements of the clear yearly value of £10.

2. Inhabitant occupiers of dwelling-houses.

3. Lodgers in apartments of the clear yearly value of £10.

4. Possessors of rights reserved by sections 81 and 83 of 2 Will. IV., c. 45.

(a) Freeholders and burgage tenants in cities and towns being counties corporate, having estates of inheritance (there are seven such cities and towns).

(b) Freeholders and burgage tenants as before having estates of life or lives, of the clear yearly value of £10.

(c) Freeholders and burgage tenants as before having estates for life or lives under the yearly value of £10, who fulfil the conditions mentioned in class II, of the county voters.

(d) Freemen and burgesses by servitude, and those claiming by birth through them in other places than London.

(e) Freemen and liverymen in London.

The Universities return members.

In England since 1604, Oxford and Cambridge have returned two members each, and since 1867 the University of London one member.

The Scotch Universities return one member each.

In Ireland the University of Dublin returns two members.

The voters are the graduates.

Every Parliamentary voter must be a man of full age (twenty-one years), and not subject to any legal incapacity, and must not during twelve months preceding July 15 have received parochial relief.

# The Albany Law Journal.

ALBANY, JANUARY 28, 1888.

## CURRENT TOPICS.

**T**HE meeting of the New York State Bar Association was very fairly attended, and its public exercises were very interesting. The association is moderately prosperous, that is to say, it had three hundred and thirty-four paying members last year. We do not know how many were in attendance on Tuesday afternoon, but at the Wednesday morning business exercises there were about fifty. It is said that a good many more partook of the governor's considerate and graceful hospitality on Tuesday. We can easily believe it. At the business meeting, to which we have alluded, a report of the committee on law reform was presented, signed by three of the twenty-four members—all who could be got together. There were only three competitors for the prize-essay, and as five are necessary, no prize was awarded. These facts need no more comment than that which we have heretofore made on bar associations generally, namely, that lawyers do not seem to be conventional persons. Perhaps we ought to add that they are no saints, for they forsake the assembling of themselves together.

Mr. Martin W. Cooke of Rochester, the president, made a direct and forcible but brief address, lighted up by some gleams of the pleasant humor for which he is celebrated. He seems to regard the association as the "mother of presidents," it having brought forth one, and being possibly pregnant with another. He struck out from the shoulder at the abuses of the cheap "reporters," and the system of extra allowances. As to the former we shall be rather reticent, lest we should be accused of jealousy. We will say however that if any lawyer wants all the cases decided in every State and Territory, without regard to their value, rather than a judicious and useful selection, then the cheap reporters are just what he wants. As Mark Hopkins once certified in recommending a subscription-book: "If any person wants this sort of a book, this is just the book for that kind of person." As to the extra allowances we are with him, and so are the judges, who would like to be relieved from this burdensome discretion. The president told a good story about a grant of an extra allowance, and we have one to offer. Under the old system a New York city judge had granted extra allowances in a will case to the amount of seven thousand dollars. His decision, requiring some blanks to be filled, was returned to him, and he embraced the opportunity to increase the allowances to ten thousand dollars. As Marjorie Fleming said of "seven times seven," this was "what nature itself can't endure." The case went to the Court of Appeals, and we excepted to the allowances, except our own—that would

have not been professional—and ours was not expected to, and when we got into court on the appeal there was a terrible row about our conduct. The result was that we consented to let ours abide the result of the rest, and the Court of Appeals swept them all away, except one, to the executors' attorneys. Now that we are out of practice we think that extra allowances are, as the said Marjorie Fleming thought of "eight times eight," "the most Devilish thing." Mr. Cooke handled the "burning question" of codification very gingerly, and dropped it quickly, as if he were afraid it might scorch him. Let him remember the warning to the Laodiceans.

The great event of the meeting was the oration of Mr. Daniel Dougherty of Philadelphia. We had heard much of this gentleman, but the half had not been told us. It is safe to say that his address was at once the most scholarly, brilliant, elegant and forcible ever heard in the new capitol. Mr. Dougherty is apparently some sixty years old; tall, slender, alert but dignified, and with an air of unmistakable refinement and cultivation. In figure, face and bearing he reminds us of our late distinguished citizen, Horatio Seymour. He is an orator of the old school—of the senatorial style—stately, deliberate and dignified, intense and repressed rather than vociferous and the prey of his own emotions. His voice is melodious, never hoarse, never loud, yet always clearly audible, teaching our profession the distinction between force and noise. His gestures are graceful and significant, and not the meaningless and spasmodic contortions so common at the bar. He knows the difference between gesture and gesticulation. In short, he is an absolutely perfect elocutionist. At first his manner seemed a little artificial, but as he warmed to his subject the spell was irresistible, and he controlled all hearts and intellects as with a magician's rod. Excepting George William Curtis we have heard no such flawless speaker since Everett and Phillips. Mr. Dougherty's rhetoric is a little too diffuse and antithetical perhaps for reading, and for the best extemporaneous effect, but we can imagine that unhampered by manuscript, and glowing with the fervor of the forum, he would be an irresistible advocate. For one precious moment, in his peroration, he laid aside his notes and showed himself the true and indisputable master of the oratorical art in its loftiest flight. Mr. Dougherty deserves, and has carried away with him the hearty and grateful thanks of the association, and of the brilliant and learned audience which hung upon his words—especially when the short notice upon which he came is considered—and a unanimous recognition of his beautiful and almost unique talents, the possession of which we cannot concede to our sister Commonwealth without some natural regret.

In one idea advanced by Mr. Dougherty we cannot coincide, namely, that it is wrong for the courts

to limit the time of advocates in summing up. If all advocates were like Mr. Dougherty we should be of his way of thinking, but to reflect that the average lawyer has the right to talk as long as he pleases—or rather, as long as he displeases—would be an unutterable terror, and one which we should suppose a criminal on trial for his life would fly from by pleading guilty. There are very few men living, or who have ever lived, who could talk acceptably or to any good purpose longer than from one to two hours. Nor can we agree with Mr. Dougherty in his apparent opinion that Hamilton was a greater advocate than Erskine. He was undoubtedly a greater man, a greater statesman—indeed, one of the greatest geniuses in statecraft that ever lived, but he could not touch Erskine as an advocate. He has left a very slight and colorless mark on our jurisprudence—none in fact but on the law of libel, and his ideas on this had been urged with equal effect a hundred years before him in this State by another Hamilton (of Philadelphia, by the way)—while Erskine's forensic efforts are the basis of many of our liberties, and will be read and cited as long as those liberties shall last. But in the main idea of Mr. Dougherty's address, the grievous wrong of newspaper comments and criticisms on causes pending in court, we applaud him to the echo, as did his audience. We have never heard so terrible and so righteous an arraignment of the press, nor so magnificent a vindication of our judiciary from its assaults. The worst that we could wish for certain editors in the city of New York, aye, and for some nearer home, is that they could have been forced to be present on this occasion. We think their blackguard souls would have quailed and shrivelled under the scathing words of the orator, and that they would fain have wriggled home to their viperous dens. Thank you, Mr. Dougherty, fearless advocate, accomplished gentleman, peerless orator, for this bold and much needed message!

Mr. Elliott F. Shepard read an instructive paper by Sir John Mellor, M. P., on "Representation in the British Parliament," which we published last week. Mr. John Winslow of Brooklyn read a paper on "The Contest between the Judiciary and the Legislature of Rhode Island." Judge Peabody made a memorial address on the late Aaron J. Vanderpoel.

On Wednesday morning the time was chiefly spent in devising a bill to get relief from the Supreme Court rule requiring manifold type-written copies of legal documents to be on fourteen pound paper, and in considering the one-eighth committee report on law reform. The substance of this report was that "the law reforms most pressing upon the attention of the profession, the Legislature and the public," are the Civil Code, the Code of Evidence, a commission to draft statutes, the abuse of injunctions and extra allowances, and of assessing candidates for judicial office for "election

expenses." Mr. Moak "smelled a rat" in this, considering it an expression of approval of codification. Some agreed with him, and some disagreed, arguing that it merely committed the association to a recognition that codification is "pressing," and we suppose there is no doubt about that. Mr. Moak tried hard to induce the meeting to say that the adoption of the report did not mean any thing about the Code, but it went through almost unanimously in its original form. The association also recommended to Congress to increase the salaries of the Federal judges in the State—a very just recommendation. Appropriate notice was taken of Judge Rapallo's death. Mr. Cooke was very properly re-elected president, having no scruple against a "second term," and Mr. Dougherty and Sir John Mellor were elected honorary members. The governor was thanked for his entertainment.

The commission on ameliorating the mode of capital punishment have recommended the adoption of electricity. The report is said to be of great historical interest, and is now before the Legislature for action. The commissioners also recommend more privacy in executions, which is a very judicious suggestion. But we should hesitate about concurring in their recommendation as to the disposal of the dead bodies of malefactors. They recommend dissection or burning in quick-lime in the prison grounds. Does not this savor a little too much of arrogating to mortals the power of punishing after death? We hoped that the community had outlived the barbarity of dissecting murderers, as it has outlived that of burying suicides at the cross-roads with a stake through the body. This expedient is designed to defeat the maudlin and disgusting obsequies sometimes held in such cases. But it is easy to regulate funerals of such malefactors; witness the funerals of the Chicago anarchists. Then again what is to be done in the case of a sincerely repentant murderer who, our religion teaches us, is as sure of immediate and eternal future happiness as a person who has lived and died in the odor of sanctity? Should society preserve his poor remains for the vulgar stare of the curious and unfeeling, or deny his relatives the consolation of a christian burial? Or should a distinction be made between those who repent and those who do not? This would seem absurd. All these complications might be avoided, to be sure, by adopting for all capital crimes the happy expedient recommended by a gentleman at the last meeting of the American Bar Association for the punishment of those convicted of rape—burning at the stake! Cremation after death would be more humane and decent than dissecting or quick-liming. In capital punishment there is something due to the sensibilities of society as well as to the victim himself. Certainly we should oppose dissection, and if burial were to be in prison grounds by the State, at least the relatives should be permitted to be present, and the ordinary mode of sepulture should be observed. If we advance

beyond the barbarity of hanging men like dogs, we ought not to bury them like dogs, or worse.

The governor has nominated Mr. John Clinton Gray of New York to the vacancy in the Court of Appeals. This gentleman is spoken of in the highest terms by the most eminent judges and lawyers of that city, without distinction of party, and the nomination is probably as good as could be made. It even meets with the approval of the newspapers. But the *Tribune* makes us tired. It says: "If the governor had sent in Mr. Gray's name more promptly there would be less room for the suspicion that he might not have made so worthy a selection but for the fact that he discovered his inability to secure the confirmation of one of his own legal fuglemen." Has it occurred to this partisan writer that if the governor had desired to put in one of his own "fuglemen," he might easily have done so without consulting the Senate? Doubtless the *Tribune* knows as well as we do that the governor had previously tendered the nomination to three of the most eminent and accomplished lawyers of the metropolis, all of whom declined it. We do not agree with the governor in politics, but when he does a good thing what is the excuse for trying to smirch his motives?

#### NOTES OF CASES.

**I**N *Tissot v. Great Southern and Telephone and Telegraph Co.*, Louisiana Supreme Court, Dec. 5, 1887, it was held that a company which undertakes, under a contract with a municipal corporation, to do a work of public improvement, such as laying a fire-alarm telegraph, has no right to invade the premises of an abutting proprietor and cut off limbs of trees overhanging the sidewalk, and which do not obstruct the use of the sidewalk, or when the posts and wires could have been, with less or no inconvenience, located elsewhere. The court said: "It is to be noted that the property in the instant case is situate in the suburban or rural part of the city, in front of a water-course, known as a 'Bayou,' and that right next to the trees, on the street side, there exists a small sidewalk of between two and three feet in width. To those who live in this climate, particularly during the hot summer months, when the thermometer points to about 100, if not more, it would be needless to argue that the overhanging of branches of magnolia trees on such sidewalk, is no nuisance, but on the contrary actually proves of great relief, not only against the heat but also sometimes even against the rain itself. The court can take judicial notice of the fact that on many sidewalks in the city and its suburbs or outskirts, there has been planted a number of trees, and it knows that this is done with the special sanction of the municipal authorities, though subject to its good pleasure only. Jew. Dig. 519. \* \* \* The defendants have called our attention to what was said in the case of the

*Earl of Lonsdale*, 2 Barn. & C. 302, by Mr. Justice Best, and which is to the effect that the permitting the branches of trees to extend so far beyond the soil of the owners of the trees is an unequivocal act of negligence which the injured party may abate without notice; but the learned justice adds that the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the nuisance has arisen to remedy it, and that in all other cases persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice. It may well be that under the circumstances under which the litigation arose, the learned justice thought himself authorized to announce what he deemed to be a principle, but from his own language the course could only be justified when security to life and property would require a speedy remedy. \* \* \* Had, by mere accident, the limbs of the trees on plaintiffs' property been detached therefrom and fallen across the sidewalk, remaining there so as to prevent the use of it by wayfarers, there is no doubt that the city, or any person injured, could have had the right (the obstruction proving a nuisance, the necessary remedy having to be applied at once) to remove it, some way or other, without any notice to the proprietor of the trees, even had it been necessary to enter upon the premises, as an indispensable means to accomplish the removal, but doing no more damage than would be essential to effect the object, remaining liable for any wanton or uncalled-for injury. The existence of the emergency alone would justify the interference. 9 U. S. Dig., 'Nuisance,' p. 649, Nos. 62, 63, 67, 68; Cooley Torts, 47. It is upon this principle, that while recognizing the rights of the defendant to put up poles and run wires thereon, this court has, in the *Irwin* case, 37 La. Ann. 67, relieved the defendant, because the right had been exercised with as little inconvenience as possible to the plaintiffs and to the public. The argument is fallacious, and a begging of the question that in this case, although the limbs were not strictly a nuisance, they were obstacles in the way of a public, necessary improvement, which had to be instantly removed; for it is not shown that it was actually impossible to put up the posts and run the wires at any other place or otherwise than through the space occupied by the branches and the foliage. It is apparent, from an inspection of the map or plat in evidence, that it would have been easy to have planted the telegraph posts, and and run the wires on them, on the other side of the street or on the embankment of the bayou, without interfering with the tow-path used for cordelling schooners and other crafts up and down the water-course. It is likewise manifest that even if the posts could not have been erected elsewhere, there existed no reason whatever to cut off the limbs of the trees, so as to leave in the foliage an open space ranging from twenty-five to forty feet in circumference, or eight to thirteen feet in diameter, for the mere purpose of running through that space an almost

imperceptible wire. \* \* \* It is evident that the plaintiffs have sustained injury in the wanton invasion of their premises, in the unjustified destruction of their property, in the deprivation of material, physical and moral enjoyment, in the endurance of aggrieved feelings and in the apprehension of a possibly irremediable wrong, for all of which they are entitled to compensatory damages. The evidence shows the value of the trees, what it would cost to replace them, how long it would take for the newly-planted trees to acquire the size of those mutilated. It establishes that these were ornaments of the property, planted by Mrs. Tissot. It does not put a value upon the disappointment, mortification and other sufferings of the plaintiffs, as such things cannot be said to be measurable and appreciable in dollars, though when there has been a mental endurance some adequate pecuniary compensation must be made. \* \* \* We deem that under the circumstances the damage done is daily being repaired, and that in the course of time it will hardly be perceptible, so that the original condition of things will be fully restored. We do not think however in the absence of any fixed rule for the allowance of such damages, that the plaintiffs are entitled to recover the amount allowed below. It is therefore adjudged and decreed that the judgment of the lower court be amended so as to allow the plaintiffs \$400, instead of \$750. See *Memphis Bell Telephone Co. v. Hunt*, 16 Lea, 456; S. C., 57 Am. Rep. 237, to same effect.

In *Muncie Nat. Bank v. Brown*, Indiana Supreme Court, Dec. 3, 1887, a notary public had for several years been using a seal of his own, but in attesting the certificate of acknowledgment to the chattel mortgage involved in this action, used a seal belonging to another person. The designs of the seals were somewhat different, one of them bearing the words "Notary Public, seal, Indiana;" the other bearing the words "Notary Public, Delaware Co., Ind." Held, that the certificate was not invalidated. The court said: "It cannot be assumed that there was no seal, since there was a seal actually impressed upon the paper. On the face of the instrument the certificate was perfect in form and in authentication. We cannot therefore hold that there was no acknowledgment. The utmost that can be asserted is that the notary public did not do his duty as the law requires, by attaching the seal he was accustomed to use. He did, in fact, take the acknowledgment of the mortgagor; he did execute and sign the proper certificate; and he did affix a seal to the certificate. If the acknowledgment must be condemned, it is because the officer did wrong in using a seal not his own. No one can perceive how this breach of duty could have worked injury to any person in the world. Whether the one seal or the other was used did not add to or take from the certificate any real efficacy. If the notary, two hours before the acknowledgment, had thrown away his old seal and adopted another,

certainly no real harm to any person could have been done. Nor is it easy to see how the mere use of one seal instead of another, where both are mere general seals without any peculiar marks or names, could do anybody any harm. Courts ought not, as it seems to us, to strike down a mortgage for such a breach of duty, unless the law imperatively requires it. We cannot believe that the law requires such a result in a case where, as here, a notarial seal is used, although not the one the notary kept for use. We have examined the cases of *Mason v. Brock*, 12 Ill. 273; *Buell v. Irwin*, 24 Mich. 153; *McKellar v. Peck*, 39 Tex. 381; *Hinckley v. O'Farrel*, 4 Blackf. 185; *Dumont v. McCracken*, 6 id. 355; *Mazey v. Wise*, 25 Ind. 1; *Pope v. Cutler*, 34 Mich. 151; and *Whetmore v. Laird*, 5 Biss. 160, and our conclusion is that they are not of controlling force, for in none of those cases was the question presented as it is in the case before us. Here a notarial seal was actually used, and the mistake of the officer consisted simply in using one not his own. The case that most nearly approaches the present is that of *McKellar v. Peck*, *supra*, where the seal of the clerk was used; but conceding that the decision there made was correct, which we doubt, it is obvious that it is not fully in point here. If there had been no seal at all, or if the seal had not been an appropriate notarial seal, a very different question would confront us. Even in such a case however it is doubtful whether the error was a fatal one, since there are very respectable authorities justifying the conclusion that the mistake was one that might be cured by amendment. *Jordan v. Corey*, 2 Ind. 385; *Hunter v. Burnsville*, 56 id. 223; *Arnold v. Nye*, 23 Mich. 293; *Sonfield v. Thompson*, 42 Ark. 46. If however we are wrong in our conclusion upon this point, it would not change the result, for it would not lead to a reversal. There was no pleading attacking the certificate of the notary public, and therefore no issue under which a defense founded on the use of another's seal in attesting the certificate was available. There is a seal attached to the certificate. It is the seal of a notary public, and it has no peculiar marks indicating that it was not the seal of the officer by whom it was used. It is a general seal, and such as our law recognizes as valid. *Lange v. State*, 95 Ind. 114. The presumption is that the officer did his duty, and this presumption is aided by the indications apparent on the face of the instrument. In order to entitle the parties assailing the mortgage to avail themselves of any breach of duty on the part of the officer, it was necessary for them to affirmatively plead the facts constituting the breach."

The exclusive right to burial in a plot of ground in a cemetery, granted to the holder in perpetuity for the purpose of burial, does not carry with it any right to put a wreath upon the grave! Such is the effect of the case of *M'Gough v. The Lancaster Burial Board*, decided by a divisional court on the 16th inst. The plaintiff had placed on his daughter's

grave a small stand, on which was placed a memorial wreath of flowers covered by a glass shade, the glass being protected by a covering of galvanized wire. This the defendants for some reason removed, and the plaintiff brought his action in the County Court, from the decision of which the defendants appealed. It was held on the appeal that the respondent had the incorporeal hereditament of a right to bury in the ground to him and his heirs, and that this was the whole extent of his right. It is not easy to imagine a reason for the more than temporary removal of a memorial wreath, and it is not probable that burial boards throughout the country will often claim to exercise the right which the Lancaster burial board has so curiously vindicated.—*London Law Times*.

**CRIMINAL LAW—BRIBERY—COMPELLING PRISONER TO TESTIFY AGAINST HIMSELF — "INVESTIGATION" — BY LEGISLATIVE COMMITTEE—EVIDENCE OF FORMER ATTEMPT—PRESUMPTION FROM FLIGHT.**

COURT OF APPEALS OF NEW YORK, NOV. 20, 1887.

PEOPLE V. SHARP.

Defendant, indicted for bribery of an alderman of New York, had previously given testimony before the railroad committee of the New York State Senate, which committee, by special resolution, had been required to investigate charges of bribery in connection with the Broadway Surface Railroad. Penal Code N. Y., § 79, makes it compulsory upon persons concerned in bribery to attend and testify "upon any trial \* \* \* or investigation," but their testimony shall not be used against them in any subsequent proceeding, civil or criminal. *Held*, that such statute is not in conflict with Const. N. Y., art. 1, § 6, providing that "no person shall be compelled, in any criminal case, to be a witness against himself," and is constitutional.

Any inquiry before such a committee is an "investigation" within the meaning of Penal Code, § 79; and evidence given before it, being compulsory, is inadmissible against the person testifying upon any subsequent trial.

The prosecution introduced evidence that defendant had on a previous occasion offered a bribe to a clerk of a Senate committee for the purpose of inducing him to alter a former railroad bill. *Held*, error.

Another alderman testified that he had received a sum of money which he thought was for the railroad. *Held*, that this supposition was inadmissible.

Persons alleged by the State to have been co-conspirators with the defendant, and who were jointly indicted with him, were intended to be subpoenaed as witnesses. One only was served, and he fled out of the jurisdiction. The State was permitted to prove the service upon that defendant, and the failure to find the others, over the objection of the defendant that the only motive for the proof was to raise a presumption of his guilt from the flight of the witnesses. *Held*, error.

**CONVICTION of bribery.** The opinion states the facts.

*W. Burke Cockran, Albert Stickney, and Edward W. Paige*, for appellant.

*Randolph B. Martine*, District Attorney, *Delancy Nicoll* and *McKensie Semple*, Assistant District Attorneys, for respondents.

DANFORTH, J. The indictment was found October 19, 1886. In substance, it accuses Jacob Sharp and

six other persons of giving and offering, and causing to be given and offered, to one Fullgraff, a member of the common council of the city of New York, \$20,000, with intent to influence him in respect to the exercise of his powers and functions as such member of the common council upon the application of the Broadway Surface Railway Company for the consent of the common council to the construction of a street railway. Sharp was tried separately. Direct evidence was given from which a jury might find that Fullgraff had in fact been bribed; and other evidence, altogether of a circumstantial character, and by no means conclusive, but sufficient, as the jury have said by their verdict, to warrant a finding that Sharp was concerned in the commission of the crime and therefore guilty of the offense charged. Exceptions were taken in behalf of the defendant to several decisions of the trial court in admitting, against his objection, certain items of testimony which it is conceded were material, and without which it is claimed by the appellant a conviction could not or might not have been obtained.

1. Among others, the counsel for the prosecution proved that the defendant was examined as a witness before a committee of the Senate of this State, appointed to investigate, among other things, the methods of the Broadway Railway Company in obtaining such consent, and also the action in respect thereto of the board of aldermen of said city, which granted, or of any member thereof who voted for, the same, and that he upon that occasion gave testimony which the learned counsel for the prosecution claimed to be "irrefutable evidence of his participation and complicity in the commission of the crime." This testimony the prosecutor offered in evidence. It was conceded by the prosecution that at the time he testified the defendant was before that committee under the operation and compulsion of a subpoena duly issued by the committee, and that the testimony he gave was in response to questions propounded in their behalf. Its admission on the trial was objected to, on the ground that it was given under privileged circumstances; that the defendant was compelled to attend and testify; and that evidence thus elicited was not competent "upon the trial of a person, where the subject under inquiry is that about which he was then interrogated."

The question before the jury was whether the defendant had committed the crime of bribery, as alleged in the indictment, and as that offense is declared by section 78, Penal Code, under which the indictment was found. This section forms part of title 8, which relates to crimes against public justice, and of chapter 1 of that title, concerning bribery and corruption. It is preceded by other provisions concerning bribery, as section 44, of an executive officer; section 66, of members of the Legislature; section 71, of a judicial officer; section 72, of such an officer accepting a bribe; section 74, of a juror—and embracing all these, as well as the provisions of section 78. Section 79 declares that (1) a person offending against any provision of the foregoing section of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation in the same manner as any other person. (2) "But," it declares, "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." (3) A person so testifying to the giving of a bribe, which has been accepted, shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution." By a subsequent section (section 712, Penal Code) these provisions are so modified as not to per-



mit such evidence being proved against the witness upon any charge of perjury committed on such examination.

The first question on this appeal is as to the meaning and spirit of the statute contained in this section (section 79). The appellant contends that by it the disclosures made by him before the Senate committee were privileged, and could not be used against him on the trial now under review; and one of the learned counsel for the people concedes that this force might be attributed to the statute if it were wholly a valid enactment (as he contends it was not), and if the evidence given before the committee had not been entirely free and voluntary (as he contends it was). These propositions lie at the bottom of the controversy.

First. Is the indictment valid? The learned counsel for the people contrast the constitutional provision, "that no person shall be compelled, in any criminal case, to be a witness against himself" (art. 1, § 6), with the compulsory words of section 79, already quoted, and pronounces one to be "the direct opposite of the other," and as we understand the argument, it is that the constitutional exemption is absolute and complete, permitting the witness to look up the secret in his own heart, and does not permit the evidence to be taken from him at all; that this right is infringed by the provisions of section 79, and that it is therefore invalid. It is, I think, an answer to this proposition that the same section declares, not only that the testimony given by the witness shall not be used in any prosecution or proceeding, criminal or civil, against him, but that the very fact of so testifying may be pleaded in bar of an indictment or prosecution for the giving of a bribe which has been accepted.

It should be borne in mind that the sole object of the introduction of the defendant's testimony was to prove from it that he was guilty of giving the bribe, which as the evidence tended to show, Fullgraff accepted, and the giving of which was the sole accusation against the defendant. If then the case is within the terms of the section, as upon this point it is assumed to be, the immunity offered by it distinguishes the statutory provision from the constitutional inhibition, inasmuch as it indemnifies or protects the witness against the consequences of his testimony. To that effect is the decision of the Court of Appeals in the case of *People v. Kelly*, 24 N. Y. 74. The court there had under review an order adjudging the relator, Hackley, guilty of contempt in refusing to answer before the grand jury questions quite similar in substance to those propounded to Sharp by the Senate committee. The complaint under examination was against certain aldermen and members of the common council of the city of New York for receiving a gift of money under the agreement that their votes should be influenced thereby in a matter pending before them in their official capacity; and Hackley, as a witness, was asked as to the disposition made by him of a certain pile of bills received from one H., and said to amount to \$50,000. Hackley asserted his privilege at common law and under the Constitution, and demurred to the question. The Court of Sessions adjudged him guilty of contempt for refusing to answer, and ordered him to be imprisoned. The Supreme Court affirmed the order, and the Court of Appeals affirmed the decision. The principal question discussed by this court was whether the relator could lawfully refuse to answer the interrogatory, and in reaching its conclusion the court examined the provisions of chapter 539, Laws 1853, entitled "An act to amend the existing law relating to bribery," and also chapter 446, Laws of 1857, amending the charter of the city of New York. Both acts relate to bribery. We

shall again refer to them, and it is sufficient in this connection to say that each act contains provisions compelling the attendance and testimony of witnesses, but provides full protection against the use of their testimony in any proceeding, civil or criminal, against the person so testifying. The object of these provisions was said to be to enable the public to avail itself of the testimony of a participator in the offense, and to enable either party concerned in its commission to be examined as a witness by the grand jury, or public officer intrusted with the prosecution; and the court held that the relator was not privileged by the Constitution, inasmuch as he was protected by the statute against the use of such testimony on his own trial.

The learned counsel for the people also argues that the statutory protection afforded by section 79 does not go far enough; that the indemnity it offers to the accused witness is partial, and not complete; that while it may save him from the penitentiary by excluding his evidence, it does not prevent the infamy and disgrace of its exposure. This argument is also met by the opinion in *People v. Kelly*, *supra*. It was there argued for the relator that he was not wholly protected; that his testimony might disclose facts and circumstances, which being thus ascertained, might be proved against him by other testimony than his sworn evidence. But the answer of the court covered, not only that supposed case, but the objection that the disgrace of exposure would still remain, although the evidence was not used. "That," said the court, "is the misfortune of his condition, and not any want of humanity in the law." "If a witness," said Judge Denio (24 N. Y. 83), "object to a question on the ground that the answer would criminate himself, he must allege in substance that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense;" adding: "If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged." The conclusion of the court was that the relator was not exempt from testifying, and it follows from the decision then rendered that the provision of the Code, which embodies the same conditions as those then under consideration, is in no sense repugnant to the Constitution.

Secondly. Was the testimony of Sharp given of his own will, or by compulsion? He would, as the prosecution concedes, have testified against himself, if as a witness on his trial he had sworn as he did before the committee. But he was not sworn upon his trial, and this fact, they say, left him to the operation of the common-law rule where his admissions made elsewhere and in another place were sought to be proved by other witnesses. To reach this conclusion, it is argued with great earnestness by one of the learned counsel for the people, that "the resolution of the Senate, and the inquisition of the committee were illegal and void proceedings, having no significance or force in the judgment of the law." "To say," continues the counsel, "that Mr. Sharp was a witness, implies a court or magistrate authorized to administer the oath and take the evidence;" and his claim is that Sharp was under no compulsion of law to be present at this inquisition, to take an oath, or to testify." In the view of the learned counsel for the prosecution, and as characterized by him, "the sittings of the committee were merely meetings of private persons, among whom was Mr. Sharp." "There were," he says, "conversational questions and answers in which he (Sharp) took a part by answering interrogations addressed to him;" and the contention of the learned counsel follows, "that" Sharp's "statements on that occasion may be used in any pro-

ceeding to which he is a party." If the premises were true, this construction might in ordinary cases follow. But if they are correct, the courts below seem to have misconceived the situation in which Sharp was placed, for we cannot find in the voluminous record before us any suggestion that the Senate had not full power to take cognizance of, and to inquire through its committee into the alleged abuses of public power and the corruption of public officers; nor that such proceedings in the present case, having in view the possible necessity of an alteration in the existing law, were it not in every respect valid and legal. Nor are we left to this negative evidence that such question was not raised upon the trial. It appears by the concession there made, and already quoted, that upon objection being made to the introduction of Sharp's testimony, on the ground that his statements before the committee were privileged, made under compulsion of a subpoena, and the constraint of an oath duly administered by the committee, who confined his evidence to such questions as the committee chose to ask, the prosecution made the admission already set out, but required the resolution under which the committee assumed to act to be put in evidence and be connected with the admission. That being done, the prosecution went into evidence of the acts of Sharp, to show that he waived his privilege before the committee by not asserting it; in no manner questioning the due appointment of the committee nor its powers. In view of these facts, it is too late to raise the question here. Moreover the decision in the case of *People v. Keeler*, 99 N. Y. 463, establishes, so far as this court is concerned, that the Senate had constitutional power to pass the resolution; that its committee was authorized to carry it into effect. In that case it appeared that charges of fraud and irregularity had been made by the public press and otherwise against the commissioners of public works in the city of New York; and the Senate, by resolution, directed its committee "to investigate" that department, with power to send for persons and papers, and report the result of its investigation, and its recommendations concerning the same, to the Senate. The relator was summoned, and appeared and testified, but refusing to answer certain questions, was on the report of the committee committed by the Senate for contempt. Upon *habeas corpus*, questions as to the constitutional power of the Senate to order the investigation, and the legality of its proceedings, were distinctly presented and affirmed.

The case on which the learned counsel for the people now places his argument (*Kilbourn v. Thompson*, 103 U. S. 176) was cited in favor of the prisoner, fully commented upon by the court, and shown, to have no application. The action of Congress reviewed in that case was in substance a creditors' bill, or effort to impeach a transaction already closed between the United States and one of its debtors. The Supreme Court of the United States held, that as to it Congress had no judicial power, and exceeded its authority in the attempted investigation. The *McDonald* case, on the contrary, reviewed a proceeding which was necessary or appropriate to enable the Legislature to perform its functions, and it was held to be no objection that it partook in some degree of a judicial character. That case brought up proceedings on all substantial points like the resolutions which were at the bottom of the inquiry before the Senate committee in this case, and its decision makes any further discussion of their validity quite unnecessary. It follows that the investigation before the committee was not beyond its powers; nor were the resolutions under which they acted void or without legal significance or force.

As therefore it cannot be said that the committee

was without power to compel the witness, and require his testimony, the respondents must find elsewhere reasons, if there are any, in support of the proposition that the evidence was by a willing witness. To that end, it is further said, in behalf of the people, that Sharp, by not asserting his privilege before the committee, waived it. But if the case comes within the purview of section 79, *supra*, of that act, the Senate subpoena and the resolution of the Senate were compulsory, and it was not necessary for the protection of the witness that he should, either by deed or word, set either at defiance, or refuse to obey the summons, or refuse to answer the questions of the committee. It is enough if he was obliged by law to answer the inquiry; and he could not be required, in order to gain the indemnity which the same law afforded, to go through the formality of an objection or protest which, however made, would be useless. In *People v. Kelly*, *supra*, the witness did plead his privilege, but it was of no avail, because he was obliged by law to answer the inquiries, and the law was held imperative and sufficient, although the case was one within the very terms of the Constitution, because by the same law he was protected against the consequences of his admissions. Whether he asserted his privilege, or whether he was silent and submissive to the laws, could make no difference. The Legislature, for reasons of public interest, required a discovery of the whole truth as to matters involved in their inquiry, and one answering in compliance with their command cannot be deemed a willing or consenting person within the meaning of the maxim, *volenti non fit injuria*, on which respondent relies. A person who yields from the necessity of obedience cannot be said to have the power of acting by his own choice, and where the law says he shall be compelled to attend, and shall be compelled to testify, acquiescence is not election, and he is not one of whom it can be said he receives no injury from that to which he willingly and knowingly agrees and consents. There can be no volition where there is neither power to refuse nor opportunity to elect. Under such circumstances, the witness must be deemed to speak for the safety of his person, and in view of the indemnity which the law promises. A man is none the less robbed because, yielding to irresistible power, he makes no resistance, and a witness who gives up his secret at the command of the law is as much under compulsion as if he ventured on the punishment that would follow on his refusing to disclose it.

In *People v. Kelly* there was the plea of privilege, but it availed nothing, because the law required an answer. The position of the witness was in no respect changed by the plea.

In the *Keeler* case, *supra*, there was refusal to answer, under the advice of counsel, but it availed nothing. It seems to us that the evidence of Sharp before the committee was given under the penalty of commitment and imprisonment for contempt, and consequently that it was obtained from him by compulsion. To refuse to attend the committee or testify would moreover have rendered the witness guilty of a misdemeanor. Sections 68, 69, Penal Code.

So far we have assumed the case to be within the provisions of section 79, Penal Code, *supra*; and we have come now to the contention, on the part of the people, that the section (79) does not embrace such investigation, but on the contrary, is to be limited to such testimony only as might be given upon trial, hearing, proceeding or investigation in the course of a criminal prosecution, and that it has no application to such testimony as might be given in the course of legislative proceedings or investigations.

It was held in *People v. Keeler*, *supra*, that the Senate might proceed in its own way in the collection of

such information as might seem important in the proper discharge of its functions; and wherever it was deemed necessary to examine witnesses, the power and authority to do so might properly be referred to a committee, with such powers as might appear to be necessary or expedient in the case; and that notwithstanding the vesting of the judicial power in the courts, certain powers, in their nature judicial, belong to the Legislature, and might be delegated to a committee authorized to take testimony and summon witnesses, and that a refusal to appear and testify before such committee, or to produce books or papers, would be a contempt of the house. It was also held, when institutions or public officers are ordered to be investigated, it is to be presumed that such an investigation is with a view to some legislative action in regard to them, and moreover that the terms of the resolution directing it may be looked at to ascertain the legislative intent.

The resolutions which led to the examination of Sharp were passed January 26, 1886. They were preceded by a reference to the provisions of the Constitution and statutes relating to street railroads, and the prohibition against such road without the consent thereto of the local authorities having control of the street upon which it was proposed to "construct the road," and a reference to the charges that consent to the railroad upon Broadway "was obtained through fraud, and by and through corrupt influence and bribery of such authorities," viz., the aldermen of the city of New York, and a recital that a strong and reputable sentiment in that city demands at the hands of the Senate "an investigation of the methods in obtaining such consent." It was for these reasons resolved by the Senate that its railroad committee be authorized "to investigate fully all matters relating to the methods of the Broadway Surface Railroad Company, or of any other person or corporation, relating to or in obtaining such consent, and also to investigate fully the action of the board of aldermen of said city, which granted or gave the same, in respect thereto, or of any member thereof who voted for the same, in respect thereto." The committee were given full power to prosecute such investigation in such directions as it thought necessary, as to all matters relating to the granting of said consent, and the inducements which led thereto, with full power to send for persons and papers, and to employ counsel and other assistants in the work before them; and the sergeant-at-arms was directed to attend the sittings of the committee, serve subpoenas, and do such other things as it directed. A report was required, with recommendations, and particularly as to the policy of an amendment to the Constitution vesting the power to grant such consent in some other authority than as at present provided. It is apparent from their terms that the resolutions which permitted the examination of Sharp involved an inquiry which the Legislature had a right to make, and which, in view of the recitals in the resolution, it was its duty to make, in order that the abuses which were disclosed might be cured by further action by the Legislature or by the people. The inquiry was judicial in its nature, was to be pursued for a lawful end, and by means as comprehensive and sufficient as could be provided. The occasion and the action of the Legislature meet every suggestion of the court in the case last cited as to the expression of legislative intent, and the imposition of the duty of obedience upon all persons who should be summoned to make, by their testimony, the investigation serve the ends of public justice. We have seen that there is no conflict between the will of the Legislature as expressed in section 79 and the Constitution, and we are now to construe that section in accordance with the legislative intent. In its exposition full ef-

fect is to be given to that intention, and if possible, full force and validity to every word, so that no part be annulled and rendered nugatory.

It cannot be doubted that the case is brought literally within the language of the section (79, *supra*). Sharp was a person offending against one of the specific provisions of the Code in relation to bribery. He was accused and has been convicted of giving a bribe. He was therefore qualified, under that section (79), as a "competent witness." Against whom? Why against another person "so offending;" that is, another person offending against any of those provisions of the Code "relating to bribery." He was in fact a witness before the committee in relation to bribery. Was he a witness against another person? The resolution recites, as the immediate cause of the action of the Senate, the alleged bribery of certain "local authorities consenting to the railway;" and then to make the accusation specific as to the person, says "the local authority" referred to, as the authority which consented, "was the aldermen of said city." There was then another person offending. Sharp was by the statute made competent as a witness as to the subject-matter against him. The Legislature may be presumed to know that such a person, although made by law competent as a witness against that other person, would even then testify, if at all, voluntarily, and to his own crime, and therefore would not be likely to testify at all; and so they not only make him a competent witness, but add, "And (he) may be compelled to attend and testify;" meaning of course to give evidence against that other person, including at any rate the other party to the transaction. If as in the case before us, the "person offending" is the giver of the bribe, then he might be compelled to testify against the receiver of the bribe. Where? Why upon any trial, upon any hearing, upon any proceeding, "or upon any investigation." It follows that if we adhere to the ordinary and natural meaning of these words, and apply them to the case in hand, we shall find neither inconsistency nor incongruity, but complete adaptation. The senate was dealing with the charge made against the aldermen of the city, that their consent was obtained by and through certain methods, and among others, bribery. It admitted that an investigation of those methods was demanded; therefore the senate authorized its committee "to fully investigate" all matters relating to these methods, and also to investigate fully, not only the action of the board of aldermen, which granted or gave such consent, but also that of any member of the board, with full power and authority "to prosecute its investigations in any and all directions in its judgment necessary to a full and complete report to the senate as to all matters relating to the granting of such consent, and the influences and inducements which led thereto," and gave to the committee full power and authority to send for persons and papers, to hold its sessions in New York, and conduct its "investigations" there. Clearly, there is to be an investigation, in the language of section 79, of a charge of bribery of a public officer, with an intent to influence him in the exercise of his powers. The committee were to ascertain, through testifying persons and papers, whether the charge was well or ill founded. Whoever gave evidence before them attended upon an "investigation," and testified; and unless we greatly confine and limit the meaning which the words used by the Legislature usually express, it is impossible to say that the case is not within the statute.

It is claimed however by the learned counsel for the people, that the "investigation" in the mind of the Legislature did not include an investigation directed by itself, and conducted through its committee, but only an "investigation" in the course of a crim-

inal prosecution; and upon that construction the judgment of the court below was put. It is no doubt the duty of the court to restrain the operation of a statute within narrower limits than its words import, if it is satisfied, that giving to them their literal meaning, the statute would be extended to cases which the Legislature never intended to include. But this can only be done where a reason for some limitation is found, either in the occasion in which they are used, or in the context. That is not the case here. In the first place, the construction contended for in behalf of the people is contrary to the plain and ordinary meaning of the words used. "Any investigation" would include all investigations in the conduct of which persons may be called by authority, as witnesses to testify under oath concerning any matter. Therefore it must include, if taken literally, the action of a legislative committee according to the direction given it, and acting with authority to subpoena witnesses, and enforce their attendance, and examine them upon oath. Nor is it any answer to this conclusion to say that only a judicial investigation was intended. If we are right in the views above expressed, the Legislature possessed, and might delegate to its committee, any power, short of final judicial action, which they thought necessary in any particular case, and although the investigation was only for the collection of information required for the proper performance by the Legislature of its own functions, it might nevertheless be a proceeding requiring witnesses and power to compel their attendance. It is moreover assumed and claimed by the prosecution, that the privilege of a witness to be exempt from a compulsory disclosure of his own criminal conduct is the same in such an examination as when sworn in court. If that be so, it affords a sufficient reason for including a legislative investigation among the proceedings in which persons, otherwise privileged, should be compelled to testify. Public policy might often require the fullest disclosure; and the very case before the Legislature was an instance in which that policy might be defeated if the utmost latitude was not permitted, and the greatest freedom of examination to ascertain the truth of the public charge that a great and valuable franchise had been obtained through corruption and bribery of public officials.

In *re Falvey*, 7 Wis. 630, it appeared that in pursuance of a resolution of the Legislature of Wisconsin, not unlike that before us, having for its object the investigation of frauds, bribery and corrupt acts charged to have been perpetrated by inducing the Legislature to grant certain lands, and the investigation of cases of alleged bribery on the part of certain railroad officials and others in procuring the grant, a committee was appointed with powers similar to those conferred by the resolution before us. One Falvey was subpoenaed before the committee, but refused to answer, and on *habeas corpus* it was adjudged that he could claim no privilege, and his refusal to answer was a contempt, because the law of that State provided that no person so examined and testifying before a committee so appointed should be held to answer in any court of justice, or be subject to any penalty or forfeiture for any fact or act touching which he should be required to testify. It was held that this language furnished a full protection.

No such provision relating to the offense of bribery is found in any statute of this State prior to 1869 (chapter 742, Laws, 1869); but the legislation on the subject extended from time to time, until consolidated and enlarged in the Penal Code. The provisions of the Revised Laws (volume 2, p. 191, § 3) were made part of the Revised Statutes (2 Rev. Stat., tit. 4, pt. 4, ch. 1, art. 2, § 9, p. 886) and related to bribery of certain state officers, judges of any court of record, and judicial of-

ficers. Section 10 of the same article related to the acceptance of a bribe by either of these officers; section 11 related to the acceptance of bribes by jurors, arbitrators and referees; and section 12 to persons who should by gifts corrupt or bribe them. In 1863, (Laws 1863, ch. 217, § 14) by the act amending the charter of the city of New York, and above cited, a penalty was imposed for bribing any member of the common council or other officers of that corporation; and it was provided that every person offending in that respect should be a competent witness against any other person offending in the same transaction, and might be compelled to appear and give evidence before any grand jury, or in any court, in the same manner as other persons, but declared that "the testimony so given should not be used in any prosecution, civil or criminal, against the person so testifying." In the same year (Laws 1863, ch. 539) the provisions of the Revised Statutes, *supra*, were amended and added to. Other officials were enumerated as the subjects of bribery, and among them, "any member of the common council or corporation of any city;" and any person offending against either of the provisions of the preceding sections was declared to be a competent witness against any other person so offending, and might be compelled to appear and give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons; but it provided that testimony so given should not be used "in any prosecution or proceeding, civil or criminal, against the person so testifying." The act of 1867 (section 52, *supra*) is confined to the city of New York, and relates only to bribes offered or given to members of its common council or officers of the corporation; makes every person offending against any of the provisions of that section a competent witness against any other person offending in the same transaction; and closes with an absolute or saving clause similar to that of the act of 1863, last cited. In 1869 (Laws 1869, ch. 742) an act was framed for "the more effectual suppression and punishment for bribery." It authorized certain actions in favor of parties injured, and by section 8 provided as follows: "No person shall be excused from testifying on any examination or trial for any offense specified in this act, or the trial of any action authorized by this act, or on any investigation by any committee of the Legislature, or either house thereof, into the conduct of any member thereof, or on the trial of any civil action for slander or libel, or any criminal action for libel, where such alleged slander or libel imputes bribery, or any offense mentioned in this act, or on the trial or examination of any charge of perjury committed in evidence given upon any such trial or investigation, on the ground that his testimony will tend to disgrace him or render him infamous, or will tend to convict him of a criminal offense, or render him liable to be proceeded against therefor. But the testimony given by such witness on such trial or investigation shall not be used against him on the trial of any action, civil or criminal, against him. And nothing herein shall be construed as compelling any person to testify in any proceeding or trial in which such person is charged with crime." Keeping in mind the compulsory and the protecting parts of the foregoing statutes, we come to the statute of 1881 (chapter 676), which establishes a Penal Code, and which, so far at least as the crime and proof of bribery is concerned, is in part a codification of preceding enactments. So far as the various provisions of these acts make the offender a competent witness, and relieve him from prosecution, they are formulated in section 78, already quoted (Pen. Code, § 79).

It is apparent from this history of progressive legislation that the word "investigation" cannot be treated as a word of mere amplification to broaden the sense

of preceding words, but must be deemed the deliberate expression of an intent on the part of the Legislature to bring in a distinct class of cases. Can there be any doubt as to the meaning of the Legislature in the corresponding clause of preceding statutes? In that of 1853 (chapter 217), requiring the party to give evidence before "any grand jury in any court;" or in chapter 539 of the same year, "before any magistrate, grand jury, or in any court;" or in the act of 1869, *supra*, "on any examination or trial, or on any investigation by any committee of the Legislature, or either house thereof, into the conduct of any member thereof?" Each successive statute goes further than the preceding; one not including an examination before a magistrate, another including it, both so obviously confined to examinations in the course of criminal procedure, but the last (1869) bringing in a new species—that of legislative investigation for a certain end, and of a certain described class. But other investigations than those relating to the conduct of its members were frequently entered upon or ordered by the Legislature to be made through its committee, in pursuing which testimony from the witnesses was required; and we see no reason to doubt that the Legislature intended by the provisions of section 79 to cover all such cases, as well as those formerly provided for, when they involve an inquiry into matters relating to bribery, as defined by the various sections of the Penal Code above referred to. The plain object of that statute was to enable these various tribunals, whether magistrates, grand juries, courts, or Legislature, to make their investigations into alleged abuses effectual, and enable them to prosecute their inquiries successfully, and to that end protect witnesses whose testimony might otherwise be withheld, but without which the investigation would fail. No reason has been suggested for confining that protection to witnesses other than those who appear upon legislative investigations, and we are not permitted by any rule applicable to the construction of statutes to give the section in question such limitation as will exclude them. It could only be done by inference, and by importing into the statute words which the Legislature did not choose to employ, and which express a meaning very different from the words actually used. This we are not at liberty to do. "What else," asks a learned judge, "is restraining by inference, or varying by interpretation, but to a certain extent recasting and remodeling the statute, or in other words, invading the province of the Legislature itself?" Williams, J., in *Garland v. Carlisle*, 4 Clark & F. 728. It certainly should not be permitted where the object of the act under examination was to extend the policy of existing statutes to new cases, and enlarge, and not restrain, its application; nor where the intention of the Legislature is clearly expressed in words, deliberately chosen, and where a literal construction does not take them beyond the mischief at which they were aimed. The case before us is not only within the words, but within the spirit, of the statute; and we are unable to find any doubt or ambiguity in its language which should deprive the defendant of a construction according to the manifest import of the words actually used.

We have not overlooked the contention of the respondent "that section 68 and 69 of the Penal Code, making the refusal of a witness to attend or testify before a legislative committee a misdemeanor," limits the inquiry to "material and proper questions;" nor the argument thereupon that a question which calls for a "criminating answer" is not a proper question, and the witness not obliged to answer. But we think that whatever effect may be given to those sections, they cannot be regarded as excluding the operation of the subsequent sections (78, 79), which deal with the offense of bribery, and provide with minuteness for

its punishment, and the means of its discovery. The actual attendance of the witness, and his disclosures, are provided for; and it is clear that to make an investigation upon the subject of bribery effectual, there must be some way of compelling both. Within the scope of those sections every question may be asked which is "pertinent" to the subject-matter; and whether it is or not will be the only question. The statute relieves the witness, and it will not be necessary for the examining or investigating tribunal to concern itself with the effect upon him. If this were not so, the whole object of the Legislature might be obstructed by the neglect or refusal of witnesses to obey the subpoena, or answer the questions, of the committee. That those put on the investigation, the results of which are now before us, were pertinent, is apparent from the use made of the answers thereto upon the prosecution of the person who then testified. If the observations already made are correct, it follows there was error in receiving them against his objection.

2. Another exception brings up the ruling of the court as to evidence from one Pottle, proving a corrupt proposal by the defendant in 1883. The witness was at the time engrossing clerk of the Assembly, and the defendant desired an alteration of a certain bill then pending before that body, so that its terms might authorize the construction of a railroad on Broadway. For this alteration he proposed to pay the witness \$5,000. We are unable to find any ground on which the evidence was inadmissible. It was introduced as part of the affirmative case which the prosecution was bound to carry to the jury. Its admission is justified upon his appeal by various propositions presented by the people. First, "We suppose," say the learned counsel, "that every criminal trial begins with a presumption of innocence in favor of the accused. This presumption must be founded on the moral rectitude or fear of the law, or both, whichever the person is supposed to possess. The presumption must be overcome before conviction can be had. Jacob Sharp was accused and brought to trial for bribing the aldermen of the city of New York, and by that means procuring the grant of a valuable right. Evidence was offered to show that not long before he had attempted to bribe another official person to do an act which, as he thought, would promote the scheme which he had so long pursued. This evidence, being given, proved beyond a question that no sense of right and wrong, no fear of law or punishment, would deter him from committing the offense of bribery for the one purpose which he had in view in all his efforts. \* \* \* The evidence objected to proved the irresistible strength of the motive, as against all other motives which might have deterred him, and upon which the presumption of innocence is founded."

The commission of a crime by Sharp in 1884 was distinctly in issue. It was bribery; but the subject was Fullgraff, a member of the common council. Of the commission of that crime the law presumed Sharp to be innocent. If Sharp had given evidence of good character, the prosecution might have answered that evidence by proof that his character was bad; but I believe it has not been thought by any judicial tribunal that such evidence could be given in anticipation of proof from the defendant, nor that an issue upon it could be tendered by the prosecution. *People v. White*, 14 Wend. 111; *Webster's case*, 5 Cush. 236; *Dewit v. Greenfield*, 5 Ohio, 227; *Com. v. Hopkins*, 2 Dana, 418; *Burrill*, Circ. Ev. 533. But even in the case I have supposed, such evidence would be of general reputation only, and not of particular acts by which reputation is shown. The effect of the argument for the people is that the evidence shows a disposition to commit the crime; that is, a criminal disposition. If that is a different view, it is equally

inadmissible. A man's general character may perhaps be so bad as to permit an inference that evil and good have to him the same meaning and that it is a matter of indifference by which he accomplished his purpose. In a judicial proceeding however proof of that would be irrelevant, although it might show in a moral sense that he would be likely to commit the crime with which he was charged. The person charged might as well seek to repel the imputation by proof of particular acts performed by him at other periods of his life, and a cause submitted to a jury be made to turn upon the preponderance of proof, on one side of antecedent bad conduct, and proof on the other of virtuous acts. Legally speaking, it would be unsafe to draw a conclusion from either. We are referred to no case holding, that upon the trial of an indictment charging a specific crime committed in a specific way, evidence that the accused was of a particular character would be relevant. Moreover, counsel on both sides seem to agree that the commission of one crime is not admissible in evidence on the trial of the same offender for another crime. It is indeed elementary law, that no evidence can be admitted which does not tend to prove the issue joined; and the reason and necessity are much stronger in criminal than in civil cases for the observance of this rule, and of confining the evidence strictly to the issue. The indictment is all that the defendant is expected to come prepared to answer. Therefore the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise, and do him manifest injustice, by creating a prejudice against his general character.

How then is this case to be taken out of this general rule of law? The learned judge, in submitting the case, desired the jury to consider the Pottle evidence "as only showing the zeal which the defendant exhibited," and not allow themselves to be prejudiced by his testimony in regard to the offer of a bribe, saying: "It is only to be considered as showing, like other evidence in the case, the extent of the defendant's feeling, interest and desire;" adding: "I should be sorry if the fact that Pottle testified to the offer of a bribe should be otherwise considered. \* \* \* So far as it tends to throw any dark shadow upon the character of the defendant, I desire you to eliminate it from your consideration, and treat it merely as evidence tending to show the depth of interest, motive and desire." These remarks not only answer the respondents' argument, but point to the danger which might follow from the evidence. They were obviously inadequate to prevent it. Nor does the discrimination between crime proven, and a conversation, make the evidence less objectionable. As presented to the jury, it was distinctly a crime committed. The point of inquiry was that, and it was plainly so avowed by the counsel for the people. He brought the witness Pottle and Sharp together; proved by him that he then had the "General Surface Railroad Act" in his possession as engrossing clerk; that he had a conversation with Sharp "in relation to the bill;" that he had a conversation with him "on the subject of the bill including or not including Broadway as one of the streets in the bill." Then asked: "Had you any conversation with him as to whether he did or did not desire to have Broadway included as one of the streets in the bill?" The defendant's counsel objected, but the objection was overruled, and an exception taken, and the witness replied: "I did." He was then asked to state "all he (Sharp) said on the subject," and the counsel for the defendant asked "to be informed to what point the evidence is to be directed," saying: "There is a particular purpose in this question, and I think we might properly be advised what it is." After some discussion, the district attorney said: "I intend to prove that Pottle was sent for by this defendant; that

he went to defendant's room; that this defendant thereupon offered Mr. Pottle the sum of \$5,000 to add to one of the sections of that bill the words 'Broadway and Fifth avenue,' permitting a horse-railway company to be constructed upon those streets; that Pottle declined the proposition, and that Sharp then offered the same sum in case he would give him the original bill. That is what I desire to prove." Whereupon defendant's counsel said: "We object to it, upon the ground that it is evidence of an utterly distinct charge of crime." The court said: "Upon the whole, my judgment is that the evidence is admissible."

A careful examination of the evidence given by Pottle authorizes the comment of the appellant's counsel that "it was not part of the conversation, but that it was the whole." Unless admissible as proving an attempt to commit a crime, it is wholly immaterial and as proof of a crime it was irrelevant, and must have been very prejudicial to the defendant. It showed a capacity or willingness to commit bribery in 1883, to induce an act from which Sharp might be benefited as one desiring the construction of the road, but which in fact gave him no advantage over other citizens; it gave him no franchise. But it could not fairly be inferred from such premises that in 1884 he did also bribe a different person for a different purpose. The inference would be purely conjectural. The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. It is not moral evidence even. The fact under investigation, in its circumstances, was entirely unlike the fact disclosed by the witness. There is no analogy between them. Yet the inference drawn by the prosecuting officer, and permitted by the court, left it for the jury to say that the desire of Sharp, manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of a bribe in the other; hence that the two crimes had the same origin. Evidence of moral character is admitted to disprove the existence of a criminal motive, or to rebut evidence of it, but evidence of a prior crime can have no legitimate place in an investigation as to whether a subsequent crime was committed by the same person. If it had been proven that Sharp had in fact given the money to Fullgraff, and the question was as to its being an innocent or criminal act—a gift which he had a right to make, or which he made corruptly—the fact, if it were a fact, that he sought to attain a similar end by bribery, might seem to show the intent with which the act charged was done. But here the very thing in dispute was whether he gave the money; and that upon a former and different occasion, he had offered money with a guilty purpose to another person could not fairly be held as relevant to that question. Moreover, it had been distinctly conceded by the defendant that he desired to secure the franchise for the Broadway Surface Railroad, and therefore evidence of his commission of a crime for the mere purpose of showing that desire was wholly unnecessary; and we may repeat here the language of Allen, J., in the *Coleman* case, 55 N. Y. 81. upon a similar question: "It was idle and frivolous to put in this evidence for the purpose avowed, while its influence could not be otherwise than damaging to the prisoner." It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence. It did indeed cast a dark shadow upon the defendant's character. It not only tended very strongly to prove the defendant guilty: it was absolute proof, but it was of a different crime from that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him.



Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and mislead them. It was, we think, improperly received, and the exception to its admission well taken.

3. We are also of opinion that there was error in the examination of the witness Miller. He was an alderman at the time of the passage of the resolution, but we do not find he was a party to any agreement concerning its passage. Against the objection of the defendant, he was allowed to testify, that after the "consent" was given, he received from De Lacy \$5,000. The district attorney then asked: "You understood, did you not, that you received that money from De Lacy on account of the Broadway Surface Railroad?" Answer. No, sir; nothing of the kind." A further examination as to the circumstances and the time of its receipt followed, and the witness said: "De Lacy gave me a roll of bills, and said, 'There is something to buy election tickets with.'" Asked by the district attorney: "Did you not understand, at the time, it was paid on account of the Broadway Railroad Company?" Answered: "No, sir; I had no understanding of that kind with him." Question. "What was your understanding at the time?" To this question there was not only the specific objection that the evidence asked for was incompetent against Sharp, but the further objection that it was asking for a conclusion. The court allowed it, and the defendant excepted. Answer. "There was no particular understanding about it so far as I was concerned. There was nothing said about it. Question. What did you think at the time, De Lacy gave it to you for?" The court held this competent. "Witness. What did I think? District Attorney. That is the question asked you. Answer. About what? District Attorney. As to what De Lacy gave it to you for. Answer. Well, I had my misgivings. District Attorney. Tell us what you did think, at the time; what he gave it to you for. Witness. I supposed it was for the Broadway road."

It is quite impossible to find any ground on which the exception taken can be overcome. The transaction was not with Sharp. The question called for no fact, but with frequent iteration, for an opinion, a supposition. Its importance in the estimation of the people is manifest from the repeated and persistent attempts to obtain it. The court below were of opinion that the ruling was erroneous, but that the jury could not have given any effect whatever to the mere expression of opinion or supposition of the witness, because the whole transaction between De Lacy and the witness was afterward given. It was, but the narration also was received under an objection, and was excepted to. It certainly did not cure the difficulty. The question to be settled was whether the money was part of the fruits of a corrupt agreement; whether the transaction was an incident of the scheme with the formation of which the defendant was charged; whether the alleged fact of bribery was true, and this like any other question of fact was to be settled by evidence. The opinion, the thought, the understanding of the witness was not evidence. The jury might however naturally reason that the conclusion of the witness, drawn from all the facts within his own knowledge, fairly represented the nature and the extent of the connection between the circumstance to which he testified and the fraudulent practices which had preceded it. It was admitted because thought relevant and material by the prosecuting officer and the court; and whether in any, or in what degree it did affect the jury, cannot be known. The payment of a large sum of money to the witness was a palpable fact. Whether it was paid to him in his capacity of alderman, or in connection with or on account of the

consent obtained from the board of aldermen, could not properly be answered by the jury upon the suspicion or conjecture of the witness. That it was not so answered we cannot say. The respondent's counsel however (the district attorney), argues that the question was proper, but that the answer was not responsive. The interlocution between the witness and the prosecutor seems to indicate that there was no misapprehension on the part of the witness, and that the answer was the answer called for by the question, and directly fitting to it. The learned counsel did not stop his examination after proving the receipt of the money, but sought the mental conclusion of the witness as to the consideration of or inducement to the gift, and the answer was accepted by him.

4. The public prosecutor, to make out the case, and as part of his evidence in chief, offered to show by a detective officer that he had been employed by the district attorney to serve subpoenas upon Moloney, Keenan, and De Lacy—all of whom the district attorney claimed to be material and competent witnesses; and to show further that the detective was unable to find them in this State, but did find Moloney in Canada, and there served him with a subpoena, and learned that the others were in Canada also, although he did not see them. These persons were named in the indictment as co-defendants with Sharp, and the evidence already intended to show that some of them—and especially Moloney—were intermediaries between the persons offending against the provisions of the statutes relating to bribery, or instruments of whoever committed the act charged. The evidence was objected to by the defendant's counsel, but admitted. It was not claimed by the prosecution that the defendant was privy to their absence, or that the object of the proof was to furnish a basis for evidence otherwise inadmissible. The learned district attorney disclaimed any intention "of proving the flight of these persons as co-conspirators," and so make use of their absence as evidence of guilt, or an admission by their conduct that the accusation against them and the defendant was true, but said he offered it only for the purpose of showing that after diligent effort, he was unable to procure their attendance as witnesses, and thus enable him to account for their absence. His claim is that they were depositaries of the direct proof of the conspiracy which the prosecution were engaged in establishing, and accomplices of the defendant. The evidence already in was, so far as Sharp was concerned, altogether circumstantial, but tended to show that the persons named, or some of them, were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue.

We think evidence of their absence was inadmissible. It could have no legitimate bearing upon the issue, and the danger is very great that such testimony will prejudice a party against whom it is offered. It may be, and frequently is, admissible, in answer to evidence from the other side which would naturally call for an explanation. But the absence out of the jurisdiction of the court of an associate, or one seemingly connected with the defendant in the act charged, is easily construed as evidence of guilt, and unless the occasion calls for such proof, it should not be allowed. It is an old maxim that "he confesses the fault who avoids the trial;" but in its application, even to the fugitive, there is great danger of error. A man may avoid the trial from many motives besides consciousness of guilt, but however actuated, his conduct can in no degree, in a court of justice, reflect upon another. Its admission in this case was virtually saying to the jury: "There is better evidence, and it might be had from the defendant's associates. It is not the fault of the prosecution that the evidence is not before you, but because of the voluntary act of those who with



the defendant stand charged with the offense." Thus the non-production of the witnesses is made to supply the place of proof of the issue. With that issue the evidence had no possible connection. The rule is that where a party to an issue on trial has proof in his power, which if produced would render material, but doubtful facts certain, the law presumes against him if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defense. But the rule cannot be applied unless it appears that the proof, whether it is a living witness or paper, is within his power. It is easy to see that the evidence offered here might be used for an ulterior purpose, although not pressed by the prosecution, yet entertained and made effective by the jury; and there certainly could be no presumption that the prosecution had the power to produce any particular witness—certainly not one of those named—nor did the law require it of them. It is therefore impossible to find any reason for, or lawful purpose to be gained by the proof offered; and its admission was a very dangerous innovation upon the general rule which excludes it as irrelevant to the issue. Nor was it a mere question as to the order of proof. It was introduced as affirmative evidence, and while it could do the prosecution no legal good, must subject the defendant to the prejudices and unfavorable inferences suggested by the absence of a co-defendant, whose presence, if innocent, could not but assist the defendant, but whose absence and refusal to obey a subpoena might easily be regarded as a confession of guilt, and could not fail to strengthen in an appreciable degree the case of the prosecution. The only case cited in support of the ruling is *Pease v. Smith*, 61 N. Y. 477. That was a civil action. The absent witness was confined in a State prison, not by his own consent, and whatever may be said of the decision there made, it has no application here, nor should it be extended to other circumstances than those there disclosed.

It is also said by the district attorney that the defendant, upon cross-examination of one of the prosecutor's witnesses, had shown the absence of one of these persons, and that he was in Canada. The same fact as to all of them seems to have been assumed as if already before the jury. Why then was the evidence insisted upon? In answer to a question from the learned trial judge whether the defendant would not "have a right to argue to the jury, in summing up, that in view of all the testimony, the people should have called Moloney," the defendant's counsel said: "No, sir. How could we argue that, when we know already, from the opening of the district attorney, that Moloney is not accessible to a subpoena?" and disclaimed any intention of so doing, or that it "could be done in common fairness," with such earnestness that it is very difficult to see why the introduction of the evidence was pressed, if no other purpose existed than to escape the imputation of keeping back testimony. Proof even of the absence of these persons was inadmissible. But that was not all. The proof was not only of their absence, but of unavailing search by a detective, the service of a subpoena upon some of them, and the failure to obey its mandate. Under the circumstances of the case, the ruling of the court in this instance may not have been of much importance, and upon it alone we should not grant a new trial. But the legal principle which requires relevant and material evidence, and admits no other, is important; and however serious the charge against an accused person may be, and however great the evil it uncovers, he cannot properly be made the subject of a judicial sentence, unless the crime is substantiated according to the established rules of evidence.

The other exceptions referred to point to violations of those rules, to the manifest prejudice of the defend-

ant, and to the benefit of those exceptions he is entitled. They require a new trial, and that it may be had, the judgment of the court below, and the conviction, should be reversed, and a new trial granted.

PECKHAM, J. It seems to me that the admission of the evidence given by the witness Pottle was error. There is not room for much discussion in regard to the general principle upon which evidence that proves, or tends to prove, the prisoner guilty of other felonies or misdemeanors, is admitted. It is conceded on all sides that the admission of such testimony forms an exception, and a very material and important exception, to the general rule of evidence. The general rule is, that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor. Whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is. Thus there is a class of cases in which evidence is admitted where it is material to show guilty knowledge of the character of the act committed by the prisoner. A good illustration of this class of cases is in the trial of an indictment for passing counterfeit money. Evidence of the passage of like money within a reasonable time before or after the commission of the offense for which the prisoner is on trial is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. A man might think the money he passed was good, and he might be mistaken once, or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit. Hence evidence of such repetition bears directly and materially upon the issue before the jury. To this same class would belong the case of an indictment for shooting an individual. For the purpose of proving that the shooting was not accidental, where such a fact is claimed, evidence may be given of efforts, or even threats, made by the defendant to shoot the same individual on prior occasions. Thus the probability of the shooting being accidental is lessened by showing prior efforts or threats to accomplish the same act for which the prisoner is on trial. Cases of embezzlement, and of obtaining money or other property by false pretenses, come under the same general rule. A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility perhaps that the entry was a mistake; but the probability of such a mistake would be greatly lessened by proof that other false entries of the same kind had been made at about the same time by the same person. Then there is another class of cases in which the facts show the commission of two crimes, and that the individual who committed the other crime also committed the one for which the prisoner is on trial. Evidence is then permitted to show that the person was the person who committed the other crime, because [in so doing, under the circumstances, and from the connection of the prisoner with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial. Another class in which evi-

dence of this nature is admissible is where it is proper for the purpose of showing a motive for the commission of the main crime.

It is claimed in this case that the evidence was admissible on the ground that it showed or tended to show the intent on the part of the prisoner in paying the money to Fullgraff after proof had been received that money was given him, and also upon the ground that it tended to show the motive of the prisoner for the commission of the crime. If this evidence did materially and directly tend to show either such intent or motive, and if it were not too remote in point of time, and if it logically connected the fact to be proved with the main transaction, then it may well be that it was admissible, even though it tended to prove the prisoner guilty of another and separate offense. The admission of the evidence of Pottle seems to me however to carry the principle further, and to a much more dangerous extent, than any other case that has come under my observation. Upon the question of the intent with which the money was paid to Fullgraff, the evidence, I think, falls far short of such logical and close connection therewith as is necessary to render it admissible. The fact being established that such payment was made, and that the prisoner was connected with its payment, the intent could not be a matter of any real doubt. That it was paid to obtain the vote of Fullgraff as an alderman for granting the franchise to the Broadway Surface Railroad could not be made a subject of honest discussion. All the evidence was to that effect, and there was absolutely no evidence to the contrary; and to offer evidence of the commission of another crime for the avowed purpose of thereby showing the intent with which this money was paid to Fullgraff, would have made, to my mind, a clear case of offering it on a colorable issue, and using it for another and wholly inadmissible purpose. However that may be, the evidence was not admissible even on the question of intent.

As is very well said by Cushing, C. J., in *State v. Lapage*, 57 N. H. 245, at 256: "It should also be remarked, that this being a matter of judgment, it is quite likely that courts would not all agree, and that some courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the courts have always professed to put the admissibility of the testimony on the ground that there was some logical connection between the crime proposed to be proved, other than the tendency to commit one crime, as manifested by the tendency to commit the other."

Judge Earl, in the case of *People v. Shulman*, reported in a note to *Mayer v. People*, 80 N. Y. 364, at 375, states as follows: "But there is one general rule which must apply to all such cases. There must be in the transaction thus sought to be proved some relation to or connection with the main transaction; that is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature to show guilty knowledge at the time of the main transaction."

And in the case of *Mayer v. People*, *supra*, which was the case of an indictment for obtaining goods by false pretenses, Rapallo, J., in speaking of the admissibility of testimony of this nature upon the question of intent, said "that when the representations, their falsity, and the knowledge of the accused that they were false, is established by competent testimony, the allegation that they were made with intent to defraud may be supported by proof of dealings by the accused with parties other than the complainant which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the pur-

chase from the complainant was made in pursuance of the same general transaction."

Under such conditions, and guided by such rules, it does not seem to me that this evidence by Pottle was so connected legitimately with the main transaction — that of the alleged bribery of Fullgraff — as in any way to characterize the intent with which the money was alleged to have been paid Fullgraff, in any other sense than the evidence tends to show capacity upon the part of the prisoner to commit the crime because he had, months before, attempted to commit one of a similar nature, with another person, for the purpose of accomplishing another act. It is a very general and extremely broad, and I think a dangerous ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was so desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime, is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place, and to accomplish the commission of another act. It throws light upon that intent only as it tends to show a moral capacity to commit a crime. It gives under the circumstances entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial.

Upon the question of motive, using that word in the sense of a reason why the prisoner should commit the crime, I do not see that it has the least materiality or bearing. It shows, and tends to show, no such reason. It only tends to show that the prisoner took an interest in the inclusion of Broadway in the bill permitting railroad tracks to be laid in the streets of cities. It might be argued therefore that he took an interest in, or had a desire for a railroad in that street. As a reason or motive for such desire, the evidence in no aspect tends to enlighten us. By the passage of the act of 1883, the prisoner would have had no greater right than any one else to obtain the road. Others could compete for it as well as a corporation in which he was interested. No reason for any interest in this question is shown by this evidence. It is the simple, bald and naked proposition which the evidence is claimed to prove the interest of the prisoner; and this interest is to be established by proof of the commission of a crime under the circumstances detailed, and months before the commission of the one charged in the indictment. This cannot be said to prove, or tend to prove, a motive for the commission of the crime in question, within the meaning of the law, and upon the question of mere interest or desire the evidence is too remote and too dangerous to be permitted.

One of the cases cited upon this branch of the argument was that of *Pierson v. People*, 79 N. Y. 422,

There the prisoner was charged with murdering one Withey, who was a married man. The prisoner was also a married man. Evidence had been given of intimate relations, though not necessarily criminal, between the prisoner and Withey's wife, before the death of the deceased. After the murder, the prisoner took the widow and her sister to the house of a friend in the evening, and came away with the widow late that night alone. A few days after the murder, the prisoner disappeared from the neighborhood. It was then proved by a witness from Michigan, who was a clergyman, that the prisoner and the widow of Withey appeared before him and were married, and that the prisoner declared on oath before him that he knew of no legal obstacle to his marriage with the woman, and thereupon he married them. This evidence was objected to on the ground that it had no direct or material bearing upon the main question in the case, and that it simply tended to prejudice the prisoner by proving him guilty of another and separate felony. The evidence as to the murder was circumstantial, and this court held that the evidence in controversy was proper, for the purpose of proving a motive for the murder. In that case the evidence showed a direct and logical connection between the murder of the deceased and its perpetration by the prisoner. It showed that the prisoner had a passion for the possession of the wife of the deceased, and that for the purpose of obtaining possession of her person, he did commit the crime of perjury and bigamy, and to accomplish this possession of the woman, the taking-off of the woman's husband was an obvious necessity. The motive of the prisoner was the desire for the woman; and the strength of that desire—in other words, the strength of the motive which impelled the murder—was shown in this way.

The case of *People v. Wood*, 3 Parker, 681, was also cited. That was a Special Term case, which arose upon an application to the learned justice who delivered the opinion for a stay of proceedings upon the conviction of the defendant for murder. Evidence had been given of separate and distinct felonies committed by the prisoner for the purpose of showing motive on his part in the killing of the deceased. The learned court held that the evidence was admissible, because it tended to show with other evidence that the felonies were part of a single transaction, influenced by a single motive and design to accomplish a single object; that they were all connected by unity of plot and design, and if proved, would tend to show the motive which actuated the prisoner in taking the life of the person stated in the indictment. In that case the evidence tended to show that each felonious act was a necessary one for the purpose of carrying out the main object which then existed in the mind of the prisoner, and that all of them formed but one transaction, and were connected together as part of one whole. Now the evidence in the case at bar was of no such character. At the time of its alleged occurrence no law had been passed. It did not appear, and could not appear, that at that time any law ever would be passed. It was an act remote in point of time different in purpose, and of an entirely separate and distinct matter, forming no part of one main transaction, and to my mind, coming nowhere near the standard for the admissibility of such evidence pronounced by all the cases which I have been able to find. The case of *People v. Stout*, 3 Parker, 672, contains the same general principles. There the evidence was admitted to the effect that the prisoner was seen in bed with the wife of the man he was charged with murdering, although such wife was also the prisoner's sister, and it was admitted as furnishing a motive for the prisoner to get the husband out of the way.

I have looked at the other cases referred to by the

learned counsel for the prosecution, and find that they come under the designation of one or the other of the classes already referred to.

*Com. v. Tuckerman*, 10 Gray, 173, 199, was a case of embezzlement; and evidence of other embezzlements from the same party during a serious of years, and contained in a statement made by the prisoner, was admitted.

*Com. v. McCarthy*, 119 Mass. 354, was an indictment for arson. To prove the intent of the prisoner, evidence was received that on two prior occasions the prisoner had set fire to a shed ten feet distant from the building destroyed, and connected therewith by a flight of stairs. This had a direct tendency to prove that the firing was not accidental, but intentional and felonious.

*Com. v. Bradford*, 126 Mass. 42, was an indictment for adultery. Evidence of improper familiarity between the defendant and the same woman, shortly before the act in question, was admitted. The evidence was admitted on the ground that intimacy, and these acts of familiarity, with the same woman, had a tendency to establish the fact of the adultery charged in the indictment. Evidence tending to show previous acts of indecent familiarity would have a tendency to prove, in the case of the same woman, of course a breaking down of all the safeguards of self-respect and modesty, and hence a gradual preparation of the woman to lend herself to the commission of the crime.

The case of *People v. O'Sullivan*, 104 N. Y. 481, forms no precedent for the admission of the evidence in this case. We simply held, that upon the trial of the defendant for the crime of rape, it was competent to prove that he had attempted to commit the same crime upon the same woman a short time prior thereto. It was put upon the ground, that upon the trial of a person for a particular crime, it is always competent to show upon the question of his guilt, that he had made an attempt at some prior time, not too remote, to commit the same offense. It was said further, that it would be incompetent to prove that the defendant had committed, or attempted to commit a rape upon any other woman. And it was stated, that upon the trial of prisoner for murder, it is competent to show that he had made previous attempts or threats to kill his victim; and hence upon the same principle, it was held that when charged with rape it was competent to show that the defendant had previously declared his intention to commit the offense, or made an unsuccessful attempt to do so.

In the case of *Com. v. Abbott*, 130 Mass. 472, upon an indictment for murder, proof was offered on the part of the prisoner of former ill feeling of the husband of the deceased toward the deceased. It was rejected as too remote and disconnected with the crime charged; particularly as there was evidence of the parties living together on good terms long subsequent to the time of this alleged ill feeling. This is certainly no precedent for the admission of the evidence in question in the case at bar.

In *Com. v. Jackson*, 132 Mass. 16, the prisoner was indicted for selling property by false representations, under the Massachusetts statute. Evidence of sales of other property of a like nature to other persons, under representations proved false, was admitted, for the purpose of showing the intent with which the representations in question were made. The Supreme Court of Massachusetts held that the evidence was inadmissible, and that for the error of its admission a new trial should be granted. The case is cited only for the purpose of quoting the opinion of the court upon the danger of this kind of evidence. Devens, J., writing the opinion, said that "the other statements made by the defendant at other times as to the other animals which he sold might have been false, while

those made in the case for which he was tried were not. The transaction formed no part of a single scheme or plan, any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons. Even if they were transactions of the same general character, they differed in all their details; and the defendant was compelled to defend himself against three distinct charges in addition to the one for which alone he was indicted. Evidence of the commission of other crimes by a defendant may deeply prejudice him with a jury, while it does not legally bear upon his case. It certainly would not be competent, in order to show the intent with which one entered a house, or took an article of personal property, to prove that he had committed a burglary or larceny at another time." He further said, in the same case: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him." I think the remarks are very pertinent in this case. The reasoning herein leads to the exclusion of evidence as to past offenses, such as Pottle's evidence tends to prove, whether it is directed toward proving the bribery of clerks to committees or members of the Legislature of 1883 or 1884.

Upon the same basis, it is difficult to see the materiality or admissibility of the evidence that the prisoner, after the passage of the act of 1884, paid to Phelps the \$50,000 as testified to by Phelps. The evidence, it can be seen, had a tendency to greatly prejudice the prisoner upon the issue of his guilt of bribing Fullgraff, while wholly inadmissible for any such purpose; and it would seem to be quite questionable to admit it for the purpose of proving an interest in a Broadway railroad, about which there could be and was no dispute or contradiction. We call attention to the question without absolutely deciding it.

We are quite clear that errors have been committed by the admission of evidence, in this case, at war with the well-settled law on the subject. That law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter for the purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law, all are innocent until convicted in accordance with the forms of law, and by a close adherence to its rules.

For the reasons above given, as well as upon all the grounds so well stated in the learned opinion of my brother Danforth, I am in favor of reversing this conviction, and granting a new trial.

#### NEW YORK COURT OF APPEALS ABSTRACT.

CONSTITUTIONAL LAW — TITLES OF LAWS — OBJECTS EMBRACED — EFFECT OF TAX DEED — HIGHWAYS — TAXATION — LIABILITY OF NON-RESIDENT LANDS — SALE — PROCEEDINGS — REPEAL OF STATUTE — VALIDITY — PRESUMPTION FROM LAPSE OF TIME — ASSESSMENT — ENTRY OF — OMISSION OF DOLLAR-SIGN — DATE OF WARRANT — NUMBER OF DISTRICT. — (1) New

York act of 1882, chap. 287, entitled "An act to amend chapter 229 of the Laws of 1879, entitled 'An act in reference to the collection of taxes,'" in certain counties, and making, under certain circumstances, the conveyances of the comptroller and treasurer of the lands in the said counties conclusive evidence of title, is not in violation of Const. N. Y., art. 3, § 16, which provides that "no local bill shall embrace more than one subject, and that shall be embraced in its title," nor in violation of Const. N. Y., art. 1, § 6, which provides that no person shall be deprived of life, liberty, property without due process of law. (2) Laws N. Y., 1836, chap. 154, § 1, providing that "the real property of non-resident owners, improved or occupied by a servant or agent, shall be subject to assessment of highway labor, and at the same rate as real property of resident owners," does not exempt from such tax non-resident lands not so occupied, nor does it repeal § 19, pt. 1, tit. 1, chap. 16, art. 2, which made all non-resident lands pierced by or adjacent to a road, assessable for highway labor. (3) Act N. Y., April 10, 1850, repealed Rev. St., pt. 1, tit. 3, chap. 13, arts. 2, 3, relating to the assessment and collection of taxes, but with the proviso that such repeal should not affect "any tax levied or assessed prior to the year 1849, nor any proceeding for the collection thereof by a sale of the lands taxed, or otherwise," and changed the proceedings for the collection of non-resident taxes by taking from the comptroller the authority to make the sale, and giving it to the treasurer. *Held*, that a sale made by the treasurer in 1852, pursuant to the act of 1850, for taxes levied in 1849, but returned to the comptroller before April 10, 1850, was valid. (4) In an action of ejectment, plaintiff contested defendant's title, which was acquired at a tax sale in 1852, for the reason (1) that the assessors did not sign the judgment-roll as required by statute, though they did sign the certificate attached thereto; (2) that in that part of the certificate which relates to the mode of valuation the words "solvent creditor" appeared, instead of "solvent debtor;" (3) that the assessment was not verified at the proper time; (4) that the treasurer's notice of the tax sale was not delivered to the printer until after the time provided by law, though otherwise sufficient. *Held*, that these defects were not jurisdictional, and were cured by Act N. Y., 1882, chap. 287, which provides that when fifteen years have elapsed since such sale of unoccupied and unimproved lands, belonging to non-resident, the sale and all proceedings shall be deemed to have been regular. (5) Rev. Stat. N. Y., pt. 1, tit. 2, chap. 13, art. 3, § 83, provides that the county board shall set down in the assessment-roll, opposite the valuations of real and personal estate, "the respective sums in dollars and cents, to be paid as tax thereon." *Held*, that a tax set down in the proper column, but without the dollar-sign, was not for that reason invalid. (6) Rev. Stat. N. Y., do not require that the date of the commissioner's warrant or the number of the road-district shall appear upon the assessment roll, to make a highway tax valid. Nov. 29, 1887. *Ensign v. Barse*. Opinion by Finch, J.

CONTRACT — REFUSAL TO PERFORM — DEMAND. — Plaintiff and defendant entered into a contract by which defendant was to furnish plaintiff certain machines, and in default pay a sum of money. The contract provided that if defendant failed to deliver the machines within thirty days after demand by plaintiff, then the money should be due. A short time after making the contract, defendant refused to manufacture and deliver the machines. *Held*, that the refusal by the defendant being absolute, the plaintiff was relieved of the obligation to make demand for the machines, and the money became due at once. *Shaw*

v. Insurance Co., 69 N. Y. 286. Nov. 29, 1887. *Robinson v. Frank*. Opinion per Curiam.

**CORPORATIONS — DISSOLUTION — APPOINTMENT OF RECEIVER — ACTION BY CORPORATION.**— In an action on a promissory note brought in the name of a foreign corporation, the plaintiff proved the appointment of the receiver, and then introduced in evidence the statute of the foreign State authorizing the appointment of a receiver on the dissolution of a corporation. *Held*, that the effect of the evidence was to show that the corporation was dissolved, and therefore was not the real party in interest, and the action was properly dismissed. Nov. 29, 1887. *Merchants' Loan & Trust Co. v. Clair*. Opinion per Curiam.

**MASTER AND SERVANT — NEGLIGENCE — DEFECTIVE APPLIANCES — LUMBER CARS.**— (1) The stakes of a lumber car are constituent parts of a car, within the meaning of Acts N. Y., 1850, chap. 140, which requires railroad companies to carry lumber, and provide special cars for that purpose; and if the company allows the shipper to supply the car with defective stakes, it is liable for injuries caused to a brakeman by their breaking. (2) In an action for damages sustained by plaintiff by reason of the unsound condition of a stake on a lumber car, defendant claimed that as the system under which stakes were furnished by the shipper was known to plaintiff, he took the risks and consequences of such system. *Held*, that the evidence showed no system, but that if the company delegated duties which it should have performed to the shipper, it is equally responsible for his negligence. (3) The defendant contended, that even if the stake by the breaking of which plaintiff was thrown off a lumber car and injured, was within the rule requiring the master to exercise reasonable care in providing safe appliances, it was still not liable, as the negligence was that of the shipper or plaintiff's co-employees in loading the car. *Held*, that as the load might have been removed without remedying the defect, the defect was in the car, and defendant was liable. (4) The evidence showed that a stake used was of very poor white brash wood, partly decayed, and that defendant had been negligent in providing no rules requiring inspection of such stakes and loads, and that there was but casual inspection by the station agent. Plaintiff was nonsuited. *Held*, error. Nov. 29, 1887. *Bushby v. New York, L. E. & W. R. Co.* Opinion by Danforth, J.

**STATUTE OF LIMITATIONS — ACKNOWLEDGMENT IN WRITING — ORDER — LIABILITY — PAYMENT OUT OF FUND.**— (1) Code N. Y., § 395, provides that an acknowledgment in writing, signed by the party to be charged, shall be necessary to take a case out of the operation of the statute of limitations. Defendant, being indebted to plaintiffs, gave them orders on a third party for the amount of the debt. *Held*, that the orders were such an acknowledgment of the debt as would continue it six years from their date. When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying, or securing the payment of his debt. In other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order, and a willingness on the part of the debtor to pay the debt. The transaction may be consistent with a different relation and another purpose, but in the absence of explanation, that is its natural and ordinary meaning. See *Bogert v. Morse*, 1 N. Y. 377. The decisions as to what is a sufficient acknowledgment of a debt to take

it out of the statute are very numerous, and not altogether harmonious. It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted (*Kincaid v. Arohibald*, 73 N. Y. 189; *Lechmere v. Fletcher*, 3 Tyrw. 450; *Bird v. Gammon*, 3 Blug. N. C. 883), or to explain ambiguities (1 *Smith Lead. Cas.* 960, and cases cited). (2) Defendant, being indebted to plaintiffs, gave them written orders on a third party for the amount of the debt, but abandoning the contract with the third party, the orders were not paid. *Held*, that the orders were not conditional, in the sense that the debt was to be paid only out of the funds in the hands of the drawee, and upon his failure to pay, the defendant was liable under his general obligation. *Winchell v. Hicks*, 18 N. Y. 558; *Smith v. Ryan*, 66 id. 352. Nov. 29, 1887. *Manchester v. Braender*. Opinion by Andrews, J.

**TAXATION — CORPORATIONS — CAPITAL STOCK — VALUATION OF — REVIEW OF ASSESSMENT.**— (1) The manner of ascertaining the value of the capital stock of a corporation, for the purposes of assessment, is left to the judgment of the assessors, who may resort to all usual tests; and when the commissioner took the book value as the actual value of the stock, their assessment will be upheld, although they appeared to have erred in their judgment. (2) By virtue of Laws N. Y., 1880, chap. 269, entitled "An act to provide for the review and correction of illegal, erroneous and unequal assessment," an assessment is subject to review in the Supreme Court of that State, if it is found to be "illegal, erroneous, or unequal," and when an assessment violates no absolute rule of law, it is subject to no review except as prescribed by law, and the Court of Appeals has no power to interfere. Dec. 13, 1887. *People, ex rel. Knickerbocker Fire Ins. Co., v. Coleman*. Opinion by Earl J.

**TRUSTS — TO SECURE TIME PAYMENTS — ANTICIPATION.**— A trustee, under a mortgage for the benefit of infants securing payments at times stated, has no authority to receive payment in anticipation of the time expressed in the mortgage; and where he executes a discharge before the trusts expressed could have been performed, it is of no effect as against the infants, and such mortgage being duly recorded, purchasers of the land for valuable consideration, after the mortgage had been discharged, are charged with notice of the terms of the trust set out in it. *Field v. Schieffelin*, 7 Johns. Ch. 150, and other similar cases cited by the appellant, apply only where a trustee or guardian has a power of disposition of the estate, and may exercise it in his discretion. This power Deming did not possess. The discharge was in contravention of the trust, and therefore in fraud of the beneficiaries for whom the trust was created. By its very terms, the mortgage was to be a security, not only for the payment of the money, but to remain such security for the payment of money at specific times during the plaintiff's minority. The defendants knew this, and knew also, that the time when the trustee was authorized to receive payment had not arrived. His power was limited by the terms of the mortgage, and his apparent authority was his real authority. He had no power to vary its terms, nor receive payment in anticipation of the times fixed by the mortgage. His declaration or certificate that he had been paid was

therefore of no avail, against the express provisions of the instrument by which his power was defined. In case of default on the part of the mortgagor in paying, the mortgagee might, as the appellant says, foreclose, for power to do so is expressly given by the mortgage; but whether the security for future payments would then be found in the decree, or otherwise, would depend on circumstances not pertinent to the present inquiry. Nov. 29, 1887. *McPherson v. Rollins*. Opinion by Danforth, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**BANKS—NATIONAL—TRANSFER OF STOCK—LIABILITY OF ASSIGNOR.**—On the sale of shares in a national bank the name of the assignee had not been inserted in the blank left for that purpose in the transfer book of the bank, and in consequence the assignors were compelled, in a suit brought by a receiver, to contribute, as owners of such shares, toward the liabilities of the bank. The assignors then brought suit in a Federal court against their assignee to recover the money so paid. *Held*, that the action was not within the jurisdiction of the Federal court, as it was not brought to enforce any liability existing under the National Banking Act, nor growing out of the banking law, which imposes no duty on an assignee of shares to register his ownership for the protection of his assignor. Dec. 5, 1887. *Lessasser v. Kennedy*. Opinion by Waite, C. J.

**CARRIER—MISDELIVERY OF FREIGHT—PRESENTATION OF BILL OF LADING.**—Action against a railroad company by the assignee of freight receipts to recover for the misdelivery of live-stock to parties whom defendants had been directed to notify of the arrival of the property, but who presented no bill of lading or order of the consignee. It was not shown that plaintiff or the shipper had any knowledge that it had been the common practice of defendants to so deliver former shipments between the same parties. *Held*, that defendant was liable for the value of the stock. The duty of a common carrier is not merely to carry safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from his duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live-stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of designation to the party designated to receive them, if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of live-stock, is more strictly enforced. *Forbes v. Boston & L. Co.*, 133 Mass. 154; *McEntee v. Steam-*

*boat Co.*, 45 N. Y. 84. If the consignee is absent from the place of destination, or cannot after reasonable inquiries be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them. *Fish v. Newton*, 1 Denio, 45. If the freight consist, as in this case, of live-stock, the carrier will not, under the circumstances mentioned—that is, when the consignee is absent, or cannot after reasonable inquiries be found, and no one appears to represent him—relieve himself from responsibility by turning the animals loose. He must place them in some suitable quarters where they can be properly fed and sheltered, under the charge of a competent person as his agent, or for account and at the expense of the owner. Turning them loose without a keeper, or delivering them to one not entitled to receive them, would equally constitute a breach of duty for which he could be held accountable. These principles are firmly established by the adjudged cases, and rest upon obvious grounds of justice. *Ang. Carr.*, § 291. The railroad company, defendant below, should therefore have given necessary instruction to the drove-yard company, which was its agent for the custody and care of the cattle, respecting their delivery—that it should be made only upon the order of the consignee, who was also the owner and shipper. The joint way-bills given by the two companies at Waverly, equally with the original receipts given at Chicago, disclosed the name. Those joint way-bills were for the guidance of, and were used by, the conductors of both companies. *The Thames*, 14 Wall. 98. The direction on the receipts given at Chicago, and on the way-bills of the first shipment from Waverly, to "notify J. & W. Blaker," in no respect qualified the duty of the carrier to deliver the animals to the order of the consignee. If they were consignees, the direction to notify them would be entirely unnecessary, because the duty of the carrier is to notify the consignee on the arrival of goods at their place of destination. *Furman v. Railway Co.*, 106 N. Y. 579; *Bank v. Bissell*, 72 id. 615. It is true that the original receipts only bound the Michigan Central Railroad Company to carry safely the animals on its own road, and deliver them safely to the next connecting line. *Myrick v. Railroad Co.*, 107 U. S. 102. But the last carrier in the connecting lines was bound to deliver the animals at the place of destination, and to the consignee there, or to his order, if they were made known to it on receiving the freight from the preceding connecting company. In this case there is no question that the company had such knowledge when the cattle were received. The destination and the name of the consignee appear upon the way-bills given at Waverly. There were only two places at which the cattle were, on their way from Chicago, reshipped—that is, taken from the cars, and after a short interval of rest replaced. Waverly was one of these places, and when they were reshipped there these way-bills, with a designation of the destination and consignee of the cattle, were made out. The indorsement by Myrick to the plaintiff, the Commercial National Bank of Chicago, of the receipts, taken on the shipment of the cattle, transferred their title, and gave to the bank the right to their possession, and if necessary to sell them for the payment of the drafts. The fact that the railroad company at Philadelphia had been in the habit of delivering cattle transported by it to the Blakers through the drove-yard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieves the company

from liability for the cattle in this case. It was not shown that the shipper, or the bank which took the draft against the shipment, or its correspondent at Newtown, in Pennsylvania, had any knowledge of the practice, and therefore if any force can be given to such a practice in any case, it cannot be given in this case, where the party sought to be affected had no knowledge of its existence. In *Bank v. Bissell*, above cited, the defendants offered to prove a custom in New York to deliver property under bills of lading to the person who was to have notice of its arrival. The evidence was rejected, and the Court of Appeals held that there was no error in its rejection, stating that if the custom were established, it could not subvert a positive, unambiguous contract. Dec., 1887. *North Pennsylvania R. Co. v. Commercial Nat. Bank*. Opinion by Field, J.

**CONTRACT—GAMBLING—OPTIONS.**—(1) Rev. Stat. Ill., 1883, ch. 38, § 130, provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time" shall be liable to a fine, and the contracts shall be considered gambling contracts and void. Plaintiff sued to recover money placed in the hands of defendants for the purpose of selling grain for future delivery on the board of trade in Chicago, claiming that the contracts made by him were illegal. *Held*, that as the only option the defendant had was as to the time of delivery, and the contracts made by him were *bona fide* for the actual delivery of the grain, he could not recover. (2) Complainant employed defendant to sell grain for him on the board of trade in Chicago, and furnished him with money in the summer of 1882 to use as margins, in accordance with the rules of the board of trade, of which defendant was a member, and it was deposited by the defendant in a bank for that purpose. Complainant, with others, sought by a bill in equity to avoid payment of losses which ensued, but was unsuccessful. In 1883 he served a notice on defendant not to pay this money on the losses. Defendant was obliged to pay or lose his membership in the board, according to its rules. *Held*, that as the money had been devoted by complainant as well as defendant for the purpose of paying damages under the rules of the board, he had no claim against defendant in equity. (3) Rev. Stat. Ill., 1883, ch. 38, § 132, provides that any person losing and paying money on a bet can recover the amount of the winner. *Held*, that a commission broker on the board of trade, selling grain by the orders of a principal, who meets with a loss thereby, is not a "winner" from his principal. Dec. 5, 1887. *White v. Barber*.

**SUBSTITUTION OF NEW AGREEMENT—CONSIDERATION—ARBITRATION AND AWARD—DECISION OF ARBITRATOR—IMPEACHMENT—CONTRACTS—BREACH OF ACTION FOR.**—(1) Under a contract of agistment, cattle were to be wintered in hay, straw and stalk-fields, and toward the middle of summer they were to be fed on corn, and the defendant agreed to feed them, that they would increase in weight an average of 450 pounds each before the time for delivering them to the owners. During the winter several of the cattle died, and it was apparent others would succumb unless better fed, whereupon it was agreed between plaintiffs and defendant that they should be let into the corn, and that defendant should be released from his obligation to increase the weight of the cattle to the extent originally agreed. *Held*, that the giving of more nutritious food by the defendant, and his discharge by the plaintiffs from obligation to increase the weight as originally stipulated, constituted a good consideration for the substituted contract. (2) It was part of the contract that the condition of the cattle be ascertained by an arbitrator. It was urged that

the arbitrator had been misled, and was partial toward the plaintiffs, the owners. *Held*, that the acts of the arbitrator could not be questioned unless he had been deceived by the plaintiffs, who were bound, if they knew of any disease affecting the cattle, to disclose it. (3) The contract stipulated that if any steers should die, the hides should be preserved as evidence of death. After agistment a number of steers were not on hand, and the hides were not produced, but there was evidence to show that defendant had previously produced them to the plaintiffs, and requested them to accept delivery. In an action for a breach of contract, *held*, (1) that the offer to count the hides, if proven, might be taken as showing that defendant had the number of hides claimed, and that if the whole number of steers were thus accounted for, the defendant should not be held responsible for them; (2) that in order to recover damages for the non-delivery of the hides, their value must be shown. Dec. 5, 1887. *Teal v. Bilby*. Opinion by Miller, J.

**ESTOPPEL—WAIVER OF RIGHT OF ACTION—INDORSEMENT OF BONDS—IN PAIS—RIGHT OF ACTION—SUIT IN EQUITY—REMEDY AT LAW.**—(1) Defendants were agents of certain parties who had loaned money to a bank, and received certain bonds as collateral security therefor. The bank failed, and they offered the bonds for sale, buying them themselves, at the market price, and applying the proceeds on the debt of the bank. Complainants were commissioners, appointed to close up the affairs of the bank, and denied the right of the defendants to sell the bonds, and apply the proceeds as they had done in May, 1879. In May, 1880, complainants having leave from the court, indorsed the bonds to bearer, while in the possession of defendants, knowing they had been or were to be again sold by them, for the purpose of giving a good title. *Held*, that this indorsement and subsequent sale by defendants constituted a waiver by both parties of the first sale, and all rights under it, and a consent to the second sale. (2) Complainants, two years after the sale, without any effort to redeem the bonds, when they had increased to three times their market value at the time of the sale, brought suit to compel the delivery of the bonds, or in default thereof the payment of their present value, less the debt of the bank. *Held*, that as complainants had made no tender of the amount of the debt, and had been credited with the market value of the bonds at the time of the sale on the debt, and had waited until the bonds were greatly increased in value before bringing suit, the suit must be dismissed, when in addition complainants had indorsed the bonds at the time of the sale knowingly to enable defendants to give a good title. (3) There was no actual fraud proven. *Held*, that if complainants could recover at all, they had a complete remedy at law. Dec. 5, 1887. *Lacombe v. Forstall*. Opinion by Miller, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**FRAUD—IN PROCURING COMPROMISE—UNDUE INFLUENCE.**—The complainant was a man of intemperate habits, which was known to Moore, who invited him to Belgreen, where Moore resided, away from his friends and relations. Moore informed the ladies, including his own daughter, at the hotel where he was boarding, that complainant was coming, that he wanted to make a compromise or trade with him, and requested them to make it pleasant and agreeable to him. Complainant remained at Belgreen, staying at the hotel at which Moore was boarding, about a week, during which time he drank to excess. Moore informed Petree, at whose saloon complainant had



drunk at times, that he wanted to effect a compromise, and was anxious to get it fixed, and requested Petree not to interfere in the compromise. When complainant went to Petree for advice it was refused, because of his promise. No person seems to have been present at any interviews between Moore and complainant during his stay at Belgreen, nor is it shown that any interview took place; if any, they were private. On the morning of the last day of his stay, complainant signed and acknowledged the settlement, which was written by Moore, before the clerk of the Circuit Court, who says he was apparently sober. This is the first intimation given of the compromise having been made. The evidence makes a case of a deliberate and preconceived plan by a man of experience and mature years, to induce a young man of dissipated habits, addicted to excessive drinking, to become his guest at the hotel at which he and his family resided, and at a distance from his friends and relations, to bring him under influences that would make him more plastic, and more easily induced to make the compromise which Moore was anxious to effect, to prevent the advice and interference of others and to procure his signature to a settlement when a suitable time and occasion were afforded. These circumstances were not purged of their suspicious character, because complainant may have had mental capacity to contract, nor because he may have been sober after leaving Belgreen, nor because he may have wanted to get the money while living. It is not a question of mental capacity, but of good faith, though the probable effects of previous excessive drinking may be considered. Threats of protracted litigation, and a pressing desire and need of money, may have been inducements brought to operate on him. The record is silent as to the circumstances under which he agreed to the compromise, and his knowledge of its contents. The incidental circumstances, combined with gross inadequacy of consideration, which create a conviction of circumvention and undue advantage, call for explanation, and exact of those claiming the benefits of the compromise to show that complainant acted intentionally, with knowledge of its nature and contents, and that no undue advantage was taken of his situation. In the absence of such explanation the conclusion of fraud follows, and equity will not give effect and operation to the settlement. *Campbell v. Spencer*, 2 Bin. 129; *McKinney v. Pinckard*, 2 Leigh, 149; *McCormick v. Malin*, 5 Blackf. 509; 2 Pom. Eq. Jur., § 928. Ala. Sup. Ct., July 13, 1887. *Cleere v. Cleere*. Opinion by Clopton, J.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, Jan. 24, 1888:

Judgment of Supreme Court affirmed with costs, payable as therein directed—*Leslie A. Mead, general guardian, etc., appellant, v. William P. Cantwell, surviving executor, etc., respondent*.—Order affirmed with costs—*In re Application of New York City and Northern Railroad to acquire title, etc.*—Judgment of General and Special Terms reversed, and judgment ordered for plaintiff on his demurrer with costs—*Horace J. Allen, appellant, v. George C. Clark, respondent*.—Order affirmed without costs—*John G. Avery, respondent, v. New York Central and Hudson River Railroad Company, appellant*.—Appeal dismissed with costs—*Victoria K. Sweet, respondent, v. United States Mutual Accident Association of New York, appellant*.—Order of General Term reversed and that of Special Term affirmed with costs on all counts—*In re Gutta Percha Manufacturing Company, appellant, v. Mayor, etc., of Houston, respondent*.—Motions for admissions to the bar without regents' certificates

denied without costs—*In re Application of Francis G. Moore and Frank McConville, students at law*.—Motion to open default granted on payment of \$10 costs—*Peter A. Tilyou, appellant, v. Patrick R. Reynolds, respondent*.—Motion to restore case to calendar granted without costs—*Frederick M. Peyser, respondent, v. Metropolitan Elevated Railroad Company, appellant*.—Motion to restore case to calendar granted without costs—*Clayton Platt, appellant, v. Richmond York River, etc., Railroad Company, respondent*.—Motion to open default granted on payment of \$10 costs—*Prudence M. Wing, appellant, v. Ambrose S. Field, respondent*.—Motions for reargument denied with \$10 costs—*William H. Ensign and others v. Mills W. Barse and others; Same v. John L. McKinney and others*.

#### NOTES.

We have recently read of a deed, "in consideration of natural love and affection, the receipt of which is hereby confessed and acknowledged."

At the recent meeting of the Ohio Bar Association, Judge Harris, in an after-dinner speech, raised the question whether "women should not serve as jurors." Judge Green, who followed, and did not agree with Judge Harris, said: He had had experience. He had had an associate justice all through his married life. Upon one occasion he came home late at night with an important case upon his mind. His wife asked him what was worrying him. He replied that he was undecided in regard to a case in which was involved a National bank and a pretty woman whom he knew. "There is no question at all," replied his wife, "the bank ought to have it." The judge said that he was emphatically in favor of keeping up the custom of having ladies at the banquets, but he believed that their strong prejudices disqualified them from acting as jurors.

There is a deed on the records of Northumberland county, Pennsylvania, written by a quaint old lawyer in the last century. It conveys Lot No. 51, in the town of Lewisburg, and contains this recital of title: "Whereas, the Creator of the earth, by parole and livery of seizin, did enfeoff the parents of mankind, to wit, Adam and Eve, of all that certain tract of land, called and known in the planetary system by the name of the Earth, \* \* \* to have and to hold to them, the said Adam and Eve, and the heirs of their bodies, lawfully to be begotten, in fee-tail general forever, as by said feoffment recorded by Moses, in the first chapter of the first book of his records, commonly called Genesis, more fully and at large appears." It then recites that Adam and Eve died seized of the premises in fee-tail general, leaving issue sons and daughters, who entered into the same premises and became thereof seized as tenants in common; that in process of time they multiplied their seed on the earth, and became very numerous, found it to be inconvenient to remain in common, and "bethought themselves to make partition of the lands and tenements to and among themselves;" that the tract known on the general plan of the earth as America was allotted to certain of the heirs, eventually (now deemed time immemorial) a certain united people called the Six Nations of North America, heirs and descendants of said grantees of America, became seized of a part of the tract now called Pennsylvania. This is followed by an accurate recital of the conveyance by the Six Nations to the Penns. and from them down to the grantor. The scrivener omits all reference to the Royal grants to William Penn. He was either a very good lawyer, or intensely anti-British. It is more than likely that he was both.—*Legal Intelligencer*.

# The Albany Law Journal.

ALBANY, FEBRUARY 4, 1888.

## CURRENT TOPICS.

ASSISTANT District Attorney Semple and the judges of the New York General Sessions seem to have conflicting views of the public duty of prosecuting officers, if the accounts of the daily newspapers are trustworthy. The difference grows out of the convictions of obscenity in the McGrath and DeLeon cases, in which Mr. Semple declined to present briefs or to argue on appeal at the General Term, owing to his opinion that there "is no provision for the punishment of such dastardly offenders as DeLeon." Judge Cowing is represented as saying, among other things, that this was a "mistake," but he is "disposed to be very charitable. Mr. Semple is a young man, has much to learn, and very likely this incident will do him good. If his idea were to be entertained it would make the district attorney's office an appellate court." And it is reported that Judge Gildersleeve added the following comments: "Mr. Semple's duties in the district attorney's office are cast iron, and there is scarcely an excuse for a deviation from his fixed line of duty. It was his duty to prepare all cases on appeal, and to uphold the judgments of these courts in every legal way. He had no right nor power to say whether the trial was fair or not, or whether the evidence was admissible or inadmissible. It was his duty, and his only duty, to investigate all the material in the hands of the district attorney looking toward an affirmation of the judgment of the lower courts." An eminent member of the New York city bar writes us as follows: "We do not know Mr. Semple and have no interest in him, but we venture to say that Mr. Semple seems as nearly right as the judges, if they are correctly reported in the *Times*. We beg to remind the judges that the district attorneys are the successors of the assistant attorney-generals. Originally in New York the attorney-general was the public prosecutor, and represented *Respublica*. Indeed some of the indictments, such as *Respublica v. Sweers*, were conducted by the attorney-general in person, and many of the cases for the people were led by him. The duties of the district attorneys are in all cases those of the attorney-general under similar circumstances, and the attorney-general's powers are prescribed by the common law. At common law an attorney-general who prosecuted against his conscience would be regarded as highly censurable. His duty was to the State and to the prisoner as much as to the State. A prosecutor who would push for a conviction under all circumstances, whether the accused was guilty or not guilty, would be highly censurable, and ought himself to be brought to the bar. So far as the judges quoted take another view, they are not right if the com-

mon law is the criterion of the public prosecutor's function. Perhaps Mr. Semple should have determined his duty at the Oyer and Terminer, not in *banc*, but in any event the judges are wrong in their statement of the law in *abstracto*." In this we concur, and would add that the power and responsibility of entering *nolle prosequi* is in and upon the district attorney. Mr. Semple may be wrong in his law, but he is right in his ethics.

It is remarkable how fond lawyers have always been of Shakespeare, and how much they have written and printed about him, especially in regard to his legal acquirements. To say nothing of Lord Campbell, we have had in this country Mr. Franklin Fiske Heard, Senator Cushman R. Davis and Mr. Appleton Morgan, who have devoted much time and research toward showing that Shakespeare must have been a lawyer. The only exception that we can recall is ex-Judge Nathaniel Holmes, now a Harvard Law School professor, who is a rabid Baconian, and has published a large book to prove that the great philosopher and lawyer wrote the Shakespearian plays. Shakespeare is Col. Ingersoll's god, and if any Baconian should dare to ventilate his audacious theories in his presence the irate colonel would probably start him toward "that undiscovered country," etc. Mr. Morgan has just published a book entitled "Shakespeare in Fact and in Criticism," which is one of the most entertaining contributions to Shakespearian literature that we have ever read, full of acuteness, ingenuity, and a delicious sarcasm. One chapter is entitled "Law and Medicine in the Plays," in which he concludes that "this Shakespeare then was a lawyer," but purposely uttered bad law in the Shylock case in order to produce the best stage effect. Mr. Morgan gives the opinion of the court in review of Portia's decision granting a new trial, with the syllabi and all in due form—a very clever skit. Mr. Morgan demolishes the Baconian theory in a chapter devoted to it, and in various arguments scattered through the work. For some of his opinions he need not apply for a patent, for no one will think of infringing; as for example, that Hamlet was the very essence of decision and determination, who moved inexorably to the execution of his purpose; that Ophelia was not in love with him, but was meanly willing to betray him to her father and the king; that the sonnets were a consecutive poem, and that Shakspeare did not write them; that Elizabeth ordered a play representing Falstaff in love, and that Shakespeare in compliance wrote "Merry Wives of Windsor." But all these opinions Mr. Morgan advocates with a lawyer's skill, and it is really refreshing to have something new about Shakespeare. Let every lawyer who loves the great bard read this entertaining book.

Chicago seems to be the paradise of law editors of the female sex. There is Mrs. Bradwell, the (we do not dare say veteran) editor of the *Legal News*,

and there is Mrs. Catharine V. Waite of the Chicago *Law Times*, the first number of the second volume of which is before us. This is an interesting number. Judge Cassoday of Wisconsin contributes a biographical sketch of Lord Mansfield. Mr. James M. Kerr of Rochester, N. Y., contributes an article entitled "Diogenes or Antipater, which?" consisting in a review of the two novel and contradictory cases of *Sherwood v. Walker*, 36 ALB. LAW JOUR. 243, relating to the sale of a blooded cow, erroneously supposed by the owner to be barren, for eighty dollars, and *Wood v. Boynton*, 64 Wis. 265; S. C., 54 Am. Rep. 610, relating to the sale of a valuable diamond for one dollar by the owner, a woman, who did not know the value of it. This latter case of course appeals to the sympathies of all women. The editor's husband furnishes an article on "The Sixteenth Amendment — Senator Ingalls in 'The Forum.'" There is also an article on "Reform in Civil Procedure" by (Mr. we suppose) M. J. Gorman, and one on "Inter-State Commerce as affected by the late Wabush decision," by Mr. John W. Smith. The editorial notes contain a sharp criticism of Mr. C. L. Bonney's pamphlet on "Our Remedy in the Laws." Mr. Waite's "Notes of Travel in England and Ireland" may usefully be skipped. Mr. Hamilton Willcox of New York advertises that he "will, without charge, advise women how to proceed in obtaining their rights." We understand that at our last election he advised them to swear in their votes, and that several have been indicted and are in danger of punishment for following Mr. Willcox's ridiculous and gratuitous advice. Gratuitous advice is seldom good.

A correspondent submits to us a proposed substitute for section 829 of the Code of Civil Procedure, and desires us to advocate it or to suggest some emendation of the offending section. We hereby respectfully decline to have any thing to do with that section. The only appropriate thing to do to it is to abolish it. There is no more reason in shutting a party out simply because the opposite party is dead than in excluding one disinterested witness merely because another disinterested witness is dead. The true theory, and the theory now in vogue is, that every party shall be heard, and the jury or the court shall judge of the comparative credibility. The law cannot "even things up," and if one party has died that should not render the other party unworthy of credit. Is it not preposterous to concede that one man should possibly lose his right because another man has died? That is the plain English of it.

Among the most interesting and instructive of our exchanges has been for many years the *Journal of Jurisprudence and Scottish Law Magazine*, now in its thirty-second year. We are glad to see that its editor proposes to broaden its scope and increase its usefulness in the manner which he points out as follows: "It is proposed, then, to make the *Journal*

of *Jurisprudence* still more worthy of its name, and to devote a portion of its contents every month to the discussion of the fundamental principles and the burning questions of the science, such as the characteristics and position of the different schools of law, the rights of property, the family and its legal relations, the rights of succession, and the doctrine and forms of contract. Nor will commercial and international law be forgotten. In order to deal interestingly and competently with these important topics, the resources of continental, and especially German, French and Italian juristic literature will be drawn upon, and this will form a marked new element in the *Journal*. It is believed that the discussion of the subjects by the most eminent continental jurists, such as Savigny, Stahl, Puchta, Bluntschli, Laurent, Rosmini, Gioberti and distinguished living writers, will be welcome to readers of the *Journal*, and some of their most interesting and valuable contributions will be reproduced in our pages during the year. At the same time increased attention will be paid to the more practical wants of the profession." The current number contains a paper on the "Medical Jurisprudence of Inebriety," by Mr. Clark Bell of New York, well known to our readers.

Mr. E. D. Palmer, our townsman, has presented to the State a bronze copy of the arms of the State, executed by him on stone for the Washington monument at the national capitol. In 1850 Governor Fish, by authority of the Legislature, commissioned Mr. Palmer to do this work, and it was executed and forwarded. Mr. Palmer could then find no definite and authoritative data, but his original design was adopted and used by the State on its seal for more than thirty years. Subsequently, through the researches of the late Dr. Homes, the State librarian, it was discovered that the traditional arms adopted by Mr. Palmer was not correct, and a new design was made and officially adopted, and under legislative authority Governor Hill commissioned Mr. Palmer to re-execute the arms for the monument. This he has done, on one-half in thickness of the original stone, which had been returned, and of this new design he has had this bronze copy made, and has hung it in the main executive chamber at the capitol. The original stone, a black marble, peculiar to this State, is in another room, and will eventually be set in the wall — as soon as it appears that it will not tumble down, we suppose. With characteristic modesty Mr. Palmer has omitted to put upon the bronze any indication that it is a gift from him.

#### NOTES OF CASES.

IN *Case v. Perew*, 46 Hun, 57, an action concerning a maritime collision, a mariner, familiar with the locality in question, was asked how far a bright light at the window of the cabin of the plaintiff's canal boat could be seen by a person on

the pilot-house of the defendant's propeller. *Held*, proper. The court said: "The evidence is of a fact derived from observation, and the conditions being in all respects the same the distance which the light could be seen would be uniform, as its effect is dependent upon natural causes only. In *McKerchnie v. Standish*, 6 N. Y. W. Dig. 433, a witness who had made astronomy a study was permitted to state how far a certain vessel would be visible at half-past six o'clock, P. M., on October 15th, if there was nothing to interrupt the view. The court, on review, remarked that this evidence was merely speculation and not to be relied upon unless other evidence failed, and that its competency even then was doubtful. The statement of the witness there does not appear to have been supported by any observation or knowledge other than that derived from his astronomical information, and by that he must have undertaken to measure the obstructive force of twilight, merely by the application of science as an expert. We assume that the statement made by the witness of the distance the light could be seen was based upon his knowledge obtained from his observation as a mariner, and as such was competent for the same reason that a person who has given attention to the movement and velocity of railroad trains may give his opinion of their speed on occasions when he has observed their passage. *Northrup v. N. Y., O. & W. R. Co.*, 37 Hun, 295. And as to the time requisite for walls of a building to dry and become fit for occupation. *Smith v. Gugerty*, 4 Barb. 615, 625. The reason of the rule which permits such evidence is that knowledge on the subject is not common to all, but comes from the personal observation and experience of those only who have given it attention, or by habits and business have gained information which enables them to have and understandingly express a judgment in respect to the matter of inquiry, and when without the aid of such evidence the jury might have no means of intelligently considering the fact. But the value when given of opinions is always for the jury to determine." In the same case the court said: "The plaintiff offered and put in evidence that portion of Dr. Jayne's almanac which purported to show the time of the rising of the moon on October 2, 1881, to which objection and exception were taken. The almanac was not competent evidence as such to prove when the moon rose on that or any day. But if the statement on the subject in it was correct the defendant could not have been prejudiced by it. Judicial notice will be taken of the time the moon rises and sets on the several days of the year as well as of the succession of the seasons, the difference of time in different longitudes, and the constant and invariable course of nature. It may be assumed that the court, treating the almanac as correctly stating the time when the moon rose on the day in question, received it in evidence to refresh the memory of the jury on the subject. And in that view we think it was competent. *State v. Morris*, 46 Conn. 179; *Munchower v. State*, 55 Md.

11; S. C., 39 Am. Rep. 414. In the latter case the court held that the almanac was the most accurate available source of information on the subject, and therefore competent. In England the almanac annexed to the book of common prayer has been treated as part of the law of that country, but as that did not contain anything about the rising or setting of the sun, Pollock, C. B., expressed doubt about the admissibility of the almanac as evidence of the fact. *Tutton v. Darke*, 5 Hurl. & Norm. 647. And in *Collier v. Nokes*, 2 C. & K. 1012, it was held that while the courts would take judicial notice of days they would not of the hours of the day in the calendar."

The London *Solicitors' Journal* says: "An interesting question is stated to have been recently decided by the judge of the Southwark County Court in a case of *Flint v. Bell*. The action was to recover compensation from a Turkish bath proprietor for the loss of a watch, chain, purse containing £2 10s. in money, and a pair of boots, intrusted by the plaintiff to the defendant to keep for him during the period of bathing. The valuables had been placed by the defendant in a drawer, the key of which an assistant of the defendant handed to the plaintiff, who put it in his waistcoat pocket, and the boots were placed by the plaintiff in 'the place provided for them.' The bath over, the key was missed, and so were the boots; and it turned out that the valuables had been handed by the attendant to a man who produced the key (which he no doubt had extracted from the pocket of the plaintiff's waistcoat) and paid for the bath, and took the opportunity to walk off in the plaintiff's boots. The learned judge held that the defendant was a gratuitous bailee, and (see *Doorman v. Jenkins*, 2 A. & E. 256) liable for gross negligence only, which he thought had not been proved, and therefore he gave judgment for the defendant. The question seems to be more one of fact than of law, being, in our opinion, whether the charge for the bath was intended by the parties to include a charge for the safe custody of the valuables and the boots. None of the articles lost could have been taken by the plaintiff into the bath with him, and custody of the clothes, etc., of bathers by the proprietors of baths is a necessary incident of the user of the bath for which the hire is paid. Was not therefore the hire paid for the user of the bath and the custody also? We cannot but think that it was, the keeping of a locked drawer and the handing the key to bathers being evidence of a habitual practice, which the plaintiff might be taken to know of, and to expect to be followed in his own case. On the other hand, to hold a bath-keeper liable for the loss of a ring worth £100 or so, or for a £1,000 bank note, would be very hard; and we think that a bath-keeper's implied contract could only be said to be to keep such articles in addition, of course, to clothes, as a customer might reasonably be expected to bring with him, though if the bath-keeper accepted custody of articles unreasonably brought, there is some

ground for saying that the implied contract would extend to them also." Somewhat analogous is the case of *Minor v. Staples*, 71 Me. 316; S. C., 36 Am. Rep. 318, holding that the innkeeper, who also keeps a sea-bathing house separate from the inn, is not liable for goods and clothes of his guest, left there while the guests were bathing, and stolen therefrom. See also *Rea v. Simmons*, 141 Mass. 561; S. C., 55 Am. Rep. 492, where it was held that a tailor was not responsible for the loss of his customer's valuables stolen from his clothes laid aside while he was trying on a new suit in a closet. The contrary however was held in a precisely similar case. *McCollin v. Reed*, Penn. Com. Pl., 55 Am. Rep. 493, note.

In *Earl v. Lefler*, 46 Hun, 9, a practical test of evidence was admitted. It was held that in an action for breach of warranty of a horse, an impression of his mouth in wax or plaster was competent in evidence. The court said it might "be classed as a species of evidence with diagrams, drawings and photographs." *Gibson's Law Notes* informs us that "the other day Kay, J., amused himself and his court with a performance of dancing-dolls!" We shall look for an account of that case with curiosity. In the Crewe County Court, in *Powell v. Parker*, a fox terrier was in dispute. The dog was brought into court, and as the evidence was conflicting, his honor toward the end of the case had the animal placed beside him on the bench, and the plaintiff went to the far end of the court and called out, "Sam, Sam." No sooner did it hear the voice than it found its way through a crowded court to the plaintiff, and began to gambol around him. The defendant had described the dog as partly deaf. The judge said he believed the dog belonged to the plaintiff, and gave a decision accordingly.

#### THE NEW EXTRADITION BILL.

THE inter-State extradition bill, prepared by a committee appointed by the inter-State Conference recently held in the city of New York, if adopted by Congress, would repeal the present law on this subject, as originally enacted in the first and second sections of the act of February 12, 1793, which, with slight alterations not affecting their general character, subsequently became sections 5278 and 5279 of the Revised Statutes of the United States. These sections read as follows:

SEC. 5278. "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory, to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive

authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

SEC. 5279. "Any agent so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent, while transporting him, shall be fined not more than \$500, or imprisoned not more than one year."

This law does not prescribe any preliminary arrest and detention of the fugitive, in advance of the demand for his delivery, or of the action of the executive of the State or Territory who is directed to make the delivery. It takes effect *only* when a demand has been made. It does not, in terms, forbid State regulations, in the exercise of the police powers of the States, for the arrest and detention of fugitive criminals, prior to the demand for their delivery, and with a view to facilitate the end at which the law aims. It assumes that the executive authority of every State has the constitutional right, without any legislation by Congress, to demand the delivery of any person, who being in that State legally charged with treason, felony, or other crime, has fled therefrom, and "is found in another State," and also that Congress has power to provide by law for a compliance with such demand when made. The law does not directly impose any duties upon the demanding executive, and does not directly subject him to any limitations, restrictions, or regulations in exercising the right of demand.

It is only to the executive on whom the demand is made that the law speaks; and what it says to him is, that on certain conditions specified, either expressly or by necessary implication, it shall be his "duty" to do the things named in the statute. These conditions are the following: 1. The person to be arrested and delivered up must be charged with treason, felony, or other crime against the laws of the State or Territory from which the demand proceeds. 2. The charge must be in the form of an indictment found or an affidavit made before a magistrate of that State or Territory. 3. A copy of this indictment or affidavit must accompany the demand for delivery. 4. This copy must, by the demanding executive, be certified as authentic. 5. The person demanded must be shown to be a fugitive from the State or Territory charging him in this way with crime therein, and to be in the State or Territory on whose executive authority the demand is made. 6. There must be a formal and official demand, by the executive authority of the State or Territory from which the person thus charged has fled, addressed to the executive authority of the State or Territory to which he has fled, and in which he is found, for the arrest and delivery of this person as a fugitive criminal.

These conditions, simple and plain in their character, furnish the rules by which the delivering executive, in making the delivery of a fugitive criminal, is to be governed; and whether in a given case they have been complied with or not, by the demanding executive, is a question for the former to determine. The latter must supply these conditions, in order to bring the case within the terms of the law, whatever other conditions he may adopt before making demands, or the law of the State or Territory may prescribe for his observance. The law of Congress knows nothing about any conditions other than those which it specifies; and as to the obligation of delivery, they are

matters of no consequence to the executive upon whom the duty of delivery is imposed. It is sufficient for him if the conditions contained in the law are complied with. The obligation then exists, but not otherwise.

Executives of States and Territories have, as a rule, undoubtedly aimed to give effect to the law by acting according to its letter and intent. If they commit mistakes, as sometimes they have done, by ordering the arrest and delivery of persons not coming within the conditions prescribed, then these persons have a legal remedy for the correction of such mistakes by suing out a writ of *habeas corpus* from a competent court, whether State or Federal, which court has full power to afford them summary relief against any illegality in their arrest and detention. There is nothing in the law that excludes a resort to this remedy.

A law that in a republican government has, without change, and without any general demand for a change, stood the test of experience for nearly a century, ought not to be hastily repealed, and ought not to be repealed at all, without a strong probability of putting a better law in its place. Had there been any serious failures on the part of governors of States or Territories to perform the duties imposed upon them by the law, the presumption is that ere this Congress would have devised some system of purely Federal agency for the arrest and delivery of fugitive criminals, and prescribed with sufficient detail the rules to be observed by such agency. It has this power. *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, and *The Matter of Voorhees*, 3 Vroom, 146. The fact that the law has been in operation for so long a period, and that Congress has hitherto seen no sufficient reason for any change in it, is an equal presumption that there is no practical necessity for changing it. The law as to simplicity, brevity, and clearness of statement, is a model; and to it has been added a large number of precedents, executive and judicial, in the way of interpretation and application.

It is moreover to be remembered that Inter-State extradition is in no sense a *trial* of the guilt or innocence of the party subject to the process. The only question to be considered is whether the party comes within the conditions for his arrest and delivery as prescribed by law. *The Matter of Clark*, 9 Wend. 212. If this fact appears, then he is to "be delivered up, to be removed to the State having jurisdiction of the crime." His trial will take place, if at all, in that State. The simpler the legal machinery for the execution of the constitutional mandate on this subject the better, provided that it involves no injustice to the party accused.

An indictment by a grand jury, or a complaint under oath before a magistrate competent to administer an oath and issue a warrant of arrest, is the usual American manner of making a legal charge of crime, and thus initiating criminal proceedings against a party; and hence Congress very properly saw fit to adopt this manner in providing for the charge of crime in extradition, with a view to a trial in the State or Territory in which the crime is charged to have been committed. The simple object is to secure the party thus accused, and place him in the jurisdiction competent to try him.

Inasmuch also as the demand must be made by "the executive authority of the State from which" the party "fled," Congress in providing for his arrest and delivery, with equal propriety, vested the power of such arrest and delivery in the executive authority of the State or Territory to which he had fled, and in which he is found, to be exercised upon the prescribed evidence of a charge of crime. The whole proceeding on both sides is therefore conducted by the supreme executive authority of a State or Territory.

Chief Justice Booth, commenting, in *State v.*

*Schlemm*, 4 Harring. 577, upon the Constitution and the act of 1793, said: "The right and power under the Constitution of the United States, and the first section of the act of Congress of 1793, to demand, arrest, commit and surrender fugitives from justice, are exclusively vested in, and confided to, the executive authority of the State from which the fugitive has escaped, and that of the State where he has taken refuge." These executives are State officers; and the same is true of all the agents who act by their appointment. Do these officers, in being charged with the duties and clothed with the powers specified, become officers of the United States? Judge Sawyer, in *In re Robb*, 19 Fed. Rep. 26, answered this question in the affirmative. The Supreme Court of the United States, in *Robb v. Connolly*, 111 U. S. 624, overruling the decision of Judge Sawyer, answered it in the negative. So also the same court, alluding in *Taylor v. Taintor*, 16 Wall. 306, to extradition cases, said: "In such cases the governor acts in his official capacity, and represents the sovereignty of the State, in giving efficacy to the Constitution of the United States and the law of Congress."

This settles the question that State officers do not become Federal officers when carrying into effect the law of Congress for Inter-State extradition. The law creates no office, but simply empowers certain State officers, namely the governor of a State or Territory, to do certain things.

The question whether Congress can confer such authority upon State officers was considered by the Supreme Court of the United States, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539, and answered in the affirmative. That decision related to the act of February 12, 1793, which provided for the rendition of fugitive criminals, and also of fugitive slaves; and in both respects it was held to be a constitutional exercise of power vested in Congress. Mr. Justice Story, in stating the opinion of the court, said:

"We hold the act to be clearly constitutional in all its leading provisions, and indeed with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty upon the grounds stated. As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may still exist on the point, in different States, as to whether State magistrates are bound to act under it, none is entertained by this court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

The words "State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation," imply that such magistrates are at liberty not thus to choose, and also that State legislation may forbid them to exercise the authority in question, in which event they would not be bound to exercise it. The general fact however that Congress may legislate for the execution of the extradition provision of the Constitution, and that in such legislation it may impose duties and confer powers upon State officers, who do not thereby become Federal officers, has been settled by the Supreme Court of the United States, and is not now in dispute.

The question whether Congress has power to compel these State officers, by such legislation, to perform the duties assigned to them, was considered by the Supreme Court of the United States, in *Kentucky v. Dennison*, 24 How. 66, and answered in the negative. Dennison, who was the governor of Ohio, refused to deliver up a fugitive criminal upon the demand of the governor of Kentucky. Kentucky then applied to the Supreme Court of the United States for a *mandamus* to compel him to make the delivery, and the court overruled the application, on the ground that "there is no power delegated to the general government,

either through the judicial department or any other department, to use any coercive means to compel him," if he refuses to make the delivery. Chief Justice Taney, in stating the opinion of the court, said:

"Indeed such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. \* \* \* It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal."

The same doctrine was stated by the same court, in *Taylor v. Taintor*, 16 Wall. 306.

The legal result derived from these authorities is the following: 1. That Congress has power to legislate for the execution of the extradition provision of the Constitution. 2. That in so doing, it may authorize State officers to perform the duties specified in such legislation. 3. That no power has been delegated to the general government to enforce upon these officers the performance of these duties.

Having thus stated and briefly explained the existing law of Congress for inter-State extradition, and cited the above authorities in regard to it, we are now prepared to consider the question whether the bill proposed as a substitute for it, would on the whole be an improvement upon the law which it is intended to supersede and repeal. It certainly would not be, so far as execution by State officers is concerned, since it contains this feature as fully as does the present law, and in this respect would not change the law at all. The bill embraces twelve sections, the first four of which constitute far the larger part of it, and are designed to secure *uniformity* of extradition procedure throughout the United States.

1. The first of these sections declares that "when-ever any person is presumptively shown to have committed treason, felony, or other crime in any of the States of the United States, and is found in any other State thereof, he shall be arrested and held as a preliminary proceeding to his extradition to the State where the crime was committed." The arrest is to be made on "complaint or information" before "a court or magistrate in the State in which said person is found," and the complaint or information is to be supported by the evidence recited in the section. The court or magistrate is to issue a warrant of arrest directed to a competent officer. The party, being brought before the court or magistrate, may be admitted to bail pending the extradition proceedings, if the offense charged is "bailable by the laws of the State in which he is found"; and if unable or unwilling to give bail, then he is to be committed to prison for thirty days," to await the appearance of a duly authorized agent of the State in which the crime was committed." If no such agent appears within the time specified, he is to be discharged. Prompt notice of these proceedings and of such commitment to prison is to be given to the governor of the State in which the crime was committed, to the end that he may, if so desiring, take the proper steps for the extradition of the party. Such is the substance of this section.

No provision for preliminary arrest and detention is contained in the existing law; and there is no practical necessity for it in any law to be enacted by Congress. State laws providing for such arrest and detention, in order to facilitate the execution of the law of Congress, and making it the duty of governors, to whom demands have been addressed for the delivery of fugitive criminals, to act in conformity with

this law, are already in existence, and have been for years. These laws have been held not to be inconsistent with the law of Congress. *Ex parte Ammons*, 34 Ohio St. 518; *Mohr's case*, 2 Ala. L. J. 547; *The Commonwealth v. Tracey*, 5 Metc. 537; *Ex parte Cubreth*, 49 Ca. 436.

These State laws are enforceable under State authority, and just as efficient for the purpose of a preliminary arrest and detention, as this section would be if enacted by Congress, without any power to enforce the duty which is prescribed by it. Why then should Congress undertake to do what the States themselves have already adequately done? Why should it seek to supersede State legislation in a matter that properly belongs to the States themselves, and in respect to which they have shown no indifference? We certainly do not want and could not well have two systems of legislation—one by the States and the other by Congress—operating concurrently upon the same territory, for the preliminary arrest and detention of fugitive criminals. We already have one, and that is quite sufficient. Why not let well enough alone?

And still further, Congress, in adopting this section, would make a law to operate in advance of any demand for the delivery of a fugitive criminal by the executive of the State from which he is assumed to have fled. The theory of the Constitution and of the present law is, that until a demand has actually been made for such delivery, nothing is to be done by Congress on the subject. This section however reverses this theory, and provides for a preliminary arrest and detention in advance of any demand. The States may do this in the exercise of their police powers; but it is difficult to see how Congress, acting under the extradition clause of the Constitution, can make a law to operate in the States *before* any demand for the delivery of a fugitive criminal. The Constitution authorizes Congress to provide for the delivery of such a criminal when a demand has been made by "the executive authority of the State from which he fled," but does not, in express words, or by just implication, authorize Congress to provide for his arrest and detention prior to such demand. The demand is, by the terms of the Constitution, the *initial* point at which the power of Congress begins. Whatever the States may see fit to do before this is a matter of their police powers. No such powers belong to Congress.

2. The second section of the bill specifies the "preliminary proceedings," which "shall be necessary before a demand can be made by the executive authority of a State for a fugitive from the justice thereof, who is charged with having committed treason, felony, or other crime therein, upon the governor of a State to which such fugitive has actually fled." These "proceedings" are set forth in detail, and made precedent to any right of demand.

If then Congress should adopt this section, it would prescribe a series of rules that must be observed in making an application to the governor of a State, asking him to demand the delivery of an alleged fugitive from justice, and also a series of papers which must be presented to him, before he "can" make the demand. Such governor being a State officer, there would be no power in the general government to enforce upon him the observance of these rules. Their observance would be either a matter of his own discretion, or of regulation by State laws, defining under what circumstances, and upon what evidence, he shall make a demand for a fugitive criminal. It is clearly within the power of a State Legislature thus to regulate the action of a State governor.

There is moreover no occasion for this section, since the Constitution both recognizes and implies the right of demand by the "executive authority" of every State. It further implies that Congress has no power



to place direct restrictions and limitations upon this right. Assuming the right, it does not imply or declare that the demand shall be complied with under all circumstances, but specifically designates the conditions of such compliance. It is sufficient for all practical purposes to specify, as is done in the present law, the constitutional *conditions* upon which the executive, to whom the demand is addressed, shall comply therewith. These conditions, being rules to guide his action, would of course be such to guide the action of the demanding executive, provided he expected to secure compliance with his demand. The law, as it now is, leaves demanding executives to infer what they must do from what it says to delivering executives. It makes no rules for the former, except as they are involved in rules to guide the latter. It also leaves the several States to determine for themselves by law when, and under what circumstances, their respective governors shall make demands for the delivery of fugitive criminals. This is better, and more in accordance with the true doctrine of State rights, than the law would be if changed as proposed in this bill.

3. The third section declares that "the executive of any State *may*, upon the papers mentioned and described in the foregoing section, demand a fugitive from the justice thereof, who has committed treason, felony, or other crime therein, of the executive of the State in which such fugitive shall be found, and the executive of the State upon whom such demand has been made *shall* comply with such demand when the same is made in conformity to the provisions of section two of this act."

The "papers" here referred to, are those which must accompany an "application" for a demand by the executive of the State who is asked to make it. These papers must be presented to him before, according to the second section, he has any power to make a demand. If on the basis of these papers, he makes a demand, then the executive of the State, to whom it is addressed, must comply therewith, if it is made "in conformity to the provisions of section two of this act." It is not expressly said, but implied, that the papers must accompany the demand. A blank form is given which must be used by the demanding executive.

The theory of the second and third sections, taken together, is to designate the procedure in accordance with which a demand must be made, if at all, and in this way specify the conditions in the presence of which a delivery must be made. The theory of the law, as now existing, is to prescribe the conditions upon which a delivery must be made, and thus indicate to the demanding executive what he must do in order to secure such delivery.

There is a very marked difference between these two theories, as one will readily see by comparing the second and third sections of this bill with section 5278 of the Revised Statutes of the United States. The theory of the present law is much the simpler one. It leaves the States to regulate the matter of making demands as they shall see fit, subject only to the necessity, in such regulation, of complying with the constitutional conditions of the obligation of delivery as specified by law. It does not force absolute uniformity of procedure upon all the States, as is proposed in this bill, in making demands for fugitive criminals. It is enough for the demanding executive, when making a demand, to produce "a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled," and by necessary implication, to show the fact

of flight from such State or Territory to the State or Territory to whose executive authority the demand is addressed. This being done, then the obligation of delivery, as defined by law, is established.

But this is by no means enough according to the provisions of the second and third sections of this bill, taken together. An exact procedure instituted and pursued by the State officer named, and involving a great variety of particulars, and resulting in the production of a series of specified papers, must be had before either a demand or a delivery can be made. The case becomes a complicated one by the details of this procedure, especially so when compared with the simplicity and sufficiency of the present law. The proposed legislation by Congress is excessive. Far the better way is to leave the States, in making demands, to regulate the matter of procedure for themselves, provided always that they must supply the constitutional conditions of the obligation of delivery, as already established by law.

4. The fourth section of the bill specifies the "proceeding" that shall be had when the demand is complied with, and gives a blank form of the warrant of delivery to be issued by the delivering executive to an officer competent to make service of the same. This officer, before making an actual delivery of the party arrested to the agent named in the warrant, is to bring him before "a court of record or a judge thereof," which court or judge is to inform him, that if he so desires, he may have a writ of *habeas corpus* to test the question of identity, or the "legality of the process generally." The court or judge, if issuing such writ and determining the case adversely to the prisoner, is to direct the officer having him in custody to deliver him to the agent designated in the warrant. If the decision be in favor of the prisoner, then he is to be discharged, unless other good cause appears for his detention. If the warrant appears defective, or has been improperly executed, then it is to be returned to the governor for correction, and the hearing is to be adjourned a sufficient time for this purpose, and in the meantime the party is to "be held in custody" until the case is disposed of.

It is plain upon the face of these provisions that the warrant of the delivering governor is, at the option of the party arrested, simply a means of arrest and bringing the case before "a court of record or a judge thereof." The *real* delivering power, if the prisoner so desires, is lodged in this court or judge, and not in the governor at all. His warrant amounts to nothing, except as a means of arrest, unless thus confirmed. The law, as it now is, makes the governor's warrant *conclusive* as to the right of removing the party "to the State having jurisdiction of the crime" charged, without excluding his right to sue out a writ of *habeas corpus*, and thus test the legality of the proceeding against him. This is amply sufficient for his protection.

The last paragraph of this section is a penal one, and among other things, provides that "any officer, agent, or person, who shall by force, threats, or undue influence, compel, persuade, or induce any person to go from any State, in which he may be in, to any other State, to answer a charge or pretended charge of crime, \* \* \* shall be deemed guilty of a felony, and on conviction thereof shall be punishable by imprisonment at hard labor for a term not less than five nor more than ten years." Such penal legislation is not beyond the power of a State in respect to its own inhabitants. But it would be interesting to know what clause of the Federal Constitution authorizes Congress to pass such a law. There surely is nothing in its extradition clause that gives this authority, and no other clause of that instrument has any relation to the subject.

5. The fifth section of the bill provides as follows:

"No person having been surrendered to the State demanding him as a fugitive from justice, shall be detained therein by any legal process, except for the crime on the charge of which he was removed thereto, nor shall he by such State be surrendered to another State, until reasonable time, for his return to the State from which he was so removed, shall have elapsed after his discharge, by acquittal or otherwise, in respect to the crime for which he was surrendered: *Provided*, That if, while in the actual custody of such demanding State, he shall commit another crime against its laws, he may for the same be held, tried and punished according to the laws thereof."

This section, though having nothing to do with the question of procedure in demanding and surrendering fugitive criminals, asserts a very important principle on the subject of extradition whether it be inter-State or international. Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States, in *United States v. Rauscher*, 119 U. S. 407, very clearly stated this principle. It is difficult to see why his reasoning in this case is not just as applicable to inter-State extradition under the Constitution and laws of the United States, as it was to the case before the court, which was one of extradition under the tenth article of the treaty of 1842 between the United States and Great Britain. The principle is that the party extradited, himself committing no fault to make an exception against him, is to be held *only* for the crime charged in the extradition proceedings, until he has had a reasonable opportunity of returning to the State or country from which he was so removed.

6. The sixth section of the bill declares that the governor of a State, in issuing his warrant of delivery, may therein provide "that said fugitive be brought before him, and if said governor become satisfied by legal proof that the extradition proceeding has been invoked for private purposes, he may revoke the same and direct the discharge of the fugitive." It is well settled, by the practice of governors and also by judicial decisions, that under the law, as it now is, State governors, after they have issued the warrant of delivery, may at any time before the actual removal of the fugitive to the State demanding him, order a rehearing of the case, and revoke their own warrants for causes which they deem sufficient. Governor Fairfield's opinion, 24 Am. Jurist, 226; Governor Cullom's opinion, *Spear on Extradition*, (2d. ed.), 713; *The case of James Carroll*, Chicago Legal News, September 23, 1873, and *Work v. Corrington*, 34 Ohio St. 64. Governors have repeatedly revoked their own warrants, assuming that so long as the party remains within their jurisdiction they have this right. The objections to this section of the bill are these: 1. It implies that governors have no such right, except as they specially provide for it in their warrants of delivery. 2. It limits by implication the right of revocation to the single case named in the section.

7. The seventh section provides, among other things, that if the agent designated in the governor's warrant does not appear within a month to receive the fugitive after the court or judge shall have ordered his delivery to such agent, then the "fugitive shall be discharged." The law as it now is provides, that "if no such agent appears within six months from the time of the arrest, the prisoner may be discharged." This may have been a proper period when the law was originally enacted; but with our modern facilities for rapid communication and travel, the period of detention for the appearance of the agent is far too long.

8. The eighth section makes the proposed law applicable "to an escaped convict, and to a convict who has served a portion of his term and been according to law conditionally released." This though not ex-

pressed, is substantially implied in the present law. It is well to have the idea distinctly expressed.

9. The tenth section declares that "nothing in this act shall be construed to authorize the judiciary or any other department of the government of the United States to compel any governor to deliver up a fugitive from justice." This so far as it relates to governors of States, makes Congress, if passing the section, declare that it does not intend to do what, according to the decision of the Supreme Court of the United States, in *Kentucky v. Dennison*, 24 How. 66, it has absolutely no power to do. In other words, Congress would say that it does not design to enact a constitutional impossibility. It is hardly worth while to say this.

The doctrine asserted is, according to the deliverance of Chief Justice Taney in *Kentucky v. Dennison*, *supra*, just as applicable to all State officers empowered by Congress to execute any law enacted by it for inter-State extradition, as it is to governors of States. But it is not equally applicable to governors of Territories or territorial officers acting under their authority, since such governors and officers are subject to the supreme legislative power of Congress.

10. The eleventh section repeals sections 5278 and 5279 of the Revised Statutes of the United States, in which the present law for inter-State extradition is found.

The reader has now before him the proposed law and the existing law. Which is the better of the two, taken as a whole?

The radical difficulty with the proposed law, especially in the first four sections, which constitute nearly the whole of it in the quantity of matter, has its basis in the idea of securing an absolute *uniformity* of extradition procedure throughout the United States, and in the further idea that it is the *exclusive* province of Congress to furnish all the law relating to inter-State extradition. The first of these ideas is a good one, so far as it is practicable under our duplicate system of government.

The second idea is not true. Inter-State extradition is mainly an affair between the States themselves; and these States are not mere municipalities, deriving their rights and powers from the general government, but political sovereignties, and as such, possessing and exercising all the powers of government, except those exclusively delegated to the general government, and those denied to them by the Constitution of the United States. It is true, as the Supreme Court of the United States has decided, that Congress has power to legislate on the subject of inter-State extradition, and that the law, as originally enacted in 1793, is constitutional; and it is just as true that the States have power to legislate in respect to fugitive criminals coming within their jurisdiction, and that they have so legislated, by providing for a preliminary arrest and detention of such criminals, by making it the duty of their respective governors to comply with the law of Congress in respect to their extradition, and by designating under what circumstances these governors shall demand fugitive criminals from other States. It is also true that Congress can enact no law for inter-State extradition, to be executed by State officers, the duties of which it can enforce upon these officers against their pleasure, or against the pleasure of the States themselves.

There is a doctrine of State rights and State powers, to be taken into consideration by Congress when legislating on this subject. The bill in question is framed as if exclusive, legal omnipotence on this subject were vested in Congress. Such is not the fact. Congress can pass no law "to cover the whole method of procedure" in any sense that excludes from the

States the right, in their discretion, to arrest and detain fugitive criminals when coming within their respective territories, or that excludes from them the right to direct their own governors in making demands for such criminals. The present law makes no such attempt, but leaves an unoccupied field for State legislation not inconsistent with it, but rather auxiliary to it: and in this respect it is clearly right. The proposed law, in seeking to carry out the theory of *uniformity* of procedure, undertakes to do too much. The idea of uniformity is plainly a good one, so far as it can be attained; but it is not the only idea to be considered.

BROOKLYN, N. Y.

SAMUEL T. SPEAR.

# NUISANCE—UNDERTAKER'S ESTABLISHMENT.

COURT OF CHANCERY OF NEW JERSEY,  
DECEMBER 9, 1887.

WESTCOTT V. MIDDLETON.

An undertaker's establishment, in which he keeps coffins, ice-boxes and cases in which he preserves the bodies of the dead, and in the rear of which he cleanses and dries such boxes, is not necessarily a nuisance, although in a populous city.

**B**ILL for permanent injunction.

*J. J. Crandall*, for complainant.

*E. A. Armstrong*, for defendant.

BIRD, V. C. The parties to this controversy own adjoining lots in the city of Camden. The complainant occupies his as a dwelling-house and for offices. The defendant occupies the basement and first floor of his dwelling to carry on the business of an undertaker, using the front room as an office, the second room as a place to keep supplies, and the second and third stories with his family. On the lot of the defendant, back of the first and second rooms, is a kitchen or extension, between which and the lot of the defendant is an open space going back to the rear of the lot, which is 180 feet deep. In this open space is a hydrant. The cellar of the defendant is used for storing lumber, which as occasion requires he takes out in the rear, through this open space, to a shop which is at the extreme rear end of his lot, there to be used in making boxes. The complaint is that the defendant is guilty of maintaining a nuisance in the maintenance of this business of undertaking, and that the complainant is entitled to the aid of this court in being relieved therefrom. There is a charge that the defendant disturbs the complainant in the manufacture of boxes. This point is practically abandoned. But the complainant insists, in the first place, that this business is carried on in an unlawful manner; and in the second place, that the defendant has no right to carry on this business where he does. The proof shows that the defendant buries from 100 to 150 persons a year, and the vehicles which he uses for that purpose are driving to and from his place of residence about four times in every case; so that from 500 to 600 times during the year the complainant has the opportunity, if he attends thereto, to be reminded that death has taken place, that some one is a corpse, and that preparations are being made for the funeral; or that some one has just been buried. In every such case the defendant uses a large box in which the corpse is preserved, as far as possible, from decomposition, by use of ice in another box, made of tin, which is placed di-

rectly over the corpse. Formerly the tin box opened underneath, by a tube running down through the box containing the body, to carry off the water, as the ice melted. This is now dispensed with, so that there is no connection whatsoever between the ice and the corpse. These boxes which are so used to preserve the body are taken, after the burial, to the residence of the defendant, through his office and store to the rear thereof; and in this narrow space, by the side of the hydrant, are often washed, and if not washed there, are washed further back in the yard. They have been allowed to remain there for an hour, and sometimes longer; occasionally all night. The complainant insists that he has several times noticed offensive odors from those boxes, which have greatly distressed him and given him alarm. Indeed it may be said that there is no doubt but that the complainant has been frequently exercised in his mind on account of the presence of these boxes, which have been receptacles of the dead; nor is there any doubt but that he has observed offensive odors, but whether from these boxes or not is not so clear to my mind. There were odors arising from that locality, but the defendant insists that they came from a drain which he found to be choked up on two occasions, and that after the drain had been opened and cleaned there were no longer any odors. The complainant insists that these odors were of the character that he says they were, because flies were attracted there in great numbers, among which was what is known as the blow-fly, which is supposed, according to the testimony, more likely to be attracted to places where there is animal decomposition than the ordinary fly. The defendant admits the use of the premises for the purposes alleged in the bill. He also admits placing the boxes referred to immediately in the rear of the main part of his house, and by the hydrant in question, and of cleansing them there; but he insists that they were never allowed to remain there any longer than was necessary before they were thoroughly cleansed and dried, and when cleansed and so dried, were immediately taken away and put under cover. He says also that he never takes to this place of business any box which has been used in case the corpse was of a person who had died of any contagious disease without first thoroughly cleansing the box. The defendant has also shown that on two occasions the drain referred to was so stopped up as to produce offensive odors, which were not perceived when the drain was open. So that after the fullest consideration my mind is led to the conviction that the odors complained of may have arisen from some other source than that alleged by the complainant. In other words, I am not satisfied that the defendant has conducted his business in such an unlawful manner as to cause any undue annoyance or discomfort to the complainant.

But the further contention, that the business itself is a nuisance, is of great importance, and cannot be passed by without the fullest consideration. The claim is that it is impossible to carry on business of this character without constant liability to communicate diseases to those who reside in the neighborhood and that this liability creates dread, discomfort and apprehension, which abridges the rights of property. It is insisted that the deadly spore will, in spite of the utmost precaution, be carried about in such vessels, and are liable to be dislodged and to be communicated to the nearest inhabitant at any moment, impregnating him with the seeds of death.

In the first place, admitting the possibility of danger lurking in every box where the person buried therefrom has died of a contagious disease, what is the duty of the court? Should the court say that such business, however lawful, cannot be carried on in a

populous part of the city? I am not prepared to assent to that doctrine. It is quite clear to my mind that this, like many other occupations, may be so conducted as to be a nuisance. For example, a grocer might allow his vegetables to decay in such quantities and in such localities upon his premises as to do infinite harm to his neighbors, and subject him to the penalties of the law, or to the restraint of a court of equity. The same may be said of the vendor of meats; so negligent might he be as to scatter disease and death to multitudes. But because these things are possible, or may occasionally happen, it is not pretended for a moment that it is unlawful to carry on the grocery business, or to vend meats, in populous parts of our cities. It seems to me that the same reasoning may be applied, with great certainty, to the business of undertaking. It may be carried on so negligently, with such indifferent regard to the rights and feelings of others as to be not only an offense to the tender sensibilities of the intelligent and refined, but to be a direct menace to the health and open violation of the civil rights of all residing in the neighborhood.

Now, as in the case supposed, there is a remedy which does not go to the destruction of the occupation, but which at the same time protects the rights of others in the comfortable enjoyment of their property, so in the case at hand, it seems to be most clear, that the court has it within its power to prevent the misapplication of a legal right, and that to go further would be a destruction of that legal right. The law means to protect every one in the enjoyment of such rights, in the enjoyment of his health, as well as in the enjoyment of his property, on the one hand, and on the other, in the enjoyment of his legitimate vocations, as well as in the possession of his property. The defendant has a right to the possession of his property; and to carry on a legitimate business there in a lawful manner is an equally sacred right. Is the business in which the defendant is engaged a lawful one? To a certain extent that is not disputed. Has he a right to carry it on on the premises which he owns and occupies? He certainly has, unless it unreasonably interferes with the lawful rights of another. The counsel for the plaintiff, perceiving the force of this view, and what would be likely to result therefrom under the evidence, insisted at last that carrying on the business of an undertaker by the defendant was in itself so obnoxious to the complainant as to render his house uncomfortable, and that the fact alone was sufficient to justify this court in restraining the defendant from the use of his premises in carrying on said business. But it has not been shown that disease of any kind has ever been communicated by any act or omission of the defendant. It is not in evidence that the fatal spore has ever been allowed to remain in any of the boxes which the defendant and his employees have handled as children do their toys; nor does it anywhere appear that any special risk has been presented in the management of this business. Therefore as to the first question, I must conclude that the complaint cannot prevail.

In the second place, it is urged that the business of an undertaker is a nuisance *per se*. Is this proposition maintainable? Must the undertaker retire from the inhabited parts of our villages, towns and cities? Is an occupation which is absolutely essential to the welfare of society to be condemned by the courts, to be classified with nuisances, and to be expelled from localities where all other innocent and innoxious trades may be carried on? In other words, is this business so detestable in itself as unreasonably to interfere with the civil rights or property rights of those who dwell within ordinary limits, and who can and do, without effort, see and hear what is being done? The

inquiry is not whether it is obnoxious to this or that individual or not; but whether or not it is of such a character as to be obnoxious to mankind generally, similarly situated. There are certain obnoxious or offensive sights, certain poisonous or destroying gases or odors, certain disturbing sounds or noises, which affect most persons alike; can the business of an undertaker be classed with any of these? Is the business of an undertaker of this class? Before the court can condemn a trade or calling it must appear that it cannot be carried on without working injury or hurt to another; and as I have said, that injury or hurt must be such as would affect all reasonable persons alike similarly situated. The law does not contemplate rules for the protection of every individual wish or desire or taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the State.

But to proceed with the case before me. Let us ascertain from what standpoint or under what circumstances the complainant regards this employment a nuisance *per se*. Mr. Westcott is one of the most highly respected citizens. He is about seventy-two years old. As to the subject-matter in hand, and every thing akin to it, he is most sensitive or tender. It is conceded that he has an extraordinary horror or repugnance to contemplating any thing pertaining to death or to the dead. Such emotions or feelings so control him that he has not attended a half-dozen funerals during his long life. As he advances in years this sentiment becomes more and more intolerable. It is urged, and with great reason, that these facts being so, Mr. Westcott's judgment is not only overcome by his imagination, but that innumerable evils are created thereby for his soul to feed upon, which he charges in this case to the defendant. Plainly the circumstances are special, and most unsafe to found any general rule of law upon. Giving the complainant credit for all he can possibly be entitled to, and keeping in mind what he actually suffers, whether justly or unjustly, whether it be the result of imagination or an over-sensitive nature or not, and also keeping in mind the rights of the defendant, how far can the court go with safety in protecting Mr. Westcott in his home, and securing to him every comfort that a citizen is entitled to in the enjoyment of that home? Many observations which have been made in disposing of the first branch of the discussion are equally applicable here; they will not be repeated. The court in disposing of every such question cannot but at once look beyond the judgment to be given in the particular case; the court cannot but inquire, what next, or where will such judgment lead to? The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. One may complain of the smell of vegetables, another of fresh meats, another of the ordinary sound of the anvil, another of the running of a saw or the humming of machinery, and the like, without limit, every case being as meritorious as the one now under consideration. Hence the value of general principles can never be lost sight of. A wide range has indeed been given to courts of equity, in dealing with these matters, but I can find no case where the court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons similarly situated alike.

My attention has been called to the case of *Railroad Co. v. Angel*, 41 N. J. L. 316. The principle there laid

down is of great value in every such case. The defendant was engaged in a lawful business, but so used its tracks in making up its trains and distributing its cars in front of the complainants' dwelling, that by reason of stench, noises, smoke, steam and dirt thereby occasioned, the comfort of the complainants' home was seriously impaired. The court below allowed an injunction against such use of the road; but the court did not pretend to hold that the company must abandon the use of its tracks altogether. It was only decided that the company had no right to allow its engines or cars to remain in the presence of or near by the house of the complainants, making hideous noises, emitting smoke and steam and unwholesome odors, to the great discomfort of the complainants in their home. The judgment of the court simply looked to the proper exercise of the lawful rights of the defendant, and in the lawful exercise of those rights where inconvenience or annoyance the complainants might suffer they must submit to. Engines in passing might whistle or emit smoke, steam and dirt, cattle might bellow, sheep bleat and hogs squeal, but to that extent the complainant must yield to the general demand. To this extent the court was sustained on appeal. I can find nothing in that case to lead me to say that the business of an undertaker is a nuisance *per se*.

My attention has also been directed to *Cleveland v. Gas-Light Co.*, 20 N. J. Eq. 201, in support of complainant's views. In that case the court said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained. \* \* \* To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is, what amounts to that discomfort from which the law will protect?" The learned chancellor then made this important observation: "The discomforts must be physical; not such as depend on taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort." For a strikingly similar definition, see *Walter v. Selfe*, 4 Eng. Law & Eq. 15.

In this case then we have the broad yet perfectly perceptible or tangible ground or principle announced that the injury must be physical, as distinguished from purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy. This is very comprehensive; indeed I cannot conceive of a more liberal or broad statement of the law, yet I apprehend it is a true delineation of the law. How therefore shall I apply this rule? I must find that physical discomfort has been produced or will be; but in so doing I must not forget the influence of the imagination or a morbid or abnormal taste on the mind and body. What has been disclosed by the proofs? These facts: Mr. Westcott and the defendant have lived side by side, in the same houses, for about eleven years. During all this time the latter has carried on the business of burying the dead in about the same open and unpretentious manner that he now does. There is no evidence that Mr. Westcott or any other person has ever been afflicted by reason of the defendant's occupation; indeed nothing has been attempted in that direction. Yet it is admitted that this trade has been and is carried on by the defendant in the midst of the most populous part of the

city of Camden. And what to my mind is of very great consequence, in considering whether this trade affects the body of Mr. Westcott through what is known as the bodily senses, or through his imagination or taste, is the fact that not another person has been produced who has been affected as he has been. As just stated, great numbers from day to day look out upon this establishment just as Mr. Westcott does, although at a greater distance; but if the injury results from seeing these evidences of the havoc of disease and of death, then surely distance cannot mitigate it, and while so many others have been subject to the same influences, not one has been offered to say that he has suffered any annoyance or discomfort by the presence of this employment in the neighborhood; and although the business of undertaking, caring for and burying the dead, has been conducted in about the same manner from the earliest times (that is, in an open and public manner, in the town and city, as well as in the country), and so continues to be, where the most refined and cultivated abide, as well as where the unpretentious do, yet from no class has any one been brought to testify to any bodily or mental injury or suffering because an undertaker was carrying on his vocation in his neighborhood.

Hence in my judgment, before a trade or business can be declared a nuisance *per se*, it must be made to appear that it necessarily works injury, discomfort or annoyance to the property or persons of citizens generally who may be so circumstanced as to come within its influence. It is not enough that only one person, and that one the complainant, alleges discomfort; and certainly his case is greatly weakened when he admits that so sensitive is he on the subject that in seventy-two years he has not attended a half-dozen funerals. If the court can compel this defendant to cease his trade next door to Mr. Westcott, because the sight of these instruments used in burying the dead have an unhealthy influence on his mind, then the vendor of crape and the artist who cuts tomb-stones and monuments will inevitably be liable to the same condemnation. See *Demarest v. Hardhan*, 34 N. J. Eq. 479, 474.

Perhaps I ought to remark that the case of *Barnes v. Hathorn*, 54 Me. 124, so much relied on by counsel of the complainant, rested on a very different state of facts, in this, that there was not only a tomb on the land of the defendant within forty-four feet of the dining-room to the plaintiff, but that at the time of the action the defendant had a dead body in it, and was shown that once before it had six deposited therein, and that experts swore that effluvia injurious to health escaped therefrom. Nor is the case of *Clark v. Lawrence*, 6 Jones Eq. 83, in any sense like the one before me.

The results of my inquiries are that while the defendant has no right to conduct his business so as to endanger or threaten the health of the complainant, or to make his home uncomfortable, either by filling the air with noxious vapors or the germs or seeds of disease, the evidence does not show that he has done either, and that the business of an undertaker is not a nuisance *per se*.

The bill should be dismissed with costs.

#### OFFICE AND OFFICER—JUSTICE OF THE PEACE HOLDING OVER TERM—VALIDITY OF ACTS.

SUPREME COURT OF OREGON, NOV. 23, 1887.

HAMLIN V. KASSAFER.

Where one had been elected justice of the peace, and had discharged the duties of that office, but at the next election was defeated, and on the expiration of his term re-

fused to surrender the office, its docket, and the books and papers thereunto belonging to his successor, who had received the certificate of election, and who had duly qualified thereunder, *held*, that the incumbent so holding over under claim or color of right was an officer *de facto*, and his official acts were valid as to the public and third persons, and could not be collaterally impeached.

**A**CTION to recover personal property alleged to have been wrongfully taken in execution under a judgment recovered before one exercising and performing the functions of a justice of the peace. Judgment for the defendants in the court below, whereupon plaintiff brought this appeal.

W. R. Andrews, for appellant.

H. K. Hanna, for respondents.

**LORD, C. J.** This action was brought by the plaintiff against the defendants to recover certain personal property alleged to have been wrongfully taken. The defendants admitted the taking, but justified in substance to this effect: That on the 28th day of September, 1887, the defendant Carlton recovered a judgment in a justice's court before one E. D. Foudroy, against the plaintiff Hamlin, for the sum of \$80 and costs; that execution was issued thereon, and placed in the hands of the defendant Kassafer as constable, and that the property aforesaid was seized and taken into custody under the same, etc. The plaintiff denied the recovery of the judgment in the said justice's court, or in any court, etc. Upon issue being thus joined, the issue raised was as to the validity of said judgment.

The evidence, as disclosed by the bill of exceptions, is in substance that one E. D. Foudroy had been elected justice of the peace for the precinct of Jacksonville at the general election in 1884, and had entered upon the discharge of the duties of his office; that at the general election in 1886, Foudroy was again a candidate for that office, but was defeated by one G. A. Hubbel, who received the certificate of election, and duly qualified, and that he demanded of the said Foudroy the possession of said office, its docket, and books thereunto belonging, but that Foudroy refused to surrender the same, and continued to exercise and perform the functions of the said office; that thereafter, and at the time of the rendition of the said judgment by the said Foudroy, he was in possession of said office, in which he held court as a justice of the peace, and of the docket and books, and also a sign at the door notifying the public he was such officer; that the defendant Hubbel, when said judgment was rendered, was in possession of the town hall, and had acted as, and performed the duties and functions of, a justice of the peace, and that these matters were open and notorious; but the evidence indicates that these acts were performed in his official character as a city recorder, by virtue of which he was *ex-officio* justice of the peace; that the defendant Carlton, at the time of the recovery of said judgment, was a resident of Bedford, and had no knowledge of any dispute as to who was justice of the peace. Upon this state of facts, the court gave several instructions, which were excepted to, and refused to give another, which constitutes the main source of grievance, and from which it is evident that the plaintiff sought to have the court instruct the jury that the defendant Foudroy was a mere usurper when the judgment was rendered by him.

It is admitted therefore that this record presents only one question—was Foudroy a *de facto* officer? Upon this point there would seem to be a little room for controversy; for conceding, as was argued, that Hubbel, by reason of official duties performed at the

town hall, was reputed to be a justice of the peace, it by no means follows that their acts operated to displace Foudroy, and induct him into the possession of the disputed office. To render the judgment void, Foudroy must have presumed to act without any just pretense or color of title. As this is the contention of counsel for the plaintiff, it may not be amiss to note preliminarily some distinctions as to officers which will render the law applicable to the facts in hand more evident.

An office has been defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it; and Chief Justice Marshall says: "He who performs the duties of that office is an officer." From the inherent nature of an office, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time. It becomes important then to observe the distinction between an officer *de jure* and an officer *de facto*. Lord Ellenborough said: "One who has the reputation of being the officer he assumed to be, and yet is not a good officer in point of law," is an officer *de facto*. *King v. Bedford Level*, 6 East, 356. To constitute a person an officer *de facto*, he must be in the actual possession of the office, and in the exercise of its functions, and in the discharge of its duties. When this is the fact, necessarily there can be no other incumbent of the office. An officer *de jure* is one who has the lawful right to the office, but who has either been ousted from or never actually taken possession of the office. When the officer *de jure* is also the officer *de facto*, the lawful title and possession is united; then no other person can be an officer *de facto* for that office. "Two persons cannot be officers *de facto* for the same office at the same time." *McCahon v. Commissioners*, 9 Kans. 442; *Boardman v. Hallday*, 10 Paige, 232; *Morgan v. Quackenbush*, 22 Barb. 80. "An officer *de facto*," said Storrs, J., "is one who exercises the duties of an office under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and on the other hand, from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office. It is not, in all cases, easy to determine what ought to be considered as constituting a colorable right to an office, so as to determine whether one is a mere usurper." *Plymouth v. Painter*, 17 Conn. 588. The distinction then which the law recognizes is that an officer *de jure* is one who has the lawful right or title, without the possession, of the office; while an officer *de facto* has the possession and performs the duties under the color of right, without being actually qualified in law so to act, both being distinguished from the mere usurper, who has neither lawful title nor color of right. The mere claim to be a public officer is not enough to constitute one an officer *de facto*. There must be some color to the claim of right to the office, or without such color, a performance of official duties, with the acquiescence of the public, for such a length of time as to raise a presumption of colorable right. *Brown v. Lunt*, 37 Me. 428; *Burk v. Elliott*, 4 Ired. 355; *Conover v. Devlin*, 15 How. Pr. 477; *Ex parte Strang*, 21 Ohio St. 610. Said Sutherland, J.: "There must be some color of election or appointment, or an exercise of the office, and an acquiescence for a length of time, which would afford a strong presumption of at least a colorable election or appointment." *Wilcox v. Smith*, 5 Wend. 233. See also *State v. Carroll*, 88 Conn. 449. It may be said then that the color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the pre-

assumption of colorable right by election or appointment. From considerations of public policy, the law recognizes the official act of such officers as lawful to a certain extent. It will not allow them to be questioned collaterally, and they are valid as to the public, and as to third persons who have an interest in the thing done. *People v. Stevens*, 5 Hill. 630; *Burton v. Patton*, 2 Jones (N. C.), 124; *People v. Sassovich*, 29 Cal. 480. Within the scope of this authority, the acts of an officer *de jure* are valid for all purposes. Not so with an officer *de facto*; his acts are only recognized in the law to be valid and effectual so far as they affect the public and third persons. As to these his acts are as valid as if he were an officer *de jure*. The reason of the rule is apparent. It would be unjust and unreasonable to require every individual doing business with such officer to investigate and determine at his peril the title of such office. "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to say that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertained that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having its acts collaterally called into question." *Devenus, J.*, in *Petersilea v. Stone*, 119 Mass. 467. Besides it is against the policy of the law to allow a suit between private individuals to determine the title to an office. Such judgment could only bind the parties, and would be of no effect as against the public.

Upon the facts of the case in hand, Foudroy was not an intruder, and did not usurp the office. He may have been holding over without legal authority. His term had expired, but he had not been ousted, but remained in the possession of the office, and continued to exercise the functions and discharge its duties. A mere usurper is one who acts without color of title, and whose acts are utterly void. *Hooper v. Goodwin*, 48 Me. 80; *Tucker v. Atken*, 7 N. H. 113. Said Christian, J.: "A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent, without any color of title whatever, and his acts are void in every respect." *McCraw v. Williams*, 33 Grat. 513. Certainly in no view of the facts can Foudroy be regarded as an intruder or usurper within this purview of the law. From the fact that there was evidence tending to show that at the town hall Hubbel had discharged duties belonging to the office of a justice of the peace, and was reputed by some persons to be such officer, the counsel for the plaintiff assumes as a consequence that Foudroy had been dislodged or ousted, and that these acts, without in fact being in possession of the office, its books or docket, operated in some way, I suppose, to give him constructive possession, and to constitute him an officer, not only *de jure*, but *de facto*, and to make the acts of Foudroy those of an intruder or usurper.

Laying aside the fact that the witness who testified as to such acts of Hubbel in the town hall, also stated on cross-examination that Hubbel was at the time city recorder, by virtue of which he was an *ex officio* justice of the peace, and that he did not know whether such acts were performed as an *ex officio* justice of the peace or not, it is plain law that no such consequences resulted. Foudroy being in possession of the office with the legal indicia of title, he was a *de facto* officer, and until the question of title was settled by a proper proceeding he may discharge the duties of the office. "Until then," that is, ousted by *quo warranto*, says Mr. Blackwell, "he holds the office by the sufferance of the State, and the silence of the government is construed by the courts as a ratification of his acts, which

is equivalent to a precedent authority. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them." Blackw. Tax Titles, 117.

In *Leach v. Cassidy*, 23 Ind. 449, the court say: "The law has provided abundant means by which an officer *de jure* may become such *de facto* against another who wrongfully holds possession; but the public are interested, that while such litigation is pending to settle the right, the functions of the office shall continue to be exercised, in order that public business may be done. To this end it is a rule of plain common sense, as well as law, that an officer *de facto* shall act until he be ousted." Again, the same court, in *State v. Jones*, 19 Ind. 358, Perkins, J., said: "But if when such person attempt to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by law. If such elected or appointed person finds the office in fact vacant, and can take possession uncontested by the former incumbent, he may do so," etc. To the same effect, in *Conover v. Devlin*, 5 Abb. Pr. 171, it is said: "The public interest—the interest of all persons having business with the office in controversy—imperatively requires that until the question of title can be decided there should be some one person recognized as in peaceable possession *de facto* of the office, and of course of the muniments necessary to discharge its duties."

In *State v. Durkee*, 12 Kans. 314, the court say: "The interest of the public requires that somebody should exercise the duties and functions of the various offices pending a litigation concerning them, and no one has a better right to do so than the various officers *de facto* who claimed to be officers *de jure*." "It would be a strange doctrine," said Valentine, J., "to announce that whenever an officer steps out of the place where he usually does his business, that any person who chooses to claim the office may at once step in, and become immediately an officer *de facto*. Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office. The only legal remedy in such case for the party out of the office to obtain the possession of the same is by a civil action in the nature of a *quo warranto*." *Brady v. Theritt*, 17 Kans. 471. The evidence is that Hubbel, who was elected and qualified, demanded the office, but that Foudroy, who was in possession, refused to deliver it up, or the books, papers and docket, but remained in possession of the same, exercising its functions and discharging its duties, when the judgment claimed to be void was rendered.

How then could Hubbel be in possession of such office? If he could not acquire possession, and make himself an officer *de facto*, by slipping in when Foudroy was out of the place where he kept his office, according to the authority last cited, how could the acts supposed to have been performed as a justice of the peace in the town hall operate to give such possession, or constitute him an officer *de facto*? However much he may have been entitled to obtain the office, nothing but actual incumbency could make him the justice of the peace of the precinct to which he was elected. Note the analogy of the facts in *Morton v. Lee*, 23 Kans. 287, to the case in hand. For brevity, they are taken from the syllabus. Where a person is duly appointed by the governor of the State as a justice of the peace, and thereafter qualifies and enters upon the discharge of the duties of the office, and is placed in full possession of the books, papers and docket pertaining to the office, and after the expiration of his appointment continues to hold over, and refuses, upon demand of his successor in office, to deliver up the books, papers and docket of the office, and has full



charge and control of the same, and continues to discharge the duties of the office, and is generally recognized by a large portion of the people where he holds his office as such officer, held that he is a justice of the peace *de facto*, and his acts as justice of the peace, though not those of a lawful officer, are valid, so far as they involve the interest of the public and third persons.

In *Carlt v. Rhener*, 27 Minn. 293, Smith, who had been elected judge, qualified, and thus under a statute became *de jure* a judge in the place of his predecessor, N., whose term then expired. Thereafter, upon the same day, before S. began to perform the duties of the office, N. directed judgment in an action he had tried. Held that his acts in doing so were those of an officer *de facto*, and were valid.

From these citations it must be manifest that where one is holding over after the expiration of his term under claim or color of right, his official acts are those of a *de facto* officer, and are valid as to the public and third persons, and cannot be collaterally assailed. And it must be considered as equally well settled that while he is in possession of such office, when an adverse claim is made, he may continue to exercise the office until the question is settled. As Foudroy was never ousted, or in any manner abandoned the office, but continued in possession thereof, with all its legal incidents, exercising its functions and discharging its duties, he was a *de facto* officer, and as such, when the judgment was rendered, it cannot be collaterally assailed.

The judgment of the court below must therefore be affirmed.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**BOUNTIES—TO VOLUNTEERS—LIABILITY OF COUNTY—AUTHORITY OF TREASURER—NOTICE TO SUPERVISORS.**—(1) A county was largely indebted on account of bounties paid to volunteers in the civil war. These debts were in the nature of short loans. To provide for their payment taxes were levied each year, and the treasurer was authorized by the board of supervisors to procure an extension of time of payment of such portion of the debts as the several towns owing the same might desire. The authority was given every year up to 1875. The treasurer assumed to exercise the authority thus given by borrowing money to pay maturing obligations, and give notes of the county therefor signed by himself as treasurer. *Held*, that under the provisions of Laws N. Y., 1864, §§ 8, 72, relating to the payment of bounties to volunteer soldiers, the county board was vested with power to borrow money and renew its obligations, from time to time, for the purpose of paying or continuing its indebtedness incurred in the payment of bounties, and its previous obligations with respect thereto were legalized, and the power assumed by the treasurer pursuant to the resolutions of the board of supervisors was upheld by said acts; following *Parker v. Board Sup'rs Saratoga Co.*, 106 N. Y. 392. (2) The board of supervisors authorized the treasurer to procure an extension of time on the "town bounty debt," which was done by giving new notes and bonds, and taking up the old obligations or making new loans. *Held*, that though strictly speaking there was no such debt, yet as it was well known what debt was meant by the description, the county was not released from its liability on the renewal; following *Parker v. Board of Sup'rs Saratoga Co.*, *supra*. (3) The amount which the treasurer was empowered so to borrow was restricted to that necessary to extend such part of the debt as he was requested to extend, and the authority to give new obligations was limited to the amount actually extended. In an action

against the county to recover on notes given in renewal of an old obligation, it appeared that the treasurer had fraudulently given notes largely in excess of the amount necessary to extend the debt. *Held*, that the authority of the treasurer to borrow money and give new notes having been proved, the burden was upon the county to show that this particular transaction was in excess of the treasurer's actual authority, in order to be relieved of its obligation; following *Parker v. Board Sup'rs Saratoga Co.*, *supra*. (4) A member of the board of supervisors of a county is bound to exercise only ordinary diligence in the performance of official duties, and he cannot, from his position, be held chargeable with knowledge of the unlawful acts of the county treasurer done under color of the authority of the board of supervisors, but in excess of the authority granted by them. Dec. 13, 1887. *Clark v. Board of Supervisors of Saratoga Co.* Opinion by Earl, J.

**COMPOSITION—CONTRACT TO GIVE UNDUE ADVANTAGE—EFFECT—ACTION BEFORE MATURITY.**—(1) In consideration of the plaintiff executing a composition deed, the assignee of the insolvents, without the consent of the other creditors, delivered an agreement to purchase the composition notes coming to him for a much larger sum than was payable under the notes. *Held*, that the agreement was fraudulent, and could not be enforced. (2) *Held*, that the plaintiff being *particeps fraudis*, could not avoid the deed, nor could he enforce the original notes: they being released and discharged by it. (3) A creditor is entitled to receive payment under a composition deed to the extent provided by it, although he has fraudulently obtained an agreement from the assignee of his debtors whereby he sought to obtain a larger sum. When action is brought on composition notes before maturity, judgment will not be given on them. He has not forfeited all claims upon his debtors, and there is no ground upon which he can be deprived of all remedy against them. He must either have the composition notes, or his original notes. If as to him the composition should be held fraudulent and void, then he could not enforce the composition notes, but would inevitably be left with his action upon his original notes. Having by his signature to the composition induced other innocent creditors to sign also, in the belief that all the creditors were to be treated alike, while in fact he was to receive a large advantage over them, he perpetrated one fraud upon them; and if he could now avoid the composition agreement as to him, and enforce his original notes for their full amount, he would perpetrate another fraud upon them, and take a still further advantage of them by depleting the very fund out of which alone perhaps the debtors would be able to fulfill the composition on their part. This he should not be permitted to do, and to defeat such an unjust result he should be held to the composition, and his remedy upon the composition notes. The courts would not, as between the parties guilty of the fraud, if their interests alone were to be affected, enforce or relieve from the composition agreement. But they will see to it, so far as they can, that the innocent parties are not made the victims of a double fraud, and this they will accomplish by holding the guilty parties to the composition agreement; and so it was held in *Mallalieu v. Hodgson*, 16 Ad. & El. (N. S.) 690, a case quite analogous to this. There as here the plaintiff, before signing a composition agreement, stipulated for a secret advantage to himself, and so did some of the other creditors unknown to him, while it was represented to him by the debtors that all the other creditors were to have no more than the composition agreed upon. Erle, J., said: "Here the plaintiff having received the composition, and the value of the prefer-

ence, which was a fraud upon the other creditors, is seeking to gain a further exclusive advantage to himself, also in fraud of them, by suing for the balance of his original debt after allowing for the composition and the value of the preference, and claims to avoid his release on the ground that he was induced by the defendants to believe that he alone was fraudulently preferred, whereas some other creditors had also obtained some unjust advantage. But a deed is not to be avoided on the ground of a fraudulent misrepresentation, unless the matter misrepresented was a material inducement to the execution of the deed." Coleridge, J., said: "As the plaintiff was himself in the transaction of the composition and release, guilty of fraud in respect to the other compounding creditors, by stipulating for a preference to himself, he is not at liberty to insist on the fraud at the same time practiced on himself; nor indeed to say that it is any fraud which induced him to enter in the composition. \* \* \* The plaintiff in this case has entered into an agreement for the compounding of his claim on the defendants which is fraudulent as regards the other creditors. He has received the composition notes, and has executed a release; but he now resorts to his original demand, and is thereupon met by a plea of the release. *Prima facie*, the release is an answer to the action, because to allow the plaintiff now to recover for his whole original demand would be a fraud on the other creditors who have come into the composition on the faith of the plaintiffs' being a party to it." As to the secret advantage given to some of the other creditors to induce them to sign the composition, the learned judge further said: "The plaintiff has stipulated and obtained a preference for himself, which for the reason I have stated will not vitiate the release as against himself, and it appears to me that the having given a preference to others was also no fraud upon the plaintiff. A mere misrepresentation by the defendants of a fact not material to the plaintiff would not sustain the issue, and the only way in which the misrepresentation could be material to the plaintiff would be inasmuch as the defendants might be rendered the less able to carry into execution the fraudulent preference to himself by having bound themselves to act similarly by others. But he had no right to have that preference carried into execution, and therefore is not in law prejudiced by a failure in regard to it. The whole consideration for his release is the fraudulent preference promised to himself, and the withholding any such preference from other creditors. He cannot allege the former as a fraud on himself to vitiate the release, for he is *particeps fraudis*, and the latter is so entirely mixed up with it, deriving all its materiality from it, that the same disability seems to exist as to it." Dec. 13, 1887. *White v. Kuntz*. Opinion by Earl, J.

**LANDLORD AND TENANT — LIABILITY OF TENANT — WEAR AND USE — RENEWAL OF LEASE — WAIVER OF DAMAGES.**— (1) Plaintiff leased defendant a dwelling-house with permission to change for the purposes of a public school, to be surrendered in the same condition as at the execution of the lease, "reasonable use and wear thereof as a public school, and damages by the elements, excepted." She showed the condition at the time of the renting, and the damages at the surrender. *Held*, that it was for the jury to decide whether they were caused by the reasonable use of the premises. (2) New leases were made from time to time; the tenancy extending over seven years. *Held*, that there was no waiver of the right of action for the breach of this covenant by making the consecutive leases, and the question of the breach should relate to the final and actual surrender, and not to the technical surrenders during the tenancy. It is perhaps true that

each new lease involved a surrender to the landlord of the lessee's possession, though they all ran to their termination, and there was no surrender of the leases themselves under the prior one. *Livingston v. Potts*, 18 Johns. 28; *Springstein v. Schermerhorn*, 12 id. 357. But such surrender, instead of being actual, was implied from the presumed intention of the parties, and devised to give consistency to the new lease. I think it never should be made to work an injustice to the contracting parties in hostility to their real agreement. It is also true, that where there has been such implied surrender, the tenant loses all rights dependent upon the continued existence and validity of the surrendered lease. *Loughran v. Ross*, 45 N. Y. 792. But that is because the right lost or extinguished could not survive the destruction of the lease and the ending of its term, and could exist only while the lease continued. Taking the new lease, and ending the old one, destroyed the right to remove buildings, or the right to estover, dependent wholly upon the ended lease. And I cannot discover that the doctrine ever went further, and sufficiently to include the present case. Certainly, a surrender of the lease during the term, and its acceptance by the landlord, does not extinguish rights of action already accrued. We have held that as to rent in arrears and overdue. *Sperry v. Miller*, 16 N. Y. 407. And where at the close of a term, there is surrender of possession by a tenant in such condition as to violate a covenant in the lease, and an acceptance of possession by the landlord, the two things occurring *eo instante*, I am not ready to admit that the right of action for a breach dies at the moment of its birth. It is true that the landlord, accepting the possession with knowledge of the facts or full opportunity to know, and without protest or claim of injury or of violated covenants, may be deemed to have admitted performance of the covenant, and waived any right of action for its breach; but the mere acceptance of possession, in and of itself, disavowed from the surrounding circumstances which characterize and qualify it, I think should not produce that result. At least, it should not flow from a mere technical or implied surrender, where there is of course neither opportunity of knowledge nor occasion for protest, and where as here consecutive leases operate in effect as renewals, and produce in substantial result one unbroken and continuous term. Dec. 13, 1887. *McGregor v. Board of Education of the City of New York*. Opinion by Finch, J.

**SURROGATES—LIABILITY FOR FUNDS OF ESTATES DEPOSITED BY THEM.**—Moneys realized from the sale of a decedent's real estate were paid over to the surrogate for distribution among creditors. Pending the proof of claims and certain other proceedings, the surrogate in good faith deposited the funds in a bank in good standing and credit. *Held*, that an action against the sureties on the official bond could not be maintained on account of the loss of part of the deposit by a subsequent failure of the bank. At common law, a public officer is bound to exercise good faith and reasonable care and diligence in the discharge of his official duties, and he is not responsible for any loss of money which came to his official custody occurring without fault on his part. But there are various decisions of the Federal courts and of some State courts imposing upon public officers charged with the duty of receiving, keeping and disbursing public money, responsibility for its loss, although occurring without fault or negligence. *U. S. v. Prescott*, 3 How. 578; *U. S. v. Moran*, 11 B. R. 458; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Keebler*, 9 id. 83; *U. S. v. Boyden*, 13 id. 17; *Bevans v. U. S.*, 13 id. 56; *U. S. v. Thomas*, 15 id. 337; *Com. v. Comly*, 3 Penn. St. 372; *State v. Harper*, 6 Ohio St. 607; *People v. Powell*, 67 Mo. 395; *Hulbert*

v. State, 22 Ind. 125; *Inhabitants of Hancock v. Hazard*, 12 Cush. 112; *Ward v. School-Dist.*, 10 Neb. 233; *Lowery v. Polk Co.*, 51 Iowa, 50. In these cases, it was held that various public officers, appointed or elected to receive, disburse, and keep public moneys, were absolutely responsible for them as debtors, although they were stolen or lost, or taken away from them by irresistible force, and without their fault. In some of the cases, the liability of the officers was based upon statutes defining their duties and responsibilities, and in other cases upon the terms of their official bonds; and the construction of the statutes and of the bonds was much influenced by views entertained by judges as to the public policy to be enforced in such cases. In the case of *U. S. v. Prescott*, Mr. Justice McLean said that "every depository of public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity. A depository would have nothing more to do than to lay his plans, and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public." At the time when that decision was made, in January, 1845, when there were no telegraph lines, and but few railroads in the country, public policy may have required from public officers the rigid responsibility thereby imposed. Most of the custodians and receivers of the public moneys lived at distant points from the central government, where it was difficult to supervise their acts, or control their conduct, or check and uncover their frauds. Yet that rigid rule of responsibility was greatly relaxed by acts of Congress relieving public officers who, without their fault, had lost public moneys intrusted to them; and finally by the congressional act of May 9, 1866 (14 U. S. Stat. at Large, 44), a general act was passed conferring upon the Court of Claims jurisdiction to hear and determine the claims of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of government funds; and it was provided that whenever the court should ascertain the fact of any such loss, and that it occurred without the fault or negligence of the officer, it should make a decree settling forth the amount thereof, and the officer should be allowed the same as a credit on settlement of his accounts. Thus as to all the officers named in the act, the policy previously declared, and which largely induced the earlier decisions of the courts, was changed. And in *U. S. v. Thomas*, *supra*, it was held that a collector or receiver of public moneys, under a bond to keep it safely, and pay it when required, was excused from rendering the same when prevented by the act of God or the public enemy, without any neglect or fault on his part, and that it was a sufficient discharge of his bondsmen from their obligations in reference to such money that the same was forcibly seized by the rebel authorities, against the will of the collector, and without his fault or negligence. Now in the changed condition of our country, with newspapers, telegraphs and railroads everywhere, in view of this latter decision, and the Federal statute referred to, it can scarcely be said, that as to Federal officers, public policy now requires the enforcement of the rigid rule of responsibility imposed by the earlier decisions. But whatever the rule may now be in the Federal courts, and in many of the

other States, it is not the settled law of this State that public officers who have given bonds for the faithful discharge of their official duties become debtors for the public moneys which come into their hands in their official capacity, and are absolutely liable for such moneys, although lost without their fault or negligence. In *Supervisors v. Dorr*, 25 Wend. 440, the action was upon the bond of a county treasurer, conditioned that he would faithfully execute the duties of his office, and pay over according to law all moneys which should come to his hands as such treasurer, and render a just and true account thereof to the board of supervisors of his county. The defense was that the money claimed was feloniously stolen from his office without any negligence or fault on his part; and it was unanimously held by the court that the facts stated constituted a defense; and the general rule was laid down that a public officer, intrusted with the receipt and disbursement of public funds, is not responsible for moneys stolen from his office without negligence or fault on his part, and is liable only for moneys lost through his misfeasance or neglect. The opinion in that case was written by Chief Justice Nelson, and concurred in by Justices Bronson and Cowen. The case was carried to the Court of Errors, where the judgment was affirmed by an equally divided court. 7 Hill, 583. The doctrine of that case has been erroneously supposed to have been overruled by the decision in *Muzzy v. Shattuck*, 1 Denio, 233. In the latter case the action was upon the official bond of a town collector, and the defense was that the money was stolen from him. It was held that the defense was not good, the Supreme Court then being composed of Bronson, C. J., and Justices Beardsley and Jewett, and Bronson, who concurred in the prior decision, also concurred in this, without any indication that he had changed his views. The prior decision was referred to in the opinion of the court, but not criticised nor disapproved. This decision was based not upon the common law, and not upon the force and effect of the official bond given by the collector, but upon the statutes defining the duties and liabilities of the collector; and the court held that by these statutes he was made an absolute debtor for the money collected by him, and that the fact that the money was stolen therefore constituted no defense. That case was afterward carried to the Court of Errors and unanimously affirmed. The opinions of that court however, if any were written, have not been reported. It is clear that the decision in *Muzzy v. Shattuck* was in no way in conflict with the decision in the case of *Supervisors v. Dorr*, and did not expressly or by implication, overrule that decision. The decision in *Muzzy v. Shattuck* has always been understood as being based upon the statutes which made the collector an absolute debtor for the moneys which he was ordered by his warrant to collect. *Looney v. Hughes*, 30 Barb. 605, affirmed, 26 N. Y. 514; *Fake v. Whipple*, 39 Barb. 339, affirmed, 39 N. Y. 394. While the case of *Supervisors v. Dorr* was affirmed by an equal division of the Court of Errors, that affirmation does not add to it as an authority, and it remains simply the unanimous decision of the Supreme Court. In view of the decisions of the Federal and State courts above cited, and the fact that that decision has been much questioned, and has by some been supposed to have been overruled by the decision in *Muzzy v. Shattuck*, it should probably not be regarded as binding authority in this State, and the question therein decided may yet be regarded as an open one. When a case arises against an officer for not paying over and accounting for public moneys intrusted to him in his official capacity, it will be necessary to determine whether his liability, in the absence of statutes specially defining it, shall be governed by the common law, or whether the broader and more

rigid rule of responsibility laid down in the cases above referred to shall be enforced in this State. It is not necessary to decide that question in this case, because the money here received by the surrogate was not public money, but the money of a private estate or of private individuals. It does not follow, because public policy requires that public officers who receive public money should be held to rigid responsibility, that the same rule should be applied to public officers who receive the money of individuals who are stimulated by private interests to some watchfulness over the conduct of the officials, and to some scrutiny as to the custody of their funds. The surrogate was not a public officer appointed to receive or disburse public money, and it was not even his main duty to receive, keep, or disburse the money of individuals. His principal duties were judicial in their nature, and any duties which he had in reference to moneys which came into his hands were merely incidental to his judicial duties. The statutes required that the surplus money arising from the foreclosure sale should be paid over to the surrogate, and he was to hold the same for distribution among the creditors of the deceased, upon proof by them of their claim as provided by the statute. 2 Rev. Stat. (6th ed.), 118. The proceeds of the sale of the real estate made by the administrators of Finley were required to be brought into the office of the surrogate, to be retained by him for distribution among the creditors, in accordance with the provisions of the statute. 3 Rev. Stat. (6th ed.), 115. This money therefore came lawfully into the possession of the surrogate, and there is nothing in the statute which makes him an absolute debtor for it. He was to keep it, and when the time came for its distribution, was to distribute it among the creditors of the deceased. It might remain in his custody for a long time, until the claims of the creditors had been established, and all litigation in reference to them and the money finally ended. The law did not provide the surrogate with a safe or other place of deposit, but left it to his own good sense and judgment to determine how he should keep and safely care for the money. There is nothing in the policy of the law which requires that he should be absolutely responsible for such money. If this money had been paid under an order of any court to its clerk or to a receiver, or any other officer, there would not have been the absolute responsibility which is claimed by the plaintiff in this case. Such clerk or other officer would have been responsible only for good faith and reasonable diligence in the care of the money. Story Bailm., § 620. Why should a greater responsibility rest upon the surrogate than upon such clerk or officer? There is no clerk or officer of the Surrogate's Court to whom the money can be paid, and hence the surrogate is required to receive and distribute it himself. He is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee. If he had been a trustee, and had deposited this money in good faith, without any negligence on his part, in this bank, its loss by the failure of the banker would have been a good defense. 1 Perry Trusts (3d ed.), § 443. Why should his responsibility be greater than that of the administrator from whom he received the money? The statutes and the official bonds of executors and administrators imposed upon them as broad an obligation as is imposed upon the surrogate by the statutes and by his official bond; and yet it is conceded that if the administrators had deposited the money of their estate in this bank in good faith, and without negligence, they would not have been responsible for its loss. 2 Williams Ex'rs, (5th Am. ed.), 164; 3 Redf. Wills, 394. There is nothing in the phraseology of the bond given by the surrogate which enlarges his statutory liability. It is a

bond simply for the faithful performance of his duties, and the faithful application and payment of all moneys that may come into his hands. It imposed upon the surrogate no broader responsibility or liability than the statute. It was simply designed to enforce and secure the faithful discharge of his duties; and any defense which he would have had when called to account for the money which came to his hands is available to his sureties when sued upon the bond. We have therefore reached the conclusion that in this State there is no statute, applicable to surrogates, which imposes upon them the broad liability claimed by the plaintiff; that there is no public policy which requires that the rule of responsibility should be thus rigorous, and that there is nothing in the terms or letter of the bond which imposes the absolute liability claimed. This deposit in Cone's bank was not a loan to him, an unauthorized investment, which would be condemned by the law. It was the same as a deposit in an incorporated banking institution. It was probably not as safe or judicious, but that circumstance only had legal bearing upon the question of good faith and proper care and diligence, and that has been found in favor of the defendants. The fact that the deposit was payable with interest makes no difference, as it was still a deposit payable upon demand, and the requirement of interest was a provident arrangement for the benefit of the persons interested in the fund. Dec. 6, 1887. *People ex rel. Nash, Surrogate, v. Faulkner*. Opinion by Earl, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**LANDLORD AND TENANT—NEGLIGENCE—DANGEROUS PREMISES.**—In suit by a tenant against her landlord for damages resulting from falling into a cesspool in the yard, covered by rotten planks, which were concealed by earth on which grass and weeds were growing, there was evidence that the same had never been pointed out to her by the defendant, and that she was ignorant of its position and dangerous character, and that defendant had directed the cover to be repaired with old boards some time previous, and was present when such repairs were made. *Held*, that it should have been left to the jury to say whether defendant knew of the defective covering, and the danger therefrom, and had neglected to inform plaintiff of it; and also whether plaintiff had been injured in consequence of her failure to make a proper examination of the premises. It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor or of deceit. If therefore he is injured by reason of the unsafe condition of the premises hired, he cannot ordinarily maintain an action in the absence of such warranty or of misrepresentation. The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he leases are safe, and adapted to the purposes for which they are hired. There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law. Where there are concealed defects attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay

the foundation of an action against the lessor, if injury occurs. The principle that one who delivers an article, which he knows to be dangerous, to another, ignorant of its qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result, and which does result, has been applied to the letting of tenements. It has thus been held that where one lets premises infected with the small-pox, and injury occurred thereby, he was liable, if knowing this danger, he omitted to inform the lessee; this upon the ground of his negligent failure to perform a duty which he owed the lessee. It was not deemed important whether the omission to give the information was intentional or otherwise. *Bowe v. Hunking*, 135 Mass. 380, and cases cited; *Tuttle v. Manufacturing Co.*, 145 Id. 169. Obviously there may be many concealed defects and dangers about a house, which careful examination will not discover. If these are known to the lessor, it is for him to reveal them. Traps or contrivances may exist by means of which the most careful occupant might be injured. "Such traps or contrivances," says Mr. Justice Field, "are not merely a want of repair; they are in a sense active agencies of mischief, which no tenant would expect to find, even in a decayed and ruinous tenement." *Bowe v. Hunking*, *ubi supra*. In *Reichenbacher v. Pahmeyer*, 8 Bradw. 217, the defect alleged was in the manner of hanging a chandelier. The chandelier was hung unsafely, and the lessor knew it, and did not disclose this fact to the lessee. It was not apparent to an observer. It was held that the lessor was liable to a servant of the lessee who was injured by its fall. See also *Scott v. Simons*, 54 N. H. 126; *Godley v. Hagerty*, 20 Penn. St. 397. In *Bowe v. Hunking*, *ubi supra*, it was held that the case then at bar was not within the exception of the general rule by which a lessor is rendered liable for negligence of this character. There was no evidence that the defective step by which the injury in that case occurred was known to the lessor or her agent to be unsafe, and further, this defect itself was obvious, and whatever danger existed was readily seen by examination. *Mass. Sup. Jud. Ct.*, Nov. 23, 1887. *Cowen v. Sunderland*. Opinion by Devereux, J.

**MASTER AND SERVANT—SCOPE OF EMPLOYMENT—ARREST OF PASSENGER FOR GIVING BAD COIN IN PAYMENT OF FARE.**—On the 30th of November, 1886, the plaintiff was a passenger in one of the defendant's tramcars. When the conductor of the car applied to her for her fare she gave him half a crown, and received from him 2s. 4d., the fare being 2d. When she was about to leave the car the conductor stopped her, and told her that she could not leave, as she had given him a bad half-crown. She was then taken on in the car past her destination until the car arrived near a police station. She was then taken out by the conductor, and taken by him to the police station, and was there charged before an inspector of police with giving a bad half-crown in payment of her fare. The half-crown was tested by the police inspector, and found to be good, and the plaintiff was thereupon discharged. She brought the present action against the tramways company for trespass and false imprisonment, and the case was tried before Stephen, J., and a special jury, when a verdict and judgment were entered for the plaintiff for £100 damages, the learned judge holding, that notwithstanding the rules of the company, the conductor had an ostensible authority to do what he did, to detain the plaintiff and give her into custody. The defendants now moved for a new trial, or that judgment should be entered for them on the ground that there was no evidence to go to the jury of the defendants' liability for the acts of their conductor, and that the judge ought to have directed

the jury that the conductor was not acting within the scope of his employment, and that the defendants were not liable, as the conductor had acted in contravention of the defendants' express orders and to protect his own interests. Section 51 of the Tramways Act, 1870, provides that every person defrauding the company in the payment of the fare shall be liable to a penalty not exceeding forty shillings; and section 52 provides that it shall be lawful for any officer or servant of the promoters or lessees of any tramway \* \* \* to seize and detain any person discovered either in or after committing or attempting to commit any such offense as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or otherwise discharged by due course of law. In a book of rules and regulations for the officers and servants of the company, relating to the conductor, are the following rules: Rule 11. "Passengers offering bad money in payment of fare. Coin must be kept quite apart from other money, and in presence of passenger tested. If bad, and passenger refuses good coin, having other money in his possession, he may be charged under the authority of an inspector or timekeeper." Rule 16. "Except in cases of assault, conductors are not to give passengers into custody without the authority of an inspector or timekeeper." Also the following rule: "A conductor shall be responsible for (3) all counterfeit and foreign coin received." Held, that taking into consideration the rules supplied to the conductor, it was not within the scope of his authority to give any person into custody, except for assault, without the authority of an inspector or timekeeper; and in so giving the plaintiff into custody he was acting *ultra vires*, and that the defendants were not liable. *Q. B. Div.*, Dec. 12, 1887. *Charleston v. London Tramways Co., Limited*. Opinions by Mathew and Charles, JJ.

#### REPORT OF THE SECRETARY OF THE STATE BAR ASSOCIATION.

IT is with much gratification that I feel myself fully warranted, in conformity with my official duty, to report that the New York State Bar Association enters upon the eleventh year of its existence under exceedingly prosperous circumstances, and with promising assurances of continued and increasing prosperity and usefulness.

A distinguished lawyer and member of the association, highly esteemed throughout the State for his learning, ability and candor, in a recent letter to a high judicial officer of this State, said: "The prospects of the State Bar Association are beyond a question gratifying. They justify the faith of those who, from the beginning, contended that a State Bar Association was a practicable thing, and that it could be made a permanent institution, representing very fairly and reputably, the lawyers of the State of New York. It can now be said by us with substantial truth, and without offense to gentlemen of the bar, who, for reasons sufficient to themselves, have not joined us, that our association embodies, and is the genuine representation of very much that is distinguished, elevated, refined and excellent in the bar of the State."

But while thus congratulating ourselves, and while possessing those genuine grounds for complacency, we cannot forget the limitations, the imperfections and deficiencies under which we still labor. Without enumerating these matters, it is sufficient for me to say, that strong and largely successful efforts have

been made, to remove them. As these efforts are to be continued, it is quite certain that all cause of complaint in this regard will in the near future be removed.

There are now on the roll of the association about five hundred and thirty-eight member; with the addition of forty life members. There is a sufficient number of newly elected members, whose names have not yet been placed on the roll, that will considerably increase the total, and there is a large class of candidates for election awaiting the action of the executive committee on their application.

There have been but three resignations, one of which was caused by removal from the State. The number of candidates for membership who have been rejected during the year shows the scrutiny and care with which the executive committee guard the association against the admission of unworthy applicants.

The necrology of the year is happily small, though, as will be seen by the report of the committee having that record in charge, that we have parted with a few illustrious members, to-wit: The Honorable Charles A. Rapallo, the Hon. David Murray, the Hon. A. M. Osborn, of the judiciary, and Aaron J. Vanderpoel, and Charles Hughes.

The committee on grievances, have during the year been engaged in proceedings tending to the disbarment of several unworthy members of the legal profession, with results that will be very satisfactory to all respectable lawyers, while they show that one of the principal objects that called the association into existence, the purification of the legal profession, is being very successfully attained.

A case has recently been reported from a distant county, to one of the members of the committee in the city of New York, upon which vigorous proceedings will be immediately commenced, to disbar a lawyer of wealth and influence, but whose professional record and character is represented as a disgrace to the legal profession. I refer to it here because it will, among other things, bring up for consideration a certain practice which though tolerated by usage, is pregnant with fraud, and the source of much latent cruelty and suffering. The case is within the purview of the committee on grievances.

The outrageous frauds practiced by a class of lawyers in this State, who make a specialty in procuring divorces, have reached such dimension that they have attracted the attention of the Bar Association during the last year, and that immediate action will be taken by it, at least to the extent of procuring such legislative action in regard to the monstrous evil as will suppress it.

The department established early last year doing chamber business before the judges of the Supreme Court at Albany, making *ex parte* motion in the different courts, and conducting business in the different State departments, for members of the association without charge, has been very useful and convenient for large numbers of the members of the association.

The committee on legal biography have ably discharged their duties, and have added largely to the interest of our mortuary record, which has already become an interesting volume.

I have deemed not inappropriate to obtain the proceedings of the meeting of the different bars of the State, called to honor the memory of its departed members, and enter them on our record. They are profitable inasmuch as they exhibit such traits and characteristics of the departed, as are worthy of commendation and hold them up to the admiration of survivors, and for imitation, especially to our younger members.

The rooms of the association in the capitol have become a favorite resort for its members, especially from

a distance. As the association has the benefit of the State law library, members here consult authorities review their briefs and attend to their correspondence. Here pleasant professional acquaintances are made, and old ones renewed, and the amenities which characterize the intercourse of members of our profession with each other, pleasingly exhibited. Most of the leading journals and many of the best magazines are to be found in the rooms.

A large addition of portraits of illustrious lawyers and jurists have been made during the year to our already large and valuable collection. Among these are twenty-five beautiful engravings of those lawyers who are regarded as among the founders of our system of jurisprudence, Chancellors Kent, Lansing, Livingston and Walworth, Alexander Hamilton, Josiah Ogden Hoffman, John Duer, Thomas J. Oakley, Ogden Hoffman, Charles O'Connor and others, presented to the association by Hon. Benjamin D. Silliman.

The association is indebted to the Hon. John F. Seymour, of Utica, for a valuable portrait of Attorney-General Samuel A. Talcott, justly termed the William Wirt of the New York State Bar.

It is also indebted to George L. Stedman, Esq., of Albany, for a rare and finely executed portrait of Thomas Addis Emmet, completed a few days before the sudden death of its illustrious original in the court-room.

I cannot refrain from referring to an incident connected with the last visit which our distinguished and lamented fellow member, Hon. A. J. Vanderpoel, made in the rooms of the association. It was the presentation by him of a portrait of Joshua A. Spencer. "I can say of Spencer, as was said of another, great but now departed jurist of our State," said Mr. Vanderpoel, "He never carried his soul to the public treasury, to a rich corporation, or money king, and asked 'what will you give me for this.' He never sold the warm feelings and honorable motives of his youth and manhood for an annual sum of money and an office. He never touched the political Aceldama, and signed the devil's bond for cursing to-morrow what he has blessed to-day."

The interest attached to this incident and to this beautiful tribute to another, is increased by its singularly forcible applications to Mr. Vanderpoel's own professional career and private life.

The secretary refers with pleasure to the interest which our last or tenth annual report has created in the profession, and in the public mind throughout the country. Applications for copies have been received from most of the law departments of colleges, from law schools, from many law librarians and from individual members of the profession.

Under the advice of the executive committee, I have furnished the desired copies free of charge. Though the edition was unusually large, it is now so far exhausted, that no more copies will be furnished except to newly elected members.

The eleventh annual report is now being prepared for the press, a larger edition than ever will be published, and if possible it will excel all others in usefulness and interest.

I cannot close this communication without expressing my thanks to the officers and members of the association for the uniform courtesy, the practicable ability and manifest success with which they have co-operated with my humble efforts in advancing its interests and prosperity.

All of which is respectfully submitted,

L. B. PROCTOR,  
Secretary.

CAPITOL, ALBANY, Jan. 19, 1888.

## CORRESPONDENCE.

## DUTCH TITLE IN MANHATTAN ISLAND.

Editor of the Albany Law Journal:

In your issue of January 21, 1888, you published some extracts from a pamphlet by Judge Arnoux, in which he denies that the Dutch ever had any title to the land on Manhattan Island, and cites authorities to support that statement.

I regret to say that the historians of this city and State are all opposed to Judge Arnoux on this point; Broadhead, Valentine, O'Callaghan and the writer of the History of New York in the Series of American Commonwealths, all unite in saying that the Dutch gained title by discovery and possession, and that the English had no title under the rules of international law. The English claim by discovery through Cabot's voyage in 1497. He is said to have struck the coast of America in the vicinity of Labrador, and then to have sailed as far south as the latitude of Gibraltar, but there is no evidence that he landed anywhere or that he ever saw the coast. Granting however that he did discover the country, the mere fact of discovery, without occupation, gives no title by international law. "The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries except those of which it has really taken actual possession." Vattel Law of Nations, vol. 1, ch. 18, § 208. See also Mertens Précis des Droits des Gens, § 37; Klüber Droit des Gens, § 126; 3 Kent Com. 381, note.

This doctrine was strongly asserted by England in 1580, in opposition to the claims of Spain under the bull of Alexander VI, which gave to Spain the whole of the continent of America. Camden Annales, Eliz. 360. This assertion by England estopped them from claiming title by the discovery of Cabot, unless this was followed by actual possession. Now what are the facts? In 1603 there was not a settlement by any nation on the coast between the St. Lawrence and Florida. In 1606 James I of England granted a charter to the Virginia Company, under which a settlement was made at Jamestown. This charter originally covered the whole coast. But in 1609 it was modified so as to extend 200 miles north of Point Comfort, in Virginia. This would fall short of New York. Meanwhile, in 1609, Hendrick Hudson had discovered Manhattan Island, no one having been there before him, except perhaps Verrezano, who was in the service of Francis I of France. In 1613 the first Dutch colony was planted, and from that time until 1664 the Dutch held the island without opposition. The Dutch therefore were the only persons who combined discovery and possession, the two conditions precedent to a complete title.

Nor do the authorities cited by Judge Arnoux substantiate his claim. The first case, *Jackson v. McIntosh*, 8 Wheat. 543, was ejectment for lands in Illinois, and the agreed statement of facts shows that the claim was under James I's charter of 1606, which extended only 200 miles north of Point Comfort. The second case, *Martin v. Waddell*, 16 Pet. 367, was ejectment for lands in New Jersey, and was claimed under the Duke of York's grant in 1664; so that neither of these cases has any relation to New York. The doctrine laid down by the court in both cases is that title by discovery is superior to the Indian title, which doctrine has been approved in many cases, and is unquestionably sound.

The validity of the Dutch grants has been upheld in many cases. See leading case of *North Hempstead v. Hempstead*, 2 Johns. Ch. 324, decided by Chancellor

Kent and affirmed in the Court of Errors. Inasmuch as these grants were made on the understanding that the lot-holders took no interest in the fee of the streets, it is difficult to see how they could gain any title to what they never originally possessed. In the case of *Wetmore v. Story*, 22 Barb., there is a masterly brief of Charles O'Connor, in which he contends that as a matter of fact the civil law did prevail here, and was recognized by the English at their accession, and that under that law adjacent owners had no title to the streets. This position was sustained. Perhaps Mr. O'Connor may have subsequently changed his mind, and come over to the position claimed by Judge Arnoux, but I am unable to find any other brief of his on the subject.

It seems to me absurd to hold that because Cabot may have come within 100 miles of New York, therefore the common law escaped somehow from his English ship, swam ashore, and remained in the air over the heads of the poor Dutchmen for fifty years, until the English, with a military force, were able to bring it down and apply it.

Yours truly,

JOHN S. MELCHER.

NEW YORK, Jan. 24, 1888

## NEW BOOKS AND NEW EDITIONS.

## TUCKER'S MERCANTILE AND MANUFACTURING CORPORATIONS.

A manual relating to the formation and management of Mercantile and Manufacturing Corporations with forms.

A book of Massachusetts law. By George F. Tucker, Boston: Geo. B. Reed, 1888. Pp. xviii, 285.

Apparently a thorough and orderly compendium of local law on a very practicable subject. Many forms are scattered through it, and forms in connection with such a topic are useful. Nine pages of cases are cited. There is a good index, concluding with "Women (see Labor; Married Woman.)" The book is elegantly printed. We are surprised by the author's statement that these associations are less common here than in England.

## BOLLES ON BANKS.

The Law Relating to Banks and their Depositors and to Bank Collections.

The National Bank Act and its judicial meaning, with an appendix containing official instructions and rules relating to the formation and management of National Banks, United States bonds, and the issue and redemption of coins and currency.

By Albert S. Bolles, editor of the Bankers' magazine. New York: Homans Publishing Co., 1887. Pp. xxxi, 523; xix, 375.

The author's purpose, as declared in his preface to the first named book, is to present in language which can be fully and easily understood, the law of banking contained in the reported decisions of the American and English courts. This purpose he seems to have accomplished. The works are designed especially for the guidance and instruction of bankers, and are extended in a direct and practical manner, forming a very intelligible and intelligent guide book to bankers. Indeed we think the works have been so admirably done, that they will be admitted to the lawyer's shelves, as manuals for ready reference. We heartily recommend them to professional favor. The publisher's duty has been well performed.



# The Albany Law Journal.

ALBANY, FEBRUARY 11, 1888.

## CURRENT TOPICS.

LAST week was a great time for Albany. Nothing like it since the bi-centenary. It was the time of the ice carnival. If Judge Arnoux had been here he would not only have no doubts about the title of the Dutch in New York, but he would have thought that they "owned the earth." Every thing was sliding down hill except the new capitol, and part of that seemed disposed to join in the exercise — sealing the fate of the assemblymen, as it were. (If that decaying ceiling would only turn their attention to the future state as much as toward life insurance, it would be a great gain.) Albany was full of visitors for two days, and this must have profited our citizens financially, unless the visitors, like John Gilpin's wife, "although on pleasure bent," "had a frugal mind." The glories of our new capitol were temporarily eclipsed by the ice palace in the park, which had several advantages over its legislative competitor — it had no smell of gas, was much better lighted, did not require to have the snow shovelled off the roof, and did not tumble down so soon as was expected. Besides, it cost nothing to take care of it. Why would it not have been a happy expedient to put the Assembly into it while their hall is repairing? It would have hastened legislation, at least, or curtailed it, which is better.

Reading the report of the secretary of the New York State Bar Association, published in this journal last week, reminds us of a matter on which we intended to comment in connection with our remarks on the address of President Cooke, namely, the good service which the association has rendered, and is likely to render, in disbaring unworthy members of the profession. We were never in favor of the association's obtaining the monopoly of this office, as was once proposed, any more than we are in favor of the power of two physicians to imprison a man in a lunatic asylum; but we are in favor of its interesting itself in the duty, even taking the laboring oar, and assuming the responsibility of this very unpleasant but extremely necessary function. We hope the association will keep at it. It is one of the ways in which it can be of practical use, and if it perseveres until it eradicates all the rascals it will have a busy career and a hoary age.

A word is due to the memory of our friend and honored brother, the late ex-Judge Joseph Neilson of the City Court of Brooklyn, who was well known to the readers of this journal by his entertaining papers on Rufus Choate and other topics, and was

known all over the country by the patience, fairness and learning which he exhibited in the most unsavory and tedious trial ever held in this country. Aside from his professional qualities and acquirements he was an excellent scholar and writer, a bright wit, and a most genial and companionable man. His conversation sparkled with good things, among which we now recall what he said to the writer, who declined his offer of a cigar, saying he never smoked — "that's one of the best things you never did." We shall always hold this good, cultivated and useful man in affectionate remembrance.

Mr. Leonard A. Jones, the well known and learned commentator on mortgages, pledges and liens, has after many years' labor published "An Index to Legal Periodical Literature," evidently a work of enormous labor, and executed with great patience and fidelity. The list of legal and general periodicals which he has examined covers seven pages, and embraces 1,373 volumes of legal and 4,434 of general periodicals. The list of authors covers forty pages. In looking over the work we learn how that other just man, Ben Adhem, must have felt when he found that his "name led all the rest." This list also shows the names of many distinguished and brilliant writers and jurists who have adorned the columns of this journal. The classification is excellent; it is easy to find any thing one wants. We have no doubt that the work will be extremely useful to every brief maker, author, teacher and scholar. It embraces not only purely legal discussions, but biography, annotated cases, proceedings of bar associations and of social science associations. It is noteworthy "that the great mass of the contributions to these periodicals has been made by lawyers and judges who are not authors of text-books, and who have not published their articles in any other form." Even poetry and Anthony Comstock have not escaped the author's eye. The work is brought down to January, 1887. It forms one large royal octavo volume of 655 pages, elegantly and conspicuously printed in double columns, and is published by Charles C. Soule of Boston.

Our English brethren are in a state of ferment over the question of "amalgamation," that is to say, the union of the functions of attorney and counsel in one person. There is a good deal of strong writing on both sides. The *Law Journal* says: "The sordid interests of solicitors are against the change, the effect of which in the United States is to reduce the incomes of solicitors by the amount which has to be paid to the counsel, who is the figure-head of the firm. Lawyers like Mr. Phelps and Mr. Evarts at the head of their profession in the United States would be only too glad to revert to the days when there was a bar of the Supreme Court, and still more the judges who, to stop the volubility of the country practitioners, have been obliged to introduce the *clôture*, with the result that

voluminous arguments in print are handed in as the clock strikes under the humorous designation of 'briefs.' Such persons as Mr. Evarts and Mr. Phelps will always lead the bar, and argue and try the causes in every community by the mere force of their talents, but they would not want a rule which should prohibit their being directly retained to bring or defend actions and to maintain suits for their own compensation. It would be an extremely inconvenient rule in our large and sparsely settled country, and quite out of harmony with our institutions. In practice the matter regulates itself. As for tediousness, we have never observed that attorneys are apt to be more long-winded than counsel.

A letter comes to us from a Michigan lawyer asking if we will publish a fee-bill for lawyers, so he can "know what to charge clients;" saying that we find fault with lawyers for charging too much, and he wants to know what we think is proper, so he can conform to it as near as may be. We suppose this is satirical. We cannot be our brothers' book-keeper. Every lawyer must charge according to his own conscience and views of policy. We have simply pointed out a danger which we think — indeed we know — threatens the profession, and has already diminished law business. Our correspondent may be a man who charges reasonably. We will say that the complaint to which we have alluded arises mainly from cities and large towns. In regard to some parts of the country — most of New England, for example — it is a wonder to us how the profession live on their costs and charges. In regard to other localities it is a wonder to us that the rest of the community live. It is a wonder that some lawyers have any business left. They charge as if they did not expect any more, at all events.

Chief Justice Waite recently said, in regard to the crowded state of the docket of the Supreme Court of the United States: "The law which fixes at this time the appellate jurisdiction of the Supreme Court was enacted substantially in its present form at the first session of Congress, nearly one hundred years ago. With few exceptions, and these for all practical purposes unimportant to the point I wish to make, the jurisdiction remains to-day as it was at first, and consequently with a population in the United States approaching sixty million and a territory embracing nearly three million square miles, the Supreme Court has appellate jurisdiction in all of the classes of cases it had when the population was less than four million and the territory but little more than eight hundred thousand square miles. Under such circumstances it is not to be wondered at that the annual appeal docket of that court has increased from one hundred cases, or perhaps a little more, half a century ago, to nearly one thousand and four hundred, and that its business is now more than three years and a half behind, that is to say, the cases entered now, when

the term of 1887 is about to begin, are not likely to be reached in their regular order for hearing until late in the term of 1890. In the face of such facts it cannot admit of a doubt that something should be done, and that at once, for relief against this oppressive wrong. It is not for me to say what this relief shall be, neither is this the time to consider it. My present end will be accomplished if the attention of the public is called to the subject, and its importance urged in some appropriate way on Congress."

#### NOTES OF CASES.

**I**N *Sisk v. Crump*, Indiana Supreme Court, Dec. 6, 1887, plaintiff alleged that in the city in which she and defendant resided animals were by law allowed to run at large; that defendant had constructed a barbed-wire fence along the highway so negligently that the wires hung loosely from the post and near the ground; and that the horse of plaintiff attempting to cross the fence from the highway into into defendant's field, in which his horses were grazing, was entangled, thrown down and killed. *Held*, that a demurrer to the complaint was improperly sustained. Elliott, J., said: "The complaint cannot be upheld on the ground that erecting a barbed-wire fence along the line of a highway, but on private property, is in itself an actionable wrong. The courts cannot say, as matter of law, that erecting such a fence is a tort. We cannot therefore yield to the contention of counsel that the act of an individual in erecting a fence of that kind in itself renders him liable to one who sustains an injury. Courts cannot judicially know that such a fence is dangerous. Our statute recognizes the right to use such fences, for it is expressly provided that railroad companies may use them in fencing their tracks. Act 1885. The complaint before us however does not rest solely on the theory that the erection of a barbed-wire fence is necessarily a tort. It goes much further, and with great particularity avers that the fence was so constructed as to be dangerous to horses and cattle passing along the highway. Nor does it stop there. It avers that beyond the fence was growing grass on which horses were feeding, and that these things would attract horses, and induce them to attempt to cross the fence and enter the inclosure. There are therefore two important elements to be considered. First, the negligence in constructing and knowingly maintaining a dangerous fence along the line of a highway; second, the probability that animals would be attracted by what they saw within the inclosure, and would probably attempt to enter it. These two elements exert an important influence upon that branch of the case which presents the question whether the appellee's act was culpably negligent. It is well settled that a lawful act may be done in such a negligent manner as to make the person who does it a wrong-doer. It may be therefore, that although erecting a barbed-wire fence is not in

itself a tort, yet the manner in which it is constructed and maintained may be such as to make the person erecting and maintaining it guilty of negligence. A thing may not be dangerous if properly constructed, but dangerous if improperly constructed. The complaint before us shows that the appellee was negligent in constructing and maintaining the fence, and on that point we have no hesitation in declaring it to be sufficient. Negligence is not always actionable. A man may do many negligent things on his own premises, and yet not incur any liability. Negligence is only actionable where it involves a breach of duty. This rule is illustrated by the cases which hold that there can be no recovery for injuries caused by the negligence of the owner of land in suffering the premises to become unsafe, unless the injured person came on the land under an express or implied invitation. *Nave v. Flack*, 90 Ind. 205; S. C., 46 Am. Rep. 205; *Railroad Co v. Griffin*, 100 Ind. 221; S. C., 50 Am. Rep. 783; *Railroad Co. v. Pitzer*, 100 Ind. 179; S. C., 56 Am. Rep. 387. There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury. While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community owes it, as a general rule, to every member of the community, and if any member suffers a special injury from a breach of that duty, an action will lie. The pivotal question in this case is therefore whether the defendant was under a general duty to maintain the wire fence so that it would not inflict injury upon animals which might be tempted from the highway into his inclosure. The theory of the complaint is that the horse was injured while attempting to cross the fence into the defendant's inclosure, and not that it was injured while simply wandering along the highway. If the horse had been injured while going along the highway a very different question would have been presented; but that is not the case which the complaint undertakes to make. The case is therefore not governed by the authorities which hold that an action will lie against one who makes the use of a highway dangerous; and the cases of *Graves v. Thomas*, 95 Ind. 362; S. C., 48 Am. Rep. 727; *Beck v. Carter*, 68 N. Y. 283; S. C., 28 Am. Rep. 175, are not in point. The complaint does not aver that the fence was intentionally made dangerous for the purpose of injuring persons or animals that might trespass on the defendant's land. The cases which assert and extend the old doctrine that spring-traps and guns shall not be set to catch trespassers have no application, for here the negligence charged against the defendant is nothing more than the failure to exercise proper care in constructing and maintaining the fence. The cases of *Hooker v. Miller*, 87 Iowa, 613; S. C., 18 Am. Rep. 18; *Deane v. Clayton*, 7 Taunt. 489, and similar cases, can exert no influence upon this investiga-

tion. The case of *Henry v. Dennis*, 93 Ind. 452, does not belong to the same class as the present, for in that case the poisonous substance which caused the injury was placed in the street. Here the fence was on the defendant's own land, and the rule declared and the case cited cannot apply. The defendant did nothing to entice the plaintiff's horse to leave the highway. If the defendant had purposely placed feed near the highway, and thus tempted animals wandering along it to enter his inclosure, a different case would confront us; but here the land was covered with grass and herbage, the usual and natural growth of the season. Nature clothed the field with the grass, not the defendant. At common law this action could not be maintained, because owners of animals are forbidden to allow them to run at large; but our statute changes this rule of the common law, and invests the board of county commissioners with authority to permit domestic animals to run at large. *Welch v. Bowen*, 108 Ind. 252. The complaint avers that the proper order had been made, so that in permitting the horse to wander upon the highway the appellant was not guilty of any wrong. The order of the board permitting animals to run at large forms an important element in the case, not only as bearing upon the question of contributory negligence, but also as bearing upon the question of the appellee's negligence. It bears upon the latter question, because it made it the duty of the appellee to take notice that horses and cattle might wander upon the highway, and with this knowledge he had no right to do any thing that was reasonably certain to cause injury to animals passing along the highway. Knowing, as he did, that animals might lawfully wander along the highway, he owed a duty to the community to use ordinary care to prevent any act of his from causing injury to animals wandering near his land. 'Enjoy your own property in such a manner as not to injure that of another person,' is a maxim of the law that rules many cases, and we think it must rule the one at bar. The appellee had a right to select his own fence, but he had no right, under the circumstances stated in the complaint, to construct it so as to make it dangerous to animals passing along the highway, for in doing so he violated the maxim we have quoted. Suppose he had dug a deep trench along the line of the highway, and had covered it with planks so thin as to give way beneath the weight of the smallest domestic animal, would he not be liable to an owner of a horse killed in attempting to cross the trench? Again, suppose that a land owner places posts along the line of his land, and attaches wires near the ground where they would be hidden by the grass or weeds, would he not be liable to the owner for the value of a horse caught in the wires and killed? The case as made by the complaint is in principle the same as those we have given as illustrations. The land owner is not bound to maintain a secure fence, nor indeed any fence; but if he does undertake to maintain a fence along a highway he must not negligently suffer it to become

dangerous to passing animals. His duty is to exercise reasonable care to prevent his fence from becoming dangerous, but it extends no further. If the fence he elects to build is built as such fences are usually built there is no liability, but if it is allowed to get out of repair, and thus become essentially dangerous, he may be liable. He is not under any duty to place boards on the top of a wire fence, or to do any like act, but he is bound to use care to keep the fence from becoming a trap to passing animals. It is the duty of land owners to take notice of the natural propensity of domestic animals, and under the allegations of this complaint it was the duty of the appellee to take notice of the propensity of horses to seek the pasture within his inclosure and join others of its kind feeding there. In view of the facts that the board of commissioners authorized animals to run at large; that the appellee was chargeable with notice of this order; that he was bound to know that it was probable that animals wandering on the highway would seek his pasture, and that the fence was so maintained along the highway as to be in effect a trap to passing animals, we think the complaint must be held sufficient. These are the controlling facts, and they make the complaint good. It is not the kind of fence selected, nor is it the absence of top planks or the like, that influences our judgment, but what chiefly influences it is this: the fence was so negligently maintained that under the circumstances stated in the complaint it was in effect a trap in which it was in a great degree probable that passing animals would be caught and injured. Had the fence, although composed of barbed wires, been constructed and maintained as ordinarily prudent husbandmen usually construct such fences, our conclusion would be altogether different, but the complaint very clearly avers that it was not so constructed or maintained. The appellant assumed all risks from fences, whatever their kind, constructed and maintained with ordinary care, but he did not assume risks from fences known to be intrinsically dangerous, constructed along the line of a public highway. We regard the location of the dangerous fence immediately along the line of the highway as an important element in the case. The strong probability that the pasture within the inclosure, and the presence of other horses feeding there, would allure horses on the highway to enter it, rendered such a fence almost certain to injure passing animals. This fact, considered in conjunction with the other facts to which we have especially directed attention, brings the case fully within the reasoning of the court in *Durham v. Musselman*, 2 Blackf. 96, and directly within the decision in *Young v. Harvey*, 16 Ind. 814. In the former case it was said: 'If the injury is the natural or probable consequences of the act, and such as any prudent man must have foreseen, it is but reasonable that the perpetrator of the act should be held accountable for the injurious consequences. As in the case of a man baiting his trap with flesh so near the highway, or the grounds of another, that dogs passing the

highway or kept in the grounds of another, are attracted into his traps and thereby injured, he is liable for the injury. *Townsend v. Waihen*, 9 East, 277. In the second place, when the injury is accidental, the liability of the actor must depend on the degree of probability there was that such an event would be produced by the act.' In *Young v. Harvey*, the horse of the plaintiff, wandering upon the streets and commons of a suburb of the city of Indianapolis, fell into an old well on the lot of the defendant, and it was held that an action would lie. This decision is strongly approved by a writer of excellent standing. 1 Thomp. Neg. 300. The case has been approved in many subsequent cases. *Graves v. Thomas*, 95 Ind. 361; S. C., 48 Am. Rep. 727; *Smith v. Thomas*, 23 Ind. 69; *Indianapolis, etc., Co. v. Wright*, 22 id. 376; *Hove v. Young*, 16 id. 812. In *Jones v. Nichols*, 46 Ark. 207; S. C., 55 Am. Rep. 575, the defendant left open an unguarded excavation some distance from the highway, and the plaintiff's cow, which had been turned out upon the commons, fell into the excavation, and it was held that the action would lie." See *Haughey v. Hart*, 62 Iowa, 96; S. C., 49 Am. Rep. 188.

In *Smalley v. City of Appleton*, Wisconsin Supreme Court, Dec. 13, 1887, an action by a woman to recover for personal injuries sustained by falling into a hole in a sidewalk, "the defendant was allowed to prove by two of its witnesses, against objections, certain declarations said to have been made by the plaintiff to the effect that with the money she expected to get from the city by reason of such injury, she was going to finish and furnish their house, get silk dresses, and dress better than they had before, get a piano, and a horse and carriage, and give the friends who went for her in this suit a ride, and those who did not she would give no ride. This testimony was referred to in the charge as of particular significance, and exception thereto was taken by the plaintiff. We must hold this class of testimony to have been immaterial and irrelevant to any of the issues on trial, and presumably prejudicial to the plaintiff." The woman got a new trial. That city attorney will know better next time.

#### WHEN SURETY IS LIABLE FOR MORE THAN PENALTY OF A BOND.

WHETHER a surety upon a bond is ever liable for more than the penalty named in the bond is a question upon which the authorities are somewhat discordant, although there is no occasion for any disagreement, the question on principle being very simple.

That he cannot be made liable under the bond for more than the penalty is clear, but whether interest will not be allowed against him where he is in default, although the allowance of the interest will render him liable for more than the penalty, is a problem that has not been solved in the same manner by different tribunals.

A majority of the cases hold that where the surety

is in default, interest may be recovered upon the sum for which he is in default, although this increases the total recovery to an amount exceeding the penalty on the bond. *United States v. Hills*, 4 Cliff. 620; *The Wanata v. Avery*, 96 U. S. 600; *Ives v. Merchants' Bank*, 12 How. (U. S.) 159, 164, 165; *Tyson v. Sanderson*, 45 Ala. 364; *Clark v. Wilkinson*, 59 Wis. 543; *Bratnord v. Jones*, 18 N. Y. 55; *Long v. Long*, 16 N. J. Eq. 59; *Lyon v. Clark*, 8 N. Y. 148; *United States v. Arnold*, 1 Gall. 348, 360, affirmed in 9 Cranch, 104; *Mower v. Kipt*, 6 Paige, 93; S. C., 9 Am. Dec. 748; *State v. Sandusky*, 46 Mo. 377; *Washington Co. v. Colton*, 28 Conn. 42; *Westbrook v. Moore*, 59 Ga. 204; *Birchfield v. Haffery* (Kans.), 7 Pac. Rep. 548; *The Wyman v. Robinson*, 73 Me. 384; S. C., 40 Am. Rep. 360; *Warner v. Thurlow*, 15 Mass. 154; *Bank of Brighton v. Smith*, 12 Allen, 243; *Harris v. Clap*, 1 Mass. 308; S. C., 2 Am. Dec. 27; *Carter v. Carter*, 4 Day, 30; *Carter v. Thorn*, 18 B. Mon. 613; *Maryland v. Wyman*, 2 Gill & J. 279; *Simmons v. Alma*, 103 Mass. 36; *Walcott v. Harris*, 1 R. I. 404.

These cases unquestionably declare the true doctrine. The question is not one of contract, but simply a question of damages against the party in default. The moment the liability of the surety becomes fixed it becomes his duty to pay, and for his failure to pay, damages are properly allowed against him in the shape of interest, although the total principal and interest may exceed the penalty of the bond. This does not render the surety liable for more than the penalty, but simply compels him to pay damages for his own default. This distinction is clearly expressed in *Bratnord v. Jones*. The court say: "The rule has often been laid down in general terms that sureties are not liable beyond the penalty of the bond in which their obligation is contained. But on a careful examination of the reason and justice of the rule, it will be found inapplicable to a question of interest accruing after they are in default, for not paying according to the condition of the bond. There is a plain distinction which has sometimes been lost sight of, and consequently some confusion and contradiction will be found in the cases on this subject. Whether a surety at the time of his default can be held beyond the penalty of his bond is a question of the interpretation and effect of his contract. Whether interest can be computed after his default, where the effect will be thus to increase his liability, is a question of compensation for the breach of his contract. \* \* \* But after that they were in default, and during the continuance of that default, interest is due from them as in any other case where money is not paid when the creditor becomes entitled to it. It may be a reasonable doctrine that a surety, who has bound himself under a fixed penalty for the payment of money or some other act to be done by a third person, has marked the utmost limit of his own liability. But when the time has come for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable and altogether just that he should compensate the creditor for the delay which he has interposed. The legal measure of this compensation is interest on the sum which he ought to have paid from the time when the payment was due from him."

And in conclusion the court say: "The question, in short, is not what is the measure of the surety's liability under the penal bond, but what does the law exact of him for unjust delay in the payment after the liability is ascertained and the debt is actually due from him."

In *The Wanata v. Avery* the court say: "The sureties in admiralty, like sureties at law, are only bound to the extent of the obligation expressed in the stipulation, unless they are themselves guilty of default, or appear and make defense, in which case they be-

come responsible for costs, and in some cases for interest by way of damages for delay in payment."

In *Wyman v. Robinson* the distinction is stated with great clearness and force. "It is commonly said that the damages cannot exceed the penalty of a bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose. The obligee is to have the penalty at a particular and definite time. Immediately upon the breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides. If he gets it later, he gets less than what the contract provides. If then the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach. After the penalty is forfeited it becomes a debt due. The sureties then stand in the nature of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule common to contracts generally applies that where money is due, and there is a default in the payment, interest is to be added as damages. The defendants should pay damages for detaining damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation. The interest is the penalty upon the surety for not fulfilling theirs."

Some of the authorities appear to hold that the sureties' liability for interest in excess of the penalty is restricted to cases where the sum upon which interest is computed is certain, or easily capable of being made certain, and hold that in other cases the penalty limits the right of recovery. *Farrar v. United States*, 5 Pet. 385; *Ives v. Merchants' Bank of Boston*, 12 How. 159.

In the last case the court, after referring to *Farrar v. United States*, say: "In the same cause it was adjudged that in an action of debt against the sureties of a surveyor who had received moneys of the United States to disburse, and given bond with sureties to account for them, the practice was to render judgment in debt for the penalty, to be discharged by the amount actually due, and that this amount could not exceed the penalty. In cases where unascertained damages are claimed, about which there is a contest, the foregoing is the proper rule."

What was said on this point however was merely obiter, and the question was not squarely presented in *Farrar v. United States*, 5 Pet. 385.

There is certainly no reason upon principle why interest should not be allowed in excess of penalty as against the surety, even though the damages may be uncertain, provided of course it is a case in which interest would be properly allowable were there no penal sum restricting the liability. The true rule is that if the claim against the surety upon the bond is of such a nature that interest could be recovered as damages if the question of penalty were not involved, the fact that a penal sum is named in the bond does not affect the question in the least.

There are some cases which perhaps incline to the view that interest cannot be recovered to exceed the penalty. *Leggett v. Humphrey*, 21 How. 75; *Laurence v. United States*, 2 McLean, 581; *Ansey v. Mock*, 8 Ala. 444; *Seamans v. White*, id. 656; *McCoy v. Elder*, 2 Blackf. (Ind.) 183; *McGill v. Bank*, 12 Wheat. 514; *State v. Sandusky*, 46 Mo. 377.

In *Fraser v. Little*, 13 Mich. 195, the court squarely refused to allow any interest whatever in excess of the penalty. The decision rests upon the English cases, which will be hereafter referred to.

But while the rule in England is that no amount in

excess of the penalty can be recovered, for interest, by way of damages for the detention of the principal, there is no well-considered decision in this country that supports this doctrine. The question as to the date from which interest is to be computed as against the surety is involved in some confusion, but an analysis of the cases will disclose a fact that there runs through them all the same thread of principle.

This principle is that whenever, under the circumstances, the surety can be said to be in default, interest upon the amount due commenced to run, and is allowed by the court as damages for the detention of the sum due from the time of the default. There seem to be three classes of decisions on this point. One allows interest from the time of the breach of the bond; another allows it only from the time of demand made upon the surety, and still a third refused to decree any interest against the surety except such as accrues after the action against him is brought. The authorities which sustain the proposition that the interest should be computed from the time the condition of the bond is broken without any demand are more numerous. The following cases sustain this position: *United States v. Arnold*, 1 Gall. 348, 360, affirmed in 9 Cranch, 104; *Wyman v. Robinson*, 73 Me. 387; *Brainard v. Jones*, 18 N. Y. 36; *Insurance Co. v. Seckel*, 8 Phila. 92; *Perritt v. Wallace*, 2 Dall. 252; *Harris v. Clap*, 1 Mass. 306; S. C., 2 Am. Dec. 27; *Washington Co. v. Colton*, 26 Conn. 42; *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177; *Clark v. Wilkinson*, 59 Wis. 543; S. C., 18 N. W. Rep. 481; *Cleveland v. Burnham*, 64 Wis. 347; *Hughes v. Wycliff*, 11 B. Mon. 202; *Marshal v. Winter*, 43 Miss. 668.

In *Wyman v. Robinson* action was brought against the sureties upon a replevin bond. The court allowed interest from the date of the breach of the bond, although the total amount exceeded the penalty of the bond, and the court expressly ruled against the claim that interest should be allowed only from the time of the demand or the commencement of the action. The court say: "In some cases the courts appear to have been reluctant to allow interest to commence before the date of the writ upon the penal bond; but why not logically from the date of the default as well as from the date of the writ? Interest is allowable from the date of the writ only because the defendant is considered in default from that date. Why not be reckoned from an earlier date if the default antedates the writ? \* \* \* Of course there may be instances where the penalty is not due till demanded, and bringing the action may be the first demand. But in the case now presented for our opinion a breach is evidenced by the judgment in a previous action. The sureties knew then as well as now just what their obligation consisted of."

Of course, as the court said in this case, if the mere breach of the bond of itself does not put the surety in default without demand, then interest could not be computed from the breach, but only from the time when the demand should be made, or in case no demand were made, from the time the suit might be brought.

The decisions which hold that interest can be computed from only these dates, and not from the time of the breach, seem to be predicated upon this theory. They regard the surety as agreeing to pay in case the principal does not pay, and therefore require that the surety should be notified of the default before the obligee on the bond can hold him responsible for any interest, for until that time these cases assert that for the purpose of interest the surety cannot be said to be in default.

This is the principle upon which the United States Supreme Court has limited the right to recover inter-

est to such as had accrued subsequently to the commencement of the action.

In *Ives v. Merchants' Bank of Boston*, 12 How. 159, the bond sued upon was a bond given upon an appeal. The judgment appealed from having been affirmed, the liability on the bond of course became absolute, *eo instanti* the judgment was affirmed. The judgment in the appellate court exceeded the penalty of the bond, and the surety was therefore, the moment the judgment was rendered, liable for the full penalty. The court below allowed interest on the penalty, not from the time of the affirmance of the judgment, but from the commencement of the action upon the bond against the surety. The court said: "Then this amount (\$2,500) was due on the bond, which could have been at once enforced by suit, and if the Supreme Court had been vested with power to render judgment against the surety on the appeal bond. As is the case in some States, no reason would seem to exist why the bond should not bear interest from the date of the judgment in the Supreme Court, against the surety as well as against the principal. But as *Ives* only guaranteed the payment of damages, and it was a duty imposed on the principal to pay the judgment, the modern rule has been applied of requiring interest from the time that demand of payment was made by suit, a rule now so generally established in similar cases by State courts of high authority, that this court could not violate it without manifest impropriety."

In *Bank of Brighton v. Smith*, 12 Allen, 243, the court based its decision, that no interest could be recovered until demand of suit, expressly upon the ground that until then the surety was not in default. The court say: "In this case interest is to be added to the penalty as damages for the detention for such time as the case shows the defendant to have been in default for its non-payment. His undertaking, by its express terms, was not on a joint promisor with Woodworth, and he cannot be said to have been in default until notice that he had become liable, and demand for payment. No notice was given or demand made until the commencement of this action, and interest ought not to have been allowed before the date of the writ. To this extent the defendant's exceptions are sustained."

The following cases held that interest is recoverable only from the time of demand upon the surety, or if no demand has been made, only from the time the suit was commenced. *Warner v. Thurlow*, 13 Mass. 154; *Bank of Brighton v. Smith*, 12 Allen, 243, 251; *Ives v. Merchants' Bank*, 12 How. 164; *Walcott v. Harris*, 1 R. I. 404; *Maryland v. Wyman*, 2 Gill & J. 279; *Boyd v. Boyd*, 1 Watts, 365; *Bank v. Magill*, 1 Paine, 670; see also *Lyon v. Clark*, 8 N. Y. 157; *Moyer v. Kipp*, 6 Paige, 88; S. C., 29 Am. Dec. 748.

The Massachusetts Supreme Court seems to be departing from its earlier decisions on this point. In *Lelen v. Brown*, 98 Mass. 515, the court say: "But interest on the penal sum therein named from the date of the breach, may be due as damages for the detention and will form a part of the judgment for the penalty to be rendered both against the principal and sureties."

Whatever construction may be placed upon the decision in New York prior to *Brainard v. Jones*, this case has certainly settled the law in that State to the effect that the interest runs from the time of the breach of the bond, and not merely from demand on the commencement of suit.

In *Lyon v. Clark* and in *Birchfield v. Haffey* (Kans.), 7 Pac. Rep. 548, the question whether interest could be allowed from the time of the breach, and before demand, was not presented, as the court below had allowed it only from the time of demand, and the plain-

cliff not having appealed, but the defendant having claimed by his appeal that the allowance of any interest in excess of the penalty against sureties in cases of penalty bonds was an error, the court was not called upon, and did not in fact in either case decide whether interest could be computed from an earlier date. But the language of the court in *Birchfield v. Haffey* is certainly broad enough to cover interest from the time of the breach of the bond. The court in this case states with admirable clearness the reason why interest is allowed in such cases. "The penalty of the bond covers the misconduct of the principal, but the interest allowed on the penalty is for the misconduct of the sureties for the delay in payment. If the damages were paid when due they would have earned the interest."

The English decisions refuse to the creditor any recovery beyond the penalty, not only as against the surety, but also against the principal. *Jevon v. Bush*, 1 Vern. 342; *Walters v. Meredith*, 3 Younge & C. 264; *Hefford v. Alger*, 1 Taunt. 218; *Hughes v. Wynne*, 1 Myl. & K. 20; *Clark v. Seton*, 6 Ves. 411; *Johnes v. Johnes*, 5 Taunt. 650; *Tew v. Winterton*, 3 Brown Ch. 489; *Knight v. Maclean*, 3 id. 496; *Wilde v. Clarkson*, 6 Term Rep. 303.

When however the debtor or surety comes into equity for relief the court will compel him to pay interest, though the total amount exceeds the penalty. *Clarke v. Seton*, 6 Ves. 411; Anonymous, 1 Salk. 164; and all the authorities in this country agree that this is the true doctrine where the debtor or surety is invoking the aid of equity. *Tazewell v. Saunders*, 18 Grat. 354, 368; *Baker v. Morris*, 10 Leigh, 284; *Long v. Long*, 16 N. J. Eq. 59.

The English cases holding there is no liability for interest beyond the penalty are consistent with a principle well settled in English jurisprudence—that interest is allowed only by virtue of express contract, except in cases of mercantile securities, and is seldom, if ever, allowed merely as damages for the detention of money, as in this country. Of course the recovery can in no case exceed the penalty and interest thereon from the time interest is computed. If this amount will not make good the creditor's claim, he must, so far as the surety is concerned, lose the balance. *Carter v. Carter*, 4 Day, 30; S. C., 4 Am. Dec. 177; *Carter v. Thorn*, 18 B. Mon. 613; *Wyman v. Robinson*, 73 Me. 384; *Marshall v. Winter*, 43 Miss. 668; *Williams v. Wilson*, 1 Vt. 266.

This rule needs no support from authority, as a recovery in excess of the penalty and interest thereon would make the surety liable beyond the limit of his contract. Whether the amount due exceeds or equals the penalty, or is the penalty itself, or a smaller sum; whether the foundation of the action is considered to be the real debt secured by the bond, or whether the penalty is regarded as the basis of recovery—whatever view may be taken of the matter, the rule on principle is clear. If there is a sum due, whether it is more or less than the penal sum named in the bond, or is just equal to it, or whether the penalty itself is the debt, the fact exists precisely the same that under that bond the principal and surety both owe and can be sued for the sum for which they are legally liable. From that moment they are in default, and why should not interest be added, not merely as penalty for the withholding of the amount, but to reimburse the creditor for the loss he has sustained by being deprived of the use of his money.

The courts which have denied the right to recover interest in excess of the penalty have all reasoned from the false premise that the penalty is the debt, and that the liability of the surety is by way of forfeiture of that penalty for the failure to perform the conditions of the bond.

In *Fraser v. Little* the court say on this point: "When a bond or specialty is given in the amount actually due and not in a penalty, there is no reason and no rule which will prevent a recovery of interest on the actual debt, for which the bond is only an evidence under seal. But where an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, never became the actual debt except by way of forfeiture, and upon such a forfeiture interest was never allowed to run by the common law or by statute."

This case and the others seem to import that the liability of the surety on the bond is not for the real debt up to the sum named in the bond, but is by way of forfeiture of the penalty. Such nonsense is, and has for years been, done away with. The penal sum is not the debt. It is not named to settle the amount of damages in case of a breach of the bond. Nay, an agreement to that effect would not be binding in many of the States, where by virtue of statutes no forfeiture can be contracted for except by way of liquidated damages, where the damages are not susceptible of exact, or nearly exact measurement. In no jurisdiction will a penal sum named in a bond be held to fix the liability of the obligors at that amount irrespective of the sum due. If the surety is liable for the penalty by way of forfeiture when the debt equals or exceeds the penalty, he must be liable for the penalty also when the debt is less. There is as much a forfeiture of the penalty in the one case as in the other. Will any one take the position that a surety in a bond in the penal sum of \$1,000 is liable for the full penalty where the real debt secured by it is only a hundred? We would like to make the acquaintance of such a judicial fossil, and find out whether he belonged to the azoic period of jurisprudence.

The liability is the debt; the penalty, the limit of that liability; and interest, the damages for not meeting and discharging that liability when it becomes due. This the New Jersey Court of Equity had the good sense to assert in *Long v. Long*, 16 N. J. Eq. 59: "For more than 200 years the principal specified in the condition of the bond, with interest, has been regarded as the real debt, and the penalty the mere form by which the debt is secured. Why should it be regarded otherwise for the sole purpose of defeating the obligor of his just claim?"

GUY C. H. CORLISS.

GRAND FORKS, DAKOTA.

#### CRIMINAL LAW—JURY—OPINIONS FORMED ON NEWSPAPER REPORT OF FORMER TRIAL.

MISSOURI SUPREME COURT, NOV. 23, 1887.

STATE V. BRYANT.

At the impanelling of a jury in a trial of an indictment for murder, on the examination as to their qualifications, two of them stated that they had formed an opinion from rumor, and newspaper accounts of the evidence on a former trial; that it would take evidence to remove it; but that they could decide the case according to the law and the evidence, and try it as impartially as if they had never heard of it. Held, that the action of the court in refusing to sustain the defendant's peremptory challenge and accepting them as jurors was not error.

APPEAL from Circuit Court, Clark county. Conviction of murder in the first degree.

B. G. Boone, Att.-Gen., and T. L. Montgomery, for State.

N. T. Cherry, G. K. Bates, W. F. Givens, and McKee & Jaymes, for defendant.



NORTON, C. J. In impanelling a jury in this case, the trial court refused to sustain defendant's peremptory challenge to Peter Handcock and Joseph Vandelah, each of whom, on the *voir dire* examination as to their qualifications as jurors, stated that he had formed an opinion from rumor and newspaper accounts purporting to give the evidence on a former trial; that it would take evidence to remove the opinion, but that notwithstanding such opinion, they could hear the case impartially, and decide it according to the evidence and instructions of the court, and that they could try the case as impartially as if they had never heard of it. The action of the court in refusing to sustain defendant's peremptory challenge to these jurors, and accepting them on the panel of forty qualified jurors is assigned for error. The ruling of the trial court upon the question is fully justified by an unbroken line of decision from the case of *State v. Baldwin*, 12 Mo. 223, decided in 1848, down to the case of *State v. Brooks*, 5 S. W. Rep. 257, decided in 1887. In case of *State v. Davis*, 29 Mo. 392, the question before the court was whether the trial court erred in refusing to sustain a peremptory challenge to jurors Shackelford, Miller and others, who stated that their opinion in regard to the issues were so fixed that it would require evidence to remove it; and in the disposition of this question it is said by Judge Scott, who delivered the opinion: "The objection to the competency of the jurors cannot be sustained. The jurors were examined on their *voir dire*, and stated that they had formed an opinion, but it was upon rumor and was not such as to bias or prejudice their minds. This has long been the law in this State, and such jurors have invariably been held competent; and the course of decision will not be varied because complaisant men, in a long course of cross-examination by counsel, may give an answer somewhat favorable to those who may wish to exclude them. Such is the growing aversion to serving on juries that unless this rule is adhered to, it will be impossible to obtain competent jurors." In case of *State v. Rose*, 32 Mo. 346, where two jurors stated that they had formed and expressed opinions as to the guilt or innocence of the defendant, that they had heard a great deal about the matter, and if the evidence turned out as they had heard it was, their minds were made up and fixed, but that they could hear the evidence and try the case impartially; that the opinion was not such as to bias their minds; it was held that no error was committed in refusing to sustain a peremptory challenge to said jurors. In the case of *State v. Corb*, 70 Mo. 491, twenty jurors stated that they had formed opinions from rumor, which it would take evidence to remove, but that such opinions would not influence them in the trial of the cause. The action of the trial court in accepting them as qualified jurors was approved. In the case of *State v. Brown*, 71 Mo. 454, where defendant was convicted for murder in the first degree, it is held that a juror was competent who stated that he had formed an opinion as to the guilt of defendant from having read the reports of a former trial in the newspapers; that the opinion was such as would require evidence to remove it, but that he could try the case fairly and impartially without regard to the opinions so formed. The case of *State v. Barton*, 71 Mo. 288, also a case in which defendant was convicted of murder in the first degree, is to the same effect, the opinion in each case being delivered by Napton, J. In the case of *State v. Walton*, 74 Mo. 270, the rule as settled by the above-cited cases is stated as follows: That a juror, who upon his examination touching his qualifications as such, answers that he had formed an impression or opinion as to the guilt or innocence of the accused; that such opinion has been formed, either from rumor or newspaper reports, or from both, which it

would require evidence to remove, is not an incompetent juror, provided it further appears to the satisfaction of the court that such opinion will readily yield to the evidence in the case, and that such juror, notwithstanding such opinion, will determine the issue upon the evidence adduced upon the trial free from bias or prejudice. In that case we were asked to reconsider the rulings of this court upon which the above rule is based, and after an investigation of the question, as viewed in cases cited in the opinion by the Supreme Court of the United States, and the courts of last resort in Pennsylvania, New York, Indiana, Iowa, Illinois, Florida, California, Mississippi, Alabama and Texas, the conclusion was reached that the position uniformly taken by this court on the question was sustained by decided weight of authority elsewhere. It is said in the case of *State v. Walton*, *supra*, that where a juror has formed an opinion only from rumor and newspaper reports he is subject to be challenged for cause, unless it further appears that the opinion is not such as to prejudice or bias his mind, and if this does appear he is a competent juror. Whether an opinion, formed from rumor or newspaper reports is such an opinion as to prejudice or bias the mind of the juror, is a question of fact to be determined under our practice by the trial judge as any other fact. The finding of the trial court on that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court than those which govern in the consideration of motions for new trials, because the verdict is against the evidence. In such cases the manner of the juror, while testifying, is often more indicative of the real character of the opinion than his words. That is seen below, but cannot always be spread on the record. Care should therefore be taken in the reviewing court not to reverse the ruling below upon such a question of fact except in a clear case. The same rule is announced in the case of *State v. Stein*, 79 Mo. 830, and *State v. Hopkirk*, 84 id. 283. In this last case Judge Sherwood, speaking for the court, said: "In relation to admitting certain persons to form the panel of forty from which the petit jury was chosen, it is enough to say that of that number, those who were objected to at the time the panel was being formed, and exceptions as to their being accepted saved, none of them had formed their opinions except from minor talk in the neighborhood and newspaper reports, they therefore do not come within the rule laid down in *Culler's* case, 82 Mo. 623, and were competent to form the panel from which the jury was afterward chosen." The fact cannot be ignored that in the march of civilization there are one or more newspapers in every town and county of the State, and that as a rule, they are read with avidity by all the citizens who can read, and when a homicide or other crime is committed, the enterprising journalist publishes the fact with all the attending circumstances. Such accounts are usually sought after and read with eagerness, and it is just as impossible for the reader not to be impressed by it, and not have some opinion concerning it, as it is to throw black ink on a white wall without coloring it. One of these results is produced by a law of the mind, and the other by a law of matter. The Legislature, giving recognition to this law of the mind, expressly provided that opinions formed from newspaper reports and rumors should not disqualify a person from being a juror, unless it should further appear that such opinion would bias his judgment and prevent him from trying the case impartially, and according to the evidence adduced on the trial. If all such persons and readers of newspapers are to be excluded as incompetent jurors, the result would be that the citizen charged with a crime would, of necessity, either be compelled to have his

cause submitted and tried by a jury of the most ignorant class in the community, if the State should exercise its right of peremptory challenge, or to a jury composed of that class of persons who seek to be professional jurors. Believing the rule so uniformly followed in this State to be in accord with sound principles and the weight of authority, and productive of the best results, both for the accused and the State, no reason is perceived for departing from it, and we adhere to it in all its integrity.

What is said by Judge Sherwood in the opinion filed on this branch of the case does not express the views of the court; but in what I have written, Judges Ray, Black, and Brace concur, and Judge Sherwood dissents. We concur in what is said in the opinion filed as to other questions involved in the case, and the judgment is therefore affirmed, with the concurrence of all the judges, except Judge Sherwood.

### CONSTITUTIONAL LAW.—RIGHT OF PHYSICIANS TO ADVERTISE.

#### CRIMINAL COURT OF COOK COUNTY, ILLINOIS.

##### PEOPLE V. MCCOY.\*

The State board of health has no power to revoke a certificate to practice medicine, except for good cause, and then only after notice and a hearing.

The board cannot declare a legitimate communication or advertisement unprofessional, and make it an offense which will justify them in revoking a certificate to practice medicine.

WATERMAN, J. In this case, it appears that the defendant, J. Cresap McCoy, received from the State board of health a certificate, which by the first section of the Medical Practice Act is made in connection with his diploma, upon which the certificate was based, conclusive evidence of his right to practice medicine in this State.

Afterward the State board of health, being dissatisfied with the character of the advertisements published by him in the daily papers, revoked the certificate issued to him, proceeding in so doing under that provision of the act which authorizes them to revoke certificates for "unprofessional or dishonorable conduct."

This having been done, an employee of one of the detective associations of this city applied to the defendant, and was by him treated for a physical ailment, in what seemed to be the regular course of the defendant's business.

This proceeding has been instituted to prevent the defendant from so practicing medicine in violation of the Medical Practice Act. So far as is shown in this case, the defendant was not notified that his certificate had been revoked. Neither the learning nor capacity of the defendant seems to have been questioned.

The defendant does not deny that he did prescribe for the witness, but he insists, among other things, that the portion of the Medical Practice Act which authorizes the State board to revoke certificates for unprofessional or dishonorable conduct is unconstitutional. And also that if constitutional the attempted revocation of his certificate is void because it was done without notice to him, and consequently without any opportunity for him to show, as he insists is the case, that he has not been guilty of either unprofessional or dishonorable conduct.

The people offered as evidence of notice to the defendant of the proceedings to revoke his certificate, an

affidavit by a constable that he served upon the defendant a notice to appear before the board.

This affidavit is of course inadmissible, and its only use, if any, is to show that the State board attempted to give the defendant notice and doubtless supposed that he had been notified.

It however appears by the testimony of the defendant that he never did have any notice, and this case must be decided as though no attempt to give notice had ever been made.

The defendant insists not only that that portion of the Medical Practice Act which provides that the State board of health may revoke the certificates of physicians for dishonorable or unprofessional conduct is unconstitutional, but that if such provision should be held to be within the Constitution, the acts of the board in the present case are unwarranted, and are in violation of his constitutional rights as a free man. Upon the part of the people it is insisted that the board are fully authorized to do what has been done in this case and that the defendant must be found guilty and punished as provided by law.

That is, it is insisted that the State board may, whenever they shall be of the opinion that any physician has been guilty of unprofessional or dishonorable conduct, revoke his certificate without notice to him, or opportunity given him for a hearing; that as to what constitutes dishonorable or unprofessional conduct they are the judges; and their opinion and judgment in this matter cannot be reviewed by the courts. The Medical Practice Act exists as a part of the police power of the State, a power, the limitations of which it is not easy to define, and under which, unless restrained by constitutional guaranties, practically every right of the citizen may be swept away. The Supreme Court of this State have said that there are necessarily limitations upon this power, and that they cannot concede the existence of an indefeasible power superior to the Constitution, that may be invoked whenever the Legislature may deem the public exigency may require it. *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191; S. C., 22 Am. Rep. 71, and that police regulations must be what they purport to be, police regulations, and must be reasonable when applied to corporations or individuals. *T. W. & W. R. Co. v. City of Jacksonville*, 67 Ill. 37; S. C., 16 Am. Rep. 611.

I think it may be said that the laws which the Legislature may make under its police power must fairly tend to protect the health, security or comfort of the citizens in their enjoyment of life, liberty or property, and the means adopted for carrying such laws into effect must be reasonable. In *Matter of Jacobs*, 96 N. Y. 98; S. C., 50 Am. Rep. 636; *People v. Marx*, 98 N. Y. 377; *Lake View v. Rose Hill Cem. Co.*, supra; *T. W. & W. R. Co. v. Jacksonville*, supra; *Yates v. Milwaukee*, 10 Wall. 497.

The State may undoubtedly regulate the practice of medicine, but if the Legislature should forbid any one to practice medicine at all, or any one not over fifty years of age, such acts would be held unconstitutional; so while power is expressly given to various cities and villages to regulate the speed of railroad trains within their limits, such limitations must be reasonable and cannot extend to prescribing a rate of speed manifestly unnecessary for the welfare of the people.

We may then inquire whether, for the purpose of confining the practice of medicine to persons guilty of neither dishonorable nor unprofessional conduct, it is reasonably necessary that the State board of health should be vested with power summarily, without notice, for reasons which seem good to them, to revoke at any moment the certificate of any physician or those of all the physicians in the State and render it at once unlawful for him or them to attend upon and prescribe for the sick.

(\*20 Chic. Leg. News, 151.)

It is insisted that no notice need be given the physician; that it is not necessary he should be informed as to the charges against him or indeed that he is accused at all; but that at once his authority to practice may be taken away and he made immediately liable to all the pains and penalties prescribed for those who practice medicine without authority of law.

If such course of procedure is warranted by the act, it cannot, as it seems to me, be considered reasonable.

The right to notice and to a hearing is such a natural equity and is so elementary, that it has always stood as the first rule for the administration of justice. *Broom Legal Maxims*; *Murdoch v. Trustees of Phillips Academy*, 12 Pick. 244; 1 Grrenl. Ev. 522.

Our own Supreme Court have repeatedly declared proceedings determinative of rights, without notice, to be violative of the most elementary principles and unwarranted by the Constitution. *Baldwin v. Smith*, 82 Ill. 162; *Willis v. Legris*, 45 id. 289; *Poppen v. Holmes*, 44 id. 360; *Campbell v. Campbell*, 63 id. 462; *Dorst v. People*, 51 id. 286.

If the power to revoke exists it must be exercised in accordance with well known legal principles.

Upon the proceedings to revoke the opinion given by Chief Justice Shaw, in *Trustees of Phillips Academy*, 12 Pick. 244, is instructive.

The constitution of the seminary provided that every professor should be under the immediate inspection of the trustees, and be by them removable for gross neglect of duty, scandalous immorality or any other just and sufficient cause. A professor having been removed by the trustees, the court held that in every tribunal acting judicially upon the rights of others, there must be substantially a motion to the party to appear, a charge given him to which he is to answer, a competent time assigned for proofs and answers, a liberty for counsel to defend his cause, and to except to the process and witnesses, and a sentence after hearing all the proofs and answers.

It is urged in this case that the proceeding for the revocation of a certificate is not judicial, and the cases of *Donahue v. County of Will*, 100 Ill. 94, and *Stern v. People*, 102 id. 540, are cited.

The proceedings may not be judicial within the meaning of article 3 of the Constitution, but they are in a manner judicial, and the right to notice and to a hearing is applicable to all proceedings wherein either judicial or quasi judicial determinations are to be made. In all the cases cited, in which the revocation without notice, of a license for misconduct has been sustained, there was reserved in the license itself a right to revoke at will.

The Medical Practice Act does not provide that the State board may revoke certificates at their discretion, but only for dishonorable or unprofessional conduct.

The Constitution of this State not only declares certain things lawful, but makes it the duty of the government to secure to individuals such constitutional rights.

The Constitution gives to every person the right to freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; the State board cannot make a legitimate publication, whether by way of communication or advertisement, an offense for which they will visit upon the offender a punishment that may reduce him to beggary.

For a physician to advertise his calling and his cures in a newspaper may be deemed by the State board unprofessional, but it is the constitutional right of every practitioner, and for so doing he cannot be deprived of the opportunity to earn his daily bread. *State v. State Board of Health*, 32 Minn. 324; S. C., 50 Am. Rep. 575.

I should certainly forbear to say more in this case

were it not that written propositions of law having been submitted, I am by the statute commanded to decide as to such propositions. The constitutionality of the clause giving the State board power to revoke physicians' certificates being questioned, we are met by the inquiry of what it is that a physician already engaged in practice is deprived of when his right to practice is taken away. In *Cooley on Torts*, 277, it is stated that "no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit."

In *Matter of Jacobs*, 98 N. Y. 96; S. C., 50 Am. Rep. 636, it is said: "So too one may be deprived of his liberty and his constitutional right thereto violated without the actual restraint or imprisonment of his person.

"Liberty in its broad sense as understood in this country means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation." In *Live Stock Association v. Crescent City*, 1 Abb. U. S., the chief justice says: "There is no more sacred right of citizenship than the right to pursue unmolested, a lawful employment in a lawful manner." "It is nothing more or less than the sacred right of labor."

To the same effect are the declarations of the court in *People v. Marx*, 99 N. Y. 377; *Berthoff v. O'Reilly*, 74 id. 509-515; S. C., 80 Am. Rep. 323; *In re Dorsey*, 7 Porter, 293, and the opinions of Justices Bradley and Field in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746.

Indeed the bare liberty of locomotion is to most men of but little consequence, if it be not coupled with the liberty to work, to use one's faculties in any lawful calling as one best may; and if it be not a deprivation of liberty to deprive one of the right to labor at the calling, which alone he understands, then the constitutional guaranty as to liberty is of little importance. Is there not also in the case of a capable physician with an established practice in which he is earning, and can earn money, a taking away of property when he is deprived of the right to so earn money?

The law recognizes that intangible things known as good-will, as property, capable of sale and entitled to protection by the courts. The good-will of a physician's business is a thing sometimes sold and is always of value. There are physicians in this State who earn in their practice more than \$10,000 per annum, and the certainty that they can continue for many years to do so is as great as such human things can be.

To say that to deprive such a man of the right in this State ever hereafter to earn any thing at his calling, is not to deprive him of property, is to say that good-will is not property.

The Constitution provides that no person shall be deprived of life, liberty or property without due process of law, and that the right of trial by jury, as heretofore enjoyed, shall remain inviolate.

While there is not entire agreement as to what is meant by due process of law, it is universally conceded that it does not mean any thing that the Legislature may enact, or any course of procedure it may prescribe; if it did, the expression in the Constitution would be meaningless; and while necessarily summary proceedings for the divestiture of property have in some instances been sanctioned, I think it has nowhere been held that one could be deprived of liberty except by proceedings in accordance with the common law, that is by the due course of procedure of a judicial tribunal. It is true that the proceeding to take

away a physician's certificate is not a criminal one, although the punishment inflicted for the offense for which he is deprived of his certificate is far more severe than that prescribed for most criminal offenses. That depriving him of the right to practice is a punishment is most clearly shown in *Ex parte Garland*, 4 Wall. 353; *Cummings v. State*, id. 277; *In re Dorsey*, 7 Porter, 293-366.

An analogy is attempted to be shown between this proceeding and that by which attorneys may be disbarred. The proceedings in the case of an attorney are simply such as have existed in all time; an attorney obtains his right to practice from the court; indeed he can only practice in court by leave of the court. It is not a natural right, but one with which he is invested perforce of an artificial state of society. The right to practice medicine is natural, growing as it does out of the constitution of man himself; the physician's certificate is but evidence that he possesses the qualifications required by the law. Nor is the case of the removal of a public official analogous. There is no natural right to office, and no property in it or its emoluments; there is attached thereto no goodwill, capable of sale, as there is to the business of a physician.

Mr. Justice Story declares that "due process of law means law in its regular administration through courts of justice." Story on the Constitution, § 1789. This definition is approved in 2 Kent Com. 11; *Taylor v. Porter*, 4 Hill, 145-7; *Hoke v. Henderson*, 4 Dev. (N. C.) 15; *Westervelt v. Gregg*, 12 N. Y. 203.

Wherever summary proceedings for the divestiture of property have been sanctioned, the justification thereof has been necessity, the nature of the case not permitting the delay incident to other methods. What necessity is there for haste in determining that a physician has been guilty of unprofessional or dishonorable conduct?

If every man accused of crime and every man charged with being a debtor may invoke the guaranty of the Constitution, and insist that he be proceeded against only by the course of the common law, however trivial be the charge and however slight the judgment that can be rendered against him, why may not the capable physician, whose all depends upon the decision as to the professional character of his conduct, demand that he be tried in a court of justice?

The greatest and the meanest criminal has a right to confront his accusers face to face; he is entitled to counsel and to compulsory process for the attendance of witnesses; he has a right of challenge not only of the jury but in this State of the judge; he is entitled to be tried in the county in which the offense of which he is accused is said to have been committed, and cannot be compelled to defend himself whenever the court may find it convenient to sit; he is presumed to be innocent; he stands upon his rights and has the benefit of all the safeguards which experience has shown to be necessary to the proper administration of justice.

But the capable and intelligent physician, whose life of usefulness is to be blighted by an unjust finding, is afforded by this law none of those things. He is to be tried when and where it may suit those who are to sit in judgment. One or all of the members of the tribunal who sit as accusers, prosecutors, judges and jury may be his mortal enemies, prejudiced against him with or without reason or cause, or his rivals in business who are to profit by his ruin; he has no right of challenge or exception; he can only humbly bow his head to the powers that be. The board are governed by no rules as to what they shall receive or consider as evidence of guilt; nor need they keep any record of the evidence presented or give any reasons for the action they may take. If as is insisted in this

case, they may also act without notice and give judgment without hearing, how far removed in its constitution is such a tribunal from the Star Chamber, the odium of whose decrees led to a revolution in which a king of England was brought to the scaffold?

And concerning what is this quasi judicial body to determine? Some animal wandering upon the highway; some wreck cast upon the shore; upon nothing less than human liberty, the sacred right of man to make use of the faculties God has given him; the right to pursue the calling for which alone he is trained; the right to heal the sick and thereby to earn bread; the possession and use of the reputation for learning and skill he has acquired. And for what period is the punishment? For life. Compared to this the ordinary term of imprisonment for felony is a slight penalty.

True, as is urged in this case, there is nothing in the law which forbids the board to grant him a new certificate. But there is also nothing which says that in any event they shall. If they do, it is a pure act of grace; rights he has none.

"Questions of power," says Chief Justice Marshall, "do not depend upon the degree to which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed." *Brown v. Maryland*, 12 Wheat. 419.

The terms "dishonorable and unprofessional conduct" cover a wide range, and the extreme and only penalty provided therefor seems, under the authority of *C. & A. R. Co. v. People*, 67 Ill. 1, violative of the constitutional provision that "all penalties shall be proportioned to the nature of the offense."

It is urged that the necessity that physicians be men guilty of neither dishonorable nor unprofessional conduct, justifies these summary methods. Is it not equally necessary that lawyers, teachers, editors and ministers, and even merchants and manufacturers, be men whose conduct is honorable and professional?

If a board may be created with power thus independently and summarily to pass upon the rights of physicians, why may not boards be organized with like powers as to most vocations?

Such measures, violative as they are of the most elementary principles for the administration of justice, and dangerous as they are to liberty, find no warrant in the Constitution.

It cannot be tolerated that among a free people a board combining within themselves the functions of accuser, prosecutor, judge and jury, should exercise such power. More especially when, as under the present law, all fines imposed for violation of the act are to be collected for the benefit of the board by whose action it is claimed to be made unlawful for the physician to practice.

Finding for the defendant.

#### NEW YORK COURT OF APPEALS ABSTRACT.

AGENCY—AUTHORITY OF AGENT TO BORROW MONEY.—Defendants, residents of Paris, sent an agent to open an office in New York for the sale of their goods. He made returns from time to time. He kept a bank account, and carried on business in his own name, and received a salary for his services. He borrowed money from time to time of the plaintiff, his sister, to pay his obligations to defendants, but gave her no memorandum at the time of the loans, and made no representation that he had authority to borrow for defendants. It was not claimed that he had written or oral authority to do so. Held, that the power to borrow money was not within the actual or apparent authority of the agent. Dec. 13, 1887. *Bickford v. Menter*. Opinion by Ruger, C. J.

**APPEAL—WHAT REVIEWABLE—FINDINGS OF FACT.**—Since Code N. Y., § 992, forbids exceptions to findings of fact, the practice of the General Term in refusing to review questions of fact, unless the case contains a statement that all the evidence given upon the trial is set forth therein, is approved. Dec. 13, 1887. *Porter v. Smith*. Opinion by Finch, J.

**— WHEN LIES — PAYMENT OF JUDGMENT. —** When a party against whom judgment has been given voluntarily pays the money to the judgment creditor, and causes the judgment to be satisfied of record, he is not prevented from appealing, unless he has agreed not to do so, or the payment was by way of compromise. Why may he not simplify the matter by placing the funds at once in the hands of the party who if the appeal fails, will be ultimately entitled to them? By so doing he will save the costs of execution, and do no harm to his creditor. We think he should not, by a temporary submission to the decision of the court, be placed in a worse position than if he awaited execution and settled it with sheriff's fees. In *Dyett v. Pendleton* (Court of Errors), 8 Cow. 326, an execution had in fact issued; but the court held that even a voluntary payment of the judgment would have been no reason against a writ of error, and in a subsequent case (*Clowes v. Dickenson*, 8 Cow. 328), Spencer, senator, referring to the decision just cited, says: "I feel confirmed on reflection that no matter how the money is paid or collected, this cannot affect the right to try error or appeal." To the same effect are many subsequent decisions, and it must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal. *Wells v. Danforth*, 1 Code R. (N. S.) 415 (Court of Appeals, 1852); *Sheridan v. Mann*, 5 How. Pr. 201; *Champion v. Congregational Soc.*, 42 Barb. 441. The statute giving the right to appeal only requires that the judgment in question shall be final (Code, § 190); that the appeal shall be taken within one year after it is entered (§ 1325), and anticipating such a case as that now presented, provides that if the judgment appealed from is reversed, the appellate court may make or compel restitution. The same rule prevailed before the Code, and it was applied whether the judgment was paid before or after writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended. *Tidd Pr.* 1033, 1034; *Sheridan v. Mann*, *supra*. Dec. 23, 1887. *Hayes v. Nourse*. Opinion by Danforth, J.

**CONTRACT—BREACH—TENDER OF PERFORMANCE—DAMAGES.**—Defendants renounced a contract for the delivery to them of iron rails, to be imported from Europe, and advised plaintiffs that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible. *Held*, that plaintiffs were justified in treating the contract as broken at the time of the renunciation, and entitled to bring action immediately for the breach, without tendering delivery of the iron. (2) Defendants are liable for the difference between the contract price and the market value of the property at the time and place of delivery, and for the sum which it cost plaintiffs to be released from the charter of a vessel in a foreign port; but all expenses incident to the performance of the contract should be deducted. Dec. 6, 1887. *Windmiller v. Pope*. Opinion per Curiam.

**GUARANTY—CONSTRUCTION—CONTINUING GUARANTY.**—Action was brought against the defendant on

a contract of guaranty, dated February, 1879, and substantially as follows: "Send \* \* \* a full line of samples, \* \* \* suitable for spring and summer, at lowest figures, and I will guaranty the payment of any goods you may sell him. Hoping you will comply with my request at once," etc. It appeared that the party continued to buy goods at different seasons during all the years until November, 1883. *Held*, that the contract was not a continuing guaranty, and that plaintiff was not entitled to recover of the guarantor for goods sold between August and November, 1883. *Rindge v. Judson*, 24 N. Y. 64; *Bank v. Myles*, 73 id. 335; *Bank v. Kaufman*, 98 id. 278. Dec. 20, 1887. *Schwartz v. Hyman*. Opinion by Earl, J.

**JUDGMENT—EFFECT—RES ADJUDICATA.**—A testator gave his wife a life interest in one-tenth of his estate, remainder over to the petitioner. During her minority, in an action of partition, the widow was allowed to take a gross sum in lieu of her life interest, and the balance of the purchase-money was invested, by order of the court, to be paid petitioner, with the accumulations, at the death of her mother. Another portion of the estate was sold under decree of court, and the proceeds by its order similarly treated. *Held*, that the disposition of the funds was *res adjudicata*, and if the decision was erroneous, it should have been corrected on appeal, and does not make the judgment void. Dec. 13, 1887. *Livingston v. Tucker*. Opinion by Finch, J.

**MARRIAGE—JUDGMENT OF NULLITY—ACTION TO SET ASIDE.**—(1) A complaint to set aside a judgment of nullity of marriage, alleged that it was procured by the fraud of her husband, but did not deny that she was guilty of the fraud charged in the divorce suit, nor did she show any defense to the same. *Held*, that the complaint was properly dismissed. (2) In an action to set aside a judgment of nullity of marriage on the ground that it was obtained by fraud, neither the judgment thus sought to be set aside, nor an order refusing to set aside the default and permit an answer in that case, can be set up as a bar to the action. *Riggs v. Pursell*, 74 N. Y. 370; *Foot v. Lathrop*, 41 id. 358. Oct. 11, 1887. *States v. Cromwell*. Opinion by Rapallo, J.

**— AGREEMENT FOR SEPARATION—VALIDITY.**—An agreement made pending an action for divorce between husband and wife, that the parties should separate, and providing for the maintenance of the wife, is not against public policy, but is valid and binding. In the pending action for divorce the plaintiff would have been entitled, if successful, to a decree of separation and a suitable allowance from the estate of her husband for her support and maintenance. It is difficult to see how it could be in accord with public policy to award such relief, and yet against public policy for the husband to concede it in advance of the decree, and as a compromise of the existing litigation. Public policy does not turn on the question whether the husband fights out the quarrel to final judgment. Where the separation exists as a fact, and is not produced or occasioned by the contract, the consideration of the husband's agreement to pay is his release from liability for the support of his wife. *Calkins v. Long*, 22 Barb. 97; *Mann v. Hulbert*, 38 Hun, 27; *Carpenter v. Osborn*, 102 N. Y. 552; 7 N. E. Rep. 823. Dec. 20, 1887. *Pettit v. Pettit*. Opinion by Finch, J.

**MASTER AND SERVANT—HIRING—BREACH OF CONTRACT—DUTY OF SERVANT.**—Plaintiff, in an action for damages for breach of a contract of hiring, while obliged to use diligence to get employment and reduce the damages consequent upon defendant's breach of contract, is not bound to accept occupation of another

kind. *Costigan v. Railroad Co.*, 2 Denio, 609. Dec. 13, 1887. *Fuchs v. Koerner*. Opinion by Danforth, J.

**MORTGAGE—CONSIDERATION—FAILURE OF—ASSIGNMENT.**—(1) The assignee of a mortgage occupies the place of his assignor in respect to the security, and is subject to the defense of want of consideration. (2) The *bona fide* purchaser of land, in an action to stay the foreclosure of a mortgage given thereon by his vendor, may prove that such mortgage was fraudulent and without consideration. Dec. 20, 1887. *Briggs v. Langford*. Opinion by Andrews, J.

**NEGLIGENCE—RAILROAD—CONDITION OF BRAKE—PROVINCE OF JURY.**—The plaintiff, a brakeman, was thrown from a car with which an engine, sent to fetch it, had come into collision. There was evidence to show, that had the brake of the car been in good order the car would only have moved a few yards, in which case the plaintiff might have suffered no injury. Held, that it should have been left to the jury to determine the condition of the brake, whether the injury was owing thereto, and whether there was contributory negligence. In order to sustain the nonsuit the counsel for the defendant claims that the collision of the engine with the ash car was the proximate cause of the plaintiff's injury, and that no negligence of the defendant in any degree tended to bring about such collision, but that on the contrary, the collision was the result of the negligent act of the plaintiff and his co-employees. We do not think that it can be said that the collision of the engine with the ash car was the proximate cause of the plaintiff's injury. Assuming that he was knocked off the car through the negligence of the engineer, or of the co-employee of the plaintiff, Buckley, by which the collision was caused, yet under the facts in this case, we think it can be said that the result of the collision was to place the plaintiff in a dangerous position, from which position he might have extricated himself without injury if the brakes on the ash car had been in proper condition. He was not injured by being thrown from the ash car; on the contrary, if the ash car had moved but a few feet after he fell upon the track, he would have sustained no injury whatever, if his evidence is to be believed. It was not until the ash car had moved a distance of some 200 feet that the brake-beam was finally raised sufficiently high to pass over the shoulder of the plaintiff so as to allow his legs to come in contact with the wheels. A jury might be asked upon this evidence to say that but for the fact of the brakes being out of order, and failing to hold the car at all, the plaintiff would have sustained no injury from the collision. In this way we think it can be said with truth that the proximate, direct cause of the injury was the condition of the brakes on the ash car, and that the only effect of the collision was to place the plaintiff in a dangerous position, from which he might have been extricated without injury, provided the brakes had been in proper order. The duty of an employer to provide safe and proper machinery for his employees, and the extent of that duty, are too well settled in this court to need the citation of authorities on that subject. The difficult point in this case, and the one in regard to which we have had considerable doubt, is whether, assuming there was a failure of the company to have proper brakes upon this ash car, that failure really bore such a relation to the happening of the accident as to render the company liable. Can it be said that this accident, or one of such a nature, might fairly and reasonably be apprehended as a possible result of a failure on the part of the company to perform its duty as to the brakes, or was it of such a character that its occurrence would never have reasonably been anticipated, and that it therefore bore no fair and just connection with the bad condition of

the brakes? After considerable reflection, and with some hesitation, we have come to the conclusion that we cannot say there was no such relation. It is a border case, and much may be said on the other side. It is perhaps true that an injury such as the plaintiff sustained never before happened in such a manner. That is not, as we think, conclusive upon the question of defendant's exemption. The purpose of brakes upon a car is to control it to a much greater extent than could be done without them. They are used, not alone when the car is in motion, and to retard its progress; the evidence in this case shows they are constantly used when a car is at rest, and for the purpose of rendering it less easy and less liable to be moved. There is thought, and properly thought, to be danger, as well as inconvenience, resulting from permitting a car to stand upon the tracks at any time with brakes unset. It is not necessary, in order to hold a defendant liable, so far as this point is concerned, to be able to see in advance all the possibilities of danger which might result from such omission. Accidents are continually happening, the exact counterpart of which may not to our knowledge have occurred before. That is not the test. If the accident is of such a nature that its occurrence might reasonably be apprehended from the failure to take the precaution in question, and if it did thus happen, then a relationship is established between such failure and the cause. Now the direct and immediate cause of this accident was the car running over the plaintiff. Granted that the plaintiff would not have been run over if he had not first been knocked off the car by the collision with the engine, that only proves that by the neglect of a co-employee he was placed in a dangerous position, and being thus placed, he is injured because the car was not supplied with a brake in a good condition. He was injured by being run over by the car, which was moving at a time when if it had had a brake in good condition and properly set, it would have been stationary. One of the dangers to be apprehended from a car in motion at a time when it ought to be stationary is that it may injure people by running over them. It is so obvious that there is danger of some kind to be apprehended from leaving a single car without the brakes being set, even when the car is in the yard, that the defendant proved, in this case, it was the duty of all employees to set the brakes of such a car, and that if the brakes were out of order it was the duty of the employees to "chook" the wheels of the car thus left; and the defendant claimed that the failure to thus "chook" the wheels of this car (if the brakes were really in the condition as charged by the plaintiff, which is denied) was the negligence of a co-employee contributing to the injury, for which it was not responsible. The duty of a brakeman calls him to situations of peril in and about standing as well as moving cars, and this peril is of a nature that is recognized as existing by the railroad authorities, and they have assumed to reduce it as far as they reasonably can by the appliance, among other things, of brakes; not alone on that account, but that is one of the objects. The failure to have the brakes in order may, under these circumstances, be fairly alleged as the cause of the accident. Dec. 23, 1887. *Lilly v. New York Cent. & H. R. R. Co.* Opinion by Peckham, J. Earl and Finch, JJ., dissent.

**PARTIES—NON-JOINDER—PLEA IN ABATEMENT.**—A plea in abatement, which sets up the non-joinder of a party plaintiff who was living when the action was commenced, is properly met by evidence showing that such party was dead at the time of the trial, when the fact of his death gives the plaintiffs named full right to prosecute the action as the survivors thereto. Oct. 25, 1887. *Groot v. Agens*. Opinion by Finch, J.

**PARTITION—PARTIES—ERROR IN—EFFECT ON DECREE.**—Code Civil Proc. N. Y., § 1538, provides that no person other than a joint tenant or tenant in common shall be plaintiff in an action for partition, and a tenant by curtesy must be a party. Plaintiff, being tenant by curtesy in a piece of land, brought an action for partition, making all others interested parties. *Held*, that error in making him plaintiff, and not defendant, was not jurisdictional, and the parties were bound by the decree. *Cromwell v. Hull*, 97 N. Y. 209. Dec. 13, 1887. *Reed v. Reed*. Opinion by Danforth, J.

**PARTNERSHIP—WHAT CONSTITUTES—AGREEMENT WITH THIRD PARTY.**—A. and B. formed a partnership, each to have an equal share in the profits. B. agreed with C. that the latter should receive his share of the profits, leaving it to C.'s discretion as to what part, not less than one-fifth, should be retained by B. A. consented to the arrangement on condition that the terms should in no way conflict with the terms of the copartnership, nor invalidate the rights secured thereby. *Held*, that C. was not in anywise a member of the copartnership. Dec. 13, 1887. *Rockafellow v. Miller*; *Banks v. Same*. Opinion by Danforth, J.

**RAILROAD COMPANIES—NEGLIGENCE—CROSSING RAILROAD TRACKS—DUTY TO LOOK—DUTY OF BRAKEMAN TO GIVE WARNING.**—(1) In an action for damages caused by being struck by an engine, the evidence established defendant's negligence, but also showed that plaintiff, after passing the south track, on which a train was standing, divided into two parts, although he was acquainted with the crossing, and knew that on the northerly track trains were going west, looked east, and negligently attempted to cross, while he could have discovered the approach of the engine. *Held*, that plaintiff could not recover. (2) The claim that defendant was liable because a brakeman standing on the southerly track, charged with the duty of coupling cars standing on that track, failed to give plaintiff warning of the approach of the engine, *held*, unfounded, as the evidence failed to show that he was stationed there to warn travellers. Dec. 6, 1887. *Young v. New York, L. E. & W. Ry. Co.* Opinion by Earl, J.

**WILL—CONVERSION OF REALTY—POWER TO SELL.**—By the terms of a testator's will he directed that his executors should divide one-half of the residue of his estate, both real and personal, into four equal parts, one of which he gave to his executors in trust to receive the profits to the sole use of his daughter Anna during her life, and upon her death to pay over, transfer and deliver the principal to her heirs, or to such person or uses as she might appoint. The same provision was made for each of three others. The other one-half it was provided should be divided in four equal parts, and to each of the daughters he gave and bequeathed one part; and it was further provided that all advancements should be deducted from the sum bequeathed. Testator empowered his executors, for the purpose of carrying the will into effect, to sell real estate as they in their discretion may deem best. *Held*, that the will, construing all its terms together, contained an imperative direction to sell real estate, and was an equitable conversion of the property into personality, and that in an action for partition, the issue of one of the daughters, having no interest in the property as realty, was not a proper party. Dec. 13, 1887. *Delafeld v. Barlow*. Opinion by Earl, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF CHARACTER OF FELLOW-SERVANT—**

**BURDEN OF PROOF.**—(1) In an action by an employee against a railroad company for injuries, it appeared that the injury was caused by the carelessness and recklessness of an engineer, who under the influence of a violent temper was in the habit of acting recklessly, to the danger of his co-employees; that the company knew of the character of the engineer; that plaintiff had been in the employ of the company with this engineer only a week. *Held*, that whether the failure of the plaintiff to refuse to work amounted to negligence on his part was a question for the jury to decide from all the circumstances in the case. (2) In an action against a railroad company for injuries to an employee, the court charged the jury that the defendant, having alleged contributory negligence on the part of the plaintiff, it must be established by a clear preponderance of evidence to warrant a jury in finding it. *Held*, that the instruction was a proper statement of the law, and in no way calculated to mislead the jury into assuming that they must look for the proof of contributory negligence only in the evidence adduced by the defendant. Dec. 19, 1887. *Northern Pac. R. Co. v. Mares*. Opinion by Matthews, J.

**WILL—REMAINDER—DEATH OF LIFE-TENANT BEFORE TITLE VESTED.**—Testator bequeathed the income from his estate to his wife, and at her death to his sisters, if living, and on their death to be divided among three charitable institutions. *Held*, that the death of the sisters before the testator did not defeat the remainder to the charities designated by the testator, but it vested in them upon the death of the widow. In support of the proposition that the bequest to the defendants must fall with that to Ann Smith and Eleonora Cummings Robison, counsel for the appellants rely upon the rule laid down by Mr. Jarman in the following language: "When a contingent particular estate is followed by other limitations a question frequently arises whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction of the others, the whole will be considered to hinge on the same contingency; and that too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations. Thus where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them." 1 Jarman. Wills (5th Am. ed., Bigelow), \*831. But the rule referred to is one of construction merely, and intended only as a formula for the purpose of classifying cases in which the meaning is gathered from the language of the testator expressing such intention, and is not to be applied to instances in which it appears that the contingency is restricted to the immediate estate. The same author divides those instances into two other classes: "First. Where the words of contingency are referable to and evidently sprung from an intention which the testator has expressed in regard to that estate by way of distinction from the others. Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts." *Id.* 831, 832. Under the second of these classes is ranged the case of *Boosey v. Gardener*, 5 De Gex, M. & G. 122. In that



case the testator bequeathed to his two sisters the interest of his long annuities for their lives, and in case of one or both of their deaths before his, he gave the whole interest in long annuities to his brother for life; at his death (that is, the death of the brother) the testator gave half of the capital to his niece, A., his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; likewise the testator bequeathed to his nephew, S., his brother's son, if not further family, his other half; in case of further family to be divided between them, not dividing the half left to A. It was held by Turner, L. J., that the bequest to the niece and nephew was not contingent upon the death of the sisters in the testator's life-time, although the preceding estate for life to the brother was. But little aid however in such cases is to be derived from a resort to formal rules, or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with a view of ascertaining through their meaning the testator's intention. In applying this principle the Supreme Judicial Court of Massachusetts, in the case of *Metcalf v. Framingham Parish*, 128 Mass. 370, 374, speaking by Gray, C. J., said: "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture; but if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Ferson v. Dodge*, 23 Pick. 287; *Towns v. Wentworth*, 11 Moore P. C. 526; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Greenwood v. Greenwood*, 5 Ch. Div. 954." Looking into the present will therefore for that purpose, we find it evident that the testator did not intend by the third subdivision of his will to give to his widow an interest in his estate beyond her life. This conclusion is not based on any distinction between a bequest of the income of the estate and a bequest of the body of the estate itself; nor do we lay any stress on the declaration of that clause, "she having the right to spend the same, but not to have it accumulate for her heirs," although that language does afford an indication in support of the conclusion. But whatever force, standing by itself, the third subdivision may have, it is clear that the testator intended, in the event that his sister, Ann Smith, and Eleonora Cummings Robison should survive both himself and his wife, that they should have an estate for life, beginning at the death of his widow. That would necessarily limit the widow's estate to her own life. But as the estate given by the fourth clause to Ann Smith and Eleonora Cummings Robison for their lives was contingent on the event that one or the other of them should be living at the death of the wife, the question remains whether that contingency also entered into the bequest in remainder to the defendants. The fact that Ann Smith and Eleonora Cummings Robison died before the testator, whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator the gift over would of course take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift over of the legacy or share is to take effect on the death of the prior legatee generally, or on the death under particular circumstances, and whether the legacy be immediate

or in remainder. It was so held in *Willing v. Baine*, 3 P. Wms. 113, where the bequest was to A., but if he died under 21, to B. In *Humberstone v. Stanton*, 1 Ves. & B. 388, it was said: "It seems formerly to have been a question whether a bequest over, in case of the death of the legatee before a certain period, could take effect where he died during the testator's life, though before the period specified. In the case of *Willing v. Baine* legacies were given to children, payable at their respective ages of twenty-one, and if any of them died before that age, the legacy given to the person so dying to go to the survivors. One having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors." The argument was that the bequest over could not take place, as "there can be no legacy unless the legatee survives the testator, the will not speaking until then; wherefore this must only be intended where the legatee survives the testator, so that the legacy vests in him, and then he dies before the age of twenty-one. It was however held, and is now settled, that in such case the bequest over takes place." It follows therefore that unless it appear on the face of the will that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which by reason of the contingency has failed. The scheme and intention therefore of the present will seems to us, considering the third and fourth subdivisions together, to be this: An estate for life to the testator's widow; an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent on one of them surviving the widow, with the ultimate remainder in fee as to the real estate, and absolutely as to the personalty, in the defendants. The language of the contingency in the fourth clause, in our opinion, affects only the intermediate life-estate of Ann Smith and Eleonora Cummings Robison, it being, we think, the plain intention of the testator to give to his widow the estate in question only for her life, and not to die intestate as to any portion of the estate, and to limit the contingency only to the gift to Ann Smith and Eleonora Cummings Robison. It is true that the ultimate gift to the defendants is described as commencing "at their death," that is, at the death of Ann Smith and Eleonora Cummings Robison; but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended. Certainly those words are not to be construed so as to require that the gift to the defendants shall take effect at the death of Ann Smith and Eleonora Cummings Robison, irrespectively of the prior decease of the widow. The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants. Dec. 19, 1887. *Robison v. Female Orphan Asylum of Portland*. Opinion by Matthews, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**ASSUMPSIT—PRIVITY—GOODS ORDERED OF ONE AND SUPPLIED BY ANOTHER—NOTICE.**—Where goods ordered of one person are supplied by another, the acceptance and use of the goods, without notice that

they have been so supplied, will not create that privity of contract between the person ordering the goods and the person supplying them which is essential to support an implied *assumpsit*; but it is not essential that notice be given before delivery. If it is given before the goods are appropriated or converted, it will be sufficient; and where such notice is given by letter, or upon the face of the invoice, the party receiving the goods cannot escape liability upon the ground that he did not see the notice because of his own inattention, or that of his agent. It may be conceded that if the appellant, Barnes, had filled the order without at the same time giving notice that the order was filled by him, and not by Perry, to whom it was sent, there could have been no recovery, even though the defendant received and appropriated the goods. In that event one of the indispensable elements of a contract—the mutual assent of contracting parties—would have been absent. To support a recovery for goods sold and delivered, there must have been a contract, either express or implied, between the person who ordered and the one who supplied the goods. Where goods ordered of one person are supplied by another, the acceptance and use of the goods, without notice that they have been so supplied, will not create that privity of contract between the person ordering the goods and the one who thus supplies them which is essential to support an implied *assumpsit*. *Hills v. Snell*, 104 Mass. 173; *Ice Co. v. Potter*, 123 Id. 28; *Boulton v. Jones*, 2 Hurl. & N. 564. The right of a party to select his own patrons, or to determine with whom he will deal, cannot be frustrated by a mere interloper who fills an order, never sent to nor intended for him, without the knowledge or consent of the person to whom the goods are supplied. It is not essential however that notice be given before the goods are delivered. If the person ordering the goods receives notice before the goods are appropriated or converted, that they have been furnished by another, and is also notified that they are furnished upon such terms as import that the person supplying the goods contemplated a sale upon terms stated, and the person who sent the order afterward receives and appropriates them, he thereby assents to and ratifies the filling of the order, and such assent and ratification relate back, and give the order the same effect as if it had been originally given to the person who filled it. *Orcutt v. Nelson*, 1 Gray, 536; *Mudge v. Oliver*, 1 Allen, 74; *Wellauer v. Fellows*, 48 Wis. 106; 4 N. W. Rep. 114. The appellant testified that he sent a letter inclosing an invoice of the goods, which stated upon its face the terms upon which they were furnished, and the credit given on account of the transaction with Perry. He also testified that he explained in the letter in which the invoice was inclosed the circumstances under which he filled the order. The appellee admits that he received the invoice at or about the time he received the goods. He does not deny that he received the letter. It is not enough that through his inattention, induced by the fact that he sent the order to Perry, he failed to observe what was patent upon the face of the letter and invoice; nor does it make any difference that the letter and invoice were received by his clerk or agent, and not by himself. The appellee cannot impose the consequences of his negligence, or that of his agent, upon the appellant, who exercised all the caution that was reasonably possible under the circumstances. The appellant having filled the order in good faith, and having given notice, which the appellee received before he appropriated the goods, the latter cannot now throw the loss, which could have happened only through his inattention on the appellant. Ind. Sup. Ct., Dec. 7, 1887. *Barnes v. Shoemaker*. Opinion by Mitchell, C. J.

#### INSURANCE—ACCIDENT—DEATH BY INHALING GAS.

—(1) An accident insurance policy was taken out by plaintiff, and afterward the insured was found dead in his bed in a hotel. His death was caused by inhaling coal gas. The policy of insurance contained a clause to the effect that no recovery could be had upon the policy unless it was established by clear and positive proof that the death of insured was "caused by external, violent and accidental means," or where death was caused by taking "poison, or by the contact with poisonous substances." Much testimony by chemists was given as to whether coal gas was a poison or poisonous substance, and the testimony was somewhat conflicting. The court refused to instruct the jury that inhaling coal gas was a taking of poison, if they believed coal gas to be a poisonous substance which, when inhaled, destroyed life. *Held*, not error. (2) An accident insurance policy contained a clause that "the benefits shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured." The evidence showed that the body of the insured, when found, had bloody froth at the mouth, and spots of blood upon the face and breast, and red spots on the body. The defendant asked the court to instruct the jury that if there were no visible signs of injury upon the body of insured except the froth and red spots, it did not constitute visible and external signs of injury. *Held*, that this was a question of fact, properly determinable by the jury, and the instruction was rightly refused. Va. Sup. Ct., Nov. 17, 1887. *United States Mutual Accident Association v. Newman*. Opinion by Lacy, J.

MASTER AND SERVANT—RAILROAD COMPANIES—NOT REQUIRED TO FENCE TRACK—DANGER OF CATTLE ON TRACK.—Railroad corporations have the right, in the absence of a duty imposed by statute or contract, to fence their roads or not, and to construct their roadbeds in respect to curves and grades as they see fit. And where a fireman on a railroad train has been over the road, and had opportunity to learn the character of the road as to curves, grades and fences, and that of the country traversed, and its use for pasturage, but continues in his employment without objection, he assumes all risk arising from the unfenced condition of the road, and consequent danger of encountering cattle on the track, or from the peculiarities of the road-bed as to grades and curves. The rule which we have expressed may be considered as settled. In *Sweeney v. Railroad Co.*, 57 Cal. 15, the plaintiff's husband, acting as conductor, was killed under circumstances similar to those under which the plaintiff in the case at bar was injured. An instruction was approved which was given by the court below in these words: "If I understand the position of the plaintiff's counsel, it is this: That the defendant failed in its duty to its employees by not fencing its railroad track; that it was negligent in this respect, and the death of Sweeney is due directly to this negligence, and that to an action of this kind it is no defense that Sweeney had full knowledge of this particular negligence, and equally with the defendant well knew the danger that might flow therefrom; in other words, that a risk cannot, under any circumstances, be naturally incident to the employment if it be incurred through the negligence or want of care on the part of the employer. This, as it seems to me, is stretching the principle beyond its legitimate limits. As I understand it, one may engage in and conduct a dangerous business, provided it be one not prohibited by law, and to assist him may employ another without incurring a responsibility to such employee for injuries sustained in such hazardous business, provided the danger or risk be equally known to both. In

such case the servant voluntarily entering upon an employment, the dangers and hazards of which are well known to him, must be held to have assumed the consequences of such risks." In *Fleming v. Railway Co.*, 27 Minn. 111, the plaintiff's intestate was acting as fireman in operating the defendant's road, and was killed under circumstances similar to those under which the plaintiff in the case at bar was injured. A recovery was sought under a statute which provides that "any company or corporation operating a line of railroad in this State, and which company or corporation has failed or neglected to fence said road,

\* \* \* shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect." It was held that the plaintiff could not recover under the statute. The court said: "If the servant enters upon and continues in the service of the company with knowledge of the unsuitableness and inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence, and he assumes the risk of the service as he finds it.

\* \* \* The power of an employee to assume the known risks of his employment, and the consequent exemption of the master in such cases, is well settled in law." In 1 Redf. Railr. 492, the author states the rule as follows: "Railways are not bound to maintain fences upon their road so as to make them liable to their own servants for injuries happening in consequence of the want of such fences; and where the statutes makes them liable for all injuries done to cattle by their agents or instruments until they fence their road the liability extends only to the owners of such cattle, and this liability is the only one incurred." Iowa Sup. Ct., Oct. 28, 1887. *Patton v. Central Iowa Ry. Co.* Opinion by Adams, C. J. Beck, J., dissenting.

**NEGLECTANCE — ACTION FOR DEATH — CONSCIOUS SUFFERING OF DECEASED — NOMINAL DAMAGES.**—Where the body of deceased was not found until some minutes after the accident which caused his death, at which time he was alive but unconscious, held, that as there was no direct evidence of conscious suffering on the part of the deceased, a ruling that his administratrix was entitled to recover only nominal damages was correct. There was no evidence of any expenses or loss incurred before death by reason of the accident, which in itself might afford ground for substantial damages. *Bancroft v. Railroad Corp.*, 11 Allen, 34. The question is as to the correctness of the latter ruling. The plaintiff deems these rulings inconsistent each with the other. We do not perceive the inconsistency. Instantaneous death, and the absence of conscious suffering after a fatal injury, are readily distinguishable, and have been distinguished in our decision. The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which it is determined whether a cause of action survives. *Hollenbeck v. Railroad Co.*, 9 Cush. 478. But as the administratrix can only recover such damages as she can show were sustained by her intestate, if he became instantly insensible, and so remained until his death, nothing could be recovered for any physical or mental suffering sustained by him. Nothing can be recovered by the administratrix on account of the death, which subsequently ensues. *Bancroft v. Railroad Corp.*, 11 Allen, 34. In *Kennedy v. Sugar Refinery*, 125 Mass. 90, where the intestate fell from a platform twenty feet in height, became unconscious on striking the ground, and in one aspect of the evidence remained so until his death, the plaintiff was allowed at the trial by the judge *at nisi prius*, to recover for mental suffering endured during his fall. It was held in this court that the burden of proof was upon the plaintiff to show that her intestate actually

endured mental suffering during the fall, before he could recover damages on that account; that as no proof was furnished of any mental suffering during the fall, and as the question whether he did suffer mental terror or distress was purely a matter of conjecture, no damages could be recovered on that account. Whether the person injured endured conscious suffering has sometimes depended upon the question whether his death was instantaneous, but the two inquiries are distinct. *Corcoran v. Railroad Co.*, 138 Mass. 507; *Tully v. Railroad*, 134 id. 499; *Riley v. Railroad Co.*, 135 id. 292. That an adequate cause of the intestate's death, and one which must be held to have produced it, is found in the crushing of his body, and disruption of his bowels, must be conceded. Viewed in the most favorable light for the administratrix this certainly fails to show any conscious pain or suffering on the part of the intestate. When found, although breathing, he was unconscious. Upon this state of facts, even if it were possible that there was some brief conscious suffering, evidence of it is not afforded, and it is left purely conjectural. The presiding judge did not undertake to say, as the plaintiff urges, that because ten minutes after the accident the victim of it could not speak, and was unconscious, he might not have passed into that condition after brief but terrible suffering, but said in substance, that the case did not afford evidence that he had suffered consciously. This was correct. The plaintiff urges that the case at bar strongly resembles *Nourse v. Packard*, 138 Mass. 307, but the evidence here wanting was afforded in that case. The dead body of the intestate was there found under a heap of loose grain. There was expert testimony that he died from suffocation, and that a person situated as he was would retain consciousness from three to five minutes. It was a reasonable conclusion that he lived in a state of conscious suffering for a few minutes after the fall of the grain upon him, which caused his death. *Mass. Sup. Jud. Ct.*, Nov. 23, 1887. *Mulchey v. Washburn Car-Wheel Co.* Opinion by Devens, J.

**NEGOTIABLE INSTRUMENTS — ACTION AT LAW ON LOST NOTE — AVERMENT OF LOSS.**—The loser of a negotiable instrument can recover in an action at law against the maker's administrator, upon proof that defendant can pay it without the hazard of being required to pay it a second time, and an averment of the loss of the note is not necessary. There is a conflict of decision on the question. The English doctrine is that the only remedy on a lost negotiable note or bill is in equity, the reason alleged being that the maker, upon paying the note, is entitled to have it surrendered to him for his protection against suit thereon by any other person coming into possession of it, and a court of equity can afford protection by exacting an indemnity bond, whereas a court of law cannot. In this country the English doctrine has been adopted in several States, but in others it has been materially modified or rejected. In this State, in *Aborn v. Bosworth*, 1 R. I. 401, which was an action on a bill of exchange lost, tried to the jury in 1850, this court instructed the jury that the drawee was entitled to recover upon proof either that the bill was destroyed or surrendered, or so indorsed that no third person could recover it. The counsel for the defendant disparages the authority of this case, because it was determined *at nisi prius*; but it should be remembered, that at the time it was tried, the full court were required to sit in the trial of cases to the jury, and the court, when so sitting, was accustomed to listen to very thorough discussions of legal questions on both principle and precedent. We think that the case has been, and should continue to be accepted as settling the law, so far as it goes, for this State.

The ground of decision was that the loser is entitled to recover in an action against the maker, whenever the recovery will put the maker in no worse position than he would have been if the loss had not occurred. The averment here is that the note was lost after indorsement, but also after maturity. The averment of the loss was not necessary to the maintenance of the action, and in our opinion it is competent for the plaintiff to prove, not only the loss, but also the destruction of the note. 2 Pars. Notes & B. 309. In *Peabody v. Denton*, 2 Gall. 351, the note was lost after maturity, and in action thereon by the indorsee against the maker, tried eighteen years after the loss, the court held, that after so great a lapse of time, it was incumbent on the defendant to show either that the note existed or had been demanded of him, or that it must otherwise be presumed that no demand would ever be made. In the case at bar, for any thing that is averred, the note may have been lost thirty years ago. In *Swift v. Stevens*, 8 Conn. 431, the note disappeared some six years before the trial. The cashier of a bank to whom it had been delivered for safe-keeping, testified that he had made diligent search for it, but was unable to find it; that he had never delivered it to any person; and that he verily believed it had been accidentally destroyed, and on motion for new trial after verdict for the plaintiff the court held that the evidence was proper to go to the jury to prove the destruction or non-existence of the note. The circumstances in the case at bar, for any thing that appears, may be equally or more cogent to prove the destruction or non-existence of the note. Moreover all that is required to entitle the plaintiff to recover is proof that the defendant can pay the note without the hazard of being required to pay it a second time. Accordingly it has been held that the loser is entitled to recovery when any future action on the note will be barred by the statute of limitations. *Torrey v. Foss*, 40 Me. 74; *Moore v. Fall*, 42 id. 450. Any future action on this note would be barred, so far as appears, and if so, the defendant will be protected. R. I. Sup. Ct., Oct. 14, 1887. *Adams v. Baker*. Opinion by Durfee, C. J.

**NUISANCE—CONTINUING—RECOVERY NOT A BAR TO SUBSEQUENT ACTION.**—Where a nuisance is a continuing one, in consequence of which damages are sustained, a recovery is limited to damages which may have accrued before the action is brought, and one action is not a bar to a second action brought for damages thereafter sustained. This action was brought to recover damages for a bridge, alleged to have been negligently and unlawfully constructed by the plaintiff in error across the Platte river, so as to form an unlawful obstruction and create a nuisance. In such case there could be no recovery until actual damages had been sustained. Thus suppose the owner of the land at the time the bridge was built had brought an action, could he have recovered for anticipated overflow? We think not. There must be actual injuries resulting from the unlawful obstruction to justify a recovery. *Miller v. Railway Co.*, 16 N. W. Rep. 567; *Drake v. Railroad Co.*, 19 id. 215; *Cain v. Railroad Co.*, 3 id. 737. But it is contended, that the plaintiff below, being the grantee of Ballou, who owned the land when the bridge in question was constructed, the present owner cannot therefore recover. This position however is untenable. If the bridge in question is a nuisance, and an unlawful obstruction in the river, then every continuance of said nuisance is a new nuisance for which, when damages have been sustained, an action may be maintained, the recovery being limited to such damages as have accrued before the action was brought. *Beswick v. Combdon*, Moore, 358; 1 Cro. Eliz. 402, and *Penruddock's case*, 5 Co.

Rep. 205; 3 Bl. Com. 220; *Rosewell v. Prior*, 2 Salk. 460; *Fay v. Prentice*, 1 C. B. 828; *Bowyer v. Cook*, 4 id. 236; *Holmes v. Wilson*, 10 Ad. & El. 503; *Thompson v. Gibson*, 7 Mees. & W. 456; *McConnell v. Kibbe*, 29 Ill. 483; 33 id. 175; *Staple v. Spring*, 10 Mass. 72; *Hodges v. Hodges*, 5 Metc. 205; *Baldwin v. Calkins*, 10 Wend. 187; *Beidelman v. Foulk*, 5 Watts, 308; *Blunt v. McCormick*, 3 Den. 283; *Cumberland, etc., Corp. v. Hitchings*, 65 Me. 140; *Thayer v. Brooks*, 17 Ohio, 489; *Beach v. Crain*, 2 N. Y. 86; 1 Suth. Dam. 202; *Gould Waters*, § 887. It is said however that one recovery will bar a future action. This in many cases no doubt is true, and if a railroad had been constructed along a street, in front of the plaintiff's property, whereby he sustained damages, one recovery would bar a future action for the same injury. But where damages result from a continuing nuisance, a different rule applies, and a recovery may be had for each injury as it occurs. Neb. Sup. Ct., Nov. 10, 1887. *Omaha & R. V. R. Co. v. Standen*. Opinion by Maxwell, C. J.

**OFFICE AND OFFICER—LIABILITY OF COUNTY COMMISSIONERS FOR NEGLECT OF DUTY IN RESPECT TO JAIL.**—A prisoner in the county jail contracted a disease of the lungs, as alleged, because of insufficient bedding and warmth during cold weather. He brought suit against the board of county commissioners in its corporate capacity for damages for neglecting to render the jail habitable. Held, not maintainable. Counties are of and constitute a part of the State government. A chief purpose of them is to establish its political organization, and effectuate the local civil administration of its powers and authorities. They are in their general nature governmental, mere instrumentalities of government, and possess corporate powers adapted to its purposes. It is not their purpose to create civil liabilities on their part, and become answerable to individuals civilly or otherwise. Indeed they are not, in a strict legal sense, municipal corporations, like towns and cities organized under charters or particular statutes, and invested with special powers, and endowed with more of the functions of corporate existence, intended to serve, not so much the purposes of the State, as subject to its general laws, the advantage of particular communities in particular localities in the promotion and regulation more or less of trade, commerce, industries, and the business transactions and relations in some respects of the people residing or going there collectively and severally. Their purposes are more general and partake more largely of the purpose and powers of governments proper. *White v. Commissioners*, 80 N. C. 437; *McCormac v. Commissioners*, id. 441; *Dare Co. v. Currituck Co.*, 95 id. 189; *Cooley Const. Lim.* 240, 247; *Dill. Mun. Corp.*, §§ 761, 762. While what we have said is true, generally, the Legislature, subject to constitutional limitations, may confer upon counties such corporate powers to make contracts, create civil liabilities, and serve such business purposes as it may deem expedient and wise, and make them answerable in damages for the negligence of their officers and agents, in failing to properly exercise the powers with which they are charged, or for exercising them improperly to the injury of individuals. But such corporate authority and liability must be specially created by and appear from statutory provisions expressed in terms, or necessarily implied. Generally a county is not liable for damages sustained by individuals by reason of the neglect of its officers and agents, and there is no statute of this State creating such liability. *White v. Commissioners*, *supra*. This case is very different in material respects from that of *Lewis v. City of Raleigh*, 77 N. C. 229 cited. It was an action against a city, brought for the purpose of the

recovery of damages sustained by the intestate of the plaintiff therein, occasioned by the neglect of the city's officers and agents. But as we have seen, cities and towns stand on a footing very different from counties. Cities and towns are incorporated largely and mainly for the particular benefit of the corporators. They have special privileges and advantages, and exercise special powers, and are in many respects held responsible as such corporations for damages occasioned by the neglect of their agents. The plaintiff cannot therefore maintain this action. It may be that he can have a remedy against the commissioners personally, but as to this we are not called upon to express an opinion. If what he alleges is true, there was gross inexcusable neglect on the part of the commissioners, resulting in serious injury to and shocking outrage upon him. It is difficult to believe that the commissioners so neglected to discharge their plain duty, or that a jailer could be so unfeeling and deaf to the appeals of a human being for relief from acute suffering that it was his duty to avert. We are glad to be assured by the counsel for the appellees that the allegations of the complaint have no real foundation in truth. The law requires in explicit terms and expects that county commissioners shall provide for the tolerable comfort of prisoners. They ought to so provide, and jailers should execute their proper orders with fidelity. If they will not, the courts and solicitors should be vigilant to compel them to do so. It should never be forgotten that a prisoner cannot help himself in essential respects, and the laws of humanity, as well as the laws of the State, requiring that his condition shall not be made or left intolerable. *N. C. Sup. Ct., Nov. 14, 1887. Manuel v. Commissioners of Cumberland Co.* Opinion by Merrimon, J.

### SONG OF THE LAW.

With fingers inky and cramped,  
With flushed and swollen face,  
A lawyer sat in lawyer-like black  
At work on a wearisome case —  
A deluge of barbarous words,  
From Chitty, Coke, Blackstone and Kent,  
Till he rose to his feet, uplifted his voice,  
And chanted his legal lament:

Think! Think! Think!  
When you rise at break of day.  
Think! Think! Think!  
Till the setting sun's last ray.  
Oh, how I would like to be  
One of those beings rare,  
Who earn ten thousand dollars a year  
By batting a ball in air.

Talk! Talk! Talk!  
Till you'll stand on Jordan's brink.  
Write! Write! Write!  
Till your blood seems turned to ink.  
Precedent, Code and rule,  
Affidavits, order and plea,  
Till e'en in my dreams a jury sits,  
In shadowy guise before me.

Oh! to play on a team  
With the canvas-clad athlete,  
To feel once more the delirious joy  
Of making the touch-down neat,  
To stand before the nets,  
To volley and serve and place,  
Or to breast the tape a yard ahead.  
At the end of a hard fought race.

To stand by the mountain brook  
Casting the tempting line,  
To lie on the deck of the bounding boat  
Ploughing the billowy brine.  
Oh, for a place apart  
Where litigants are not,  
Where books are never bound in sheep  
And filled with meaningless "rot."

So he sang this song of the law  
In monotonous dirge-like tone,  
Till he thought of the work he ought to do  
And the minutes already flown.  
Then he sadly sat him down,  
Arranged pen, paper and ink  
And with a heartfelt, weary sigh  
Composed himself to think.

Ye litigants, wealthy or poor,  
Whatever your station and place,  
Reflect on your lawyer's treadmill life,  
Consider his dolorous case.  
And though he may lose your suit—  
He cannot infallible be—  
When you pay the other attorney's costs,  
In pity just double his fee.

W. H. F.

### CORRESPONDENCE.

#### AN ANCIENT RECORD.

*Editor of the Albany Law Journal:*

Among the notes in your valuable journal of the 28th inst. I noticed one taken from the *Legal Intelligence*, wherein appeared the record of an ancient deed from Northumberland county, Penn. Some years ago, having professional business at Sunbury, I was shown some of its quaint old records. I took a copy of one, which I furnish for your readers, if you think proper to give it space:

"August Sessions, 1784. Northumberland county. *Respublica v. Joseph Disbury*. Indictment for felony. The defendant pleads *non cul. et hoc*, etc. Attorney-general, *similiter*. Jury of the county called. Found guilty of the offense charged. Judgment, that the said Joseph Disbury receive thirty-nine lashes between the hours of 8 and 9 o'clock to-morrow; to stand in the pillory one hour; to have his ears cut off and nailed to the post; to return the property stolen or the value thereof; remain in prison three months; pay a fine of thirty pounds to the Hon. President of this State for the support of the government and stand committed until the fine and the fees are paid."

Yours truly,

A. A. VAN DUSEN.

MAYVILLE, N. Y., Jan. 31, 1888.

#### DUTY OF DISTRICT ATTORNEYS.

*Editor of the Albany Law Journal:*

In your note on the case of Mr. Semple, in your issue of February 4, I think you have been somewhat led astray by the "eminent member of the New York city bar," whom you quote with approbation. I think neither the judges in question, nor any good lawyer would question the doctrine that a public prosecutor should exercise his conscience in the discharge of his official duties, and that one who would push for a conviction, whether he believed the accused guilty or not guilty, ought himself to be brought to the bar. But the present difficulty arises from the fact that the district attorney in New York city is obliged to discharge a great part of his duties through something like a dozen assistants, amongst whom his various

functions are apportioned. Thus one assistant examines a case, determines whether it ought to be tried, and prepares and tries it, presumably with his best skill and judgment; another prepares and argues the case in the appellate courts; and both are under the general supervision and direction of the district attorney himself. Now it is manifest that it would not do to require or to permit each assistant through whose hands a case might pass to execute his independent judgment upon it, or we will have one pulling down what another has carefully set up, with all the disastrous consequences of a house divided against itself. The assistants are but representatives of their principal; and after their principal has acted through one assistant it is not seemly that his act should be repudiated by another. But this is what Mr. Semple did, and for so doing he was reproved. His motives were no doubt proper ones, but he overlooked the fact that his position was that of a subordinate only. If he was satisfied that his associates who had prepared the case, conducted the trial and obtained the conviction were in the wrong, there was still no authority delegated to him to overrule them. His proper course was to have referred the matter to the common superior, and to have been guided by his decision.

Yours respectfully,

WM. G. WILSON.

NEW YORK, Feb. 6, 1888.

#### NEW BOOKS AND NEW EDITIONS.

##### METCALF ON CONTRACTS.

This second edition of this well known work is edited Mr. Franklin Fiske Heard, a careful and competent writer. The lapse of twenty years fully justifies the new edition with its references to recent cases. These references might well have been more ample, if we may judge from the single instance of contracts in restraint of trade, on which point there have been quite a large number of recent adjudications which are not alluded to here. This paucity is noticeable on other points. This leads us to infer that the book cannot be relied on in practice as the final word, although the value of the text as a statement of principles cannot be easily overestimated. The volume is published by Charles C. Soule, of Boston, and is beautifully printed.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, Feb. 7, 1888:

Judgment of General Term reversed and that of the Special Term on the demurrer sustained with costs—Mary Holland and others, appellants, v. Henry Alcock, impleaded, etc., respondent.—Judgment affirmed. Plaintiff recovered a verdict of \$1,000 for injuries to his hand, received in falling down the icy steps on Maiden Lane, in this city, on returning home from New York—Samuel A. Foster, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment affirmed, with costs—Louis Zimmerman and others, executors, etc., appellants, v. George Kinkle and others, respondents.—Appeal dismissed with costs—Davis W. Shuler, respondent, v. Elizabeth Maxwell and others, appellants.—Judgment affirmed and judgment absolute ordered for the defendant on the stipulation, with costs—Solon S. Laing, appellant, v. Charles S. Butler and another, respondents.—Judgment reversed, new trial granted, costs to abide event—Charles T. Russell and another, appellants, v. Samuel W. Allerton, respondent.

ent.—Judgment affirmed with costs. Action concerning the dimensions of a right of way. Both parties own lands at Valley Falls, holding title from the late Chauncey B. Slocum. The Thompson title is the elder one and in it Mr. Slocum reserved the right of way. This was subsequently acquired with other lands by plaintiff. A dissension arose between the parties as to the proper width of this easement and plaintiff succeeds in obtaining the final endorsement of this claim. It will necessitate the removal of a section of defendant's brick woolen mill, or he must purchase the easement from the plaintiff—Thomas Lape, respondent, v. James Thompson, appellant.—Judgment reversed, new trial granted. Greenwald was convicted of the murder of one Weeks in Brooklyn, while burglarizing the latter's house. With the exception of two accomplices, who gave State's evidence, the case is wholly circumstantial and based on the fact that prisoner is an ex-convict and was captured while committing another burglary. There is some reason to believe that one of the informing witnesses is the actual assassin of Mr. Weeks—The People, respondent, v. John Greenwald, appellant.—Judgment affirmed with costs—Daniel Chapman, respondent, v. The Atlantic Refining Company, appellant.—Judgment affirmed with costs—Frances Jewhurst, respondent, v. City of Syracuse, appellant.—Judgment affirmed with costs—George A. Kyle, respondent, v. Samuel K. Nester, appellant.—Judgment affirmed with costs—Frank E. Kirby, respondent, v. Henry Clews and another, appellants.—Judgment affirmed with costs—William Armour, respondent, v. Brooklyn City Railroad Company, appellant.—Judgment reversed, new trial granted, costs to abide event—James Black, respondent, v. Brooklyn City Railroad Company, appellant.—Judgment affirmed with costs—George W. Elkins, respondent, v. James D. Kilbourne, appellant.—Motion for reargument denied with \$10 costs—Horace B. Woodruff and another, respondents, v. Rochester and Pittsburg Railroad Company, appellant.—Motion to dismiss granted with costs of appeal—Louis Zimmerman and another, respondents, v. Emil Dieckerschoff and others, appellants.—Motion to dismiss granted with costs of the appeal to be paid by the attorney—James F. Childs, appellant, v. George C. Gordon, respondent.—Motion to amend remittitur denied with \$10 costs—Lawrence J. Callanan and another, v. George F. Gilman.

#### NOTES.

One would naturally expect that Talkington and Dumbleton would fall out and go to law, as they are reported to have done in a recent case in the United States Supreme Court.

A learned counsel (Mr. Rippon) applied on Tuesday to Mr. Justice Day to hold over a case until after the "luncheon time" of the court, as the plaintiff had telegraphed that he had missed his train. Mr. Justice Day: You should ask that the case be postponed until after "the adjournment," for "the court" does not lunch; that is not an epoch in the life of "the court." I do not speak of what individuals do, but "the court" does not lunch. Mr. Winch: If the court does not lunch, I may say the bar does; I do not oppose my learned friend's application. The *St. James' Gazette* says, with reference to Mr. Justice Day's view of the impersonal "court:" "An order was passed once by a certain judge in Greater Britain, fining a man who, to quote the record, pursued the court with a petition, and even presumed to pull the court's leg while the court was getting into its dog-cart."

# The Albany Law Journal.

ALBANY, FEBRUARY 18, 1888.

## CURRENT TOPICS.

THE current number of the *American Law Review* contains a trilogy on the present condition of our laws. The first article is an address by Joel Prentiss Bishop before the South Carolina Bar Association, entitled "The Common Law as a System of Reasoning—how and why essential to good government; what its perils, and how averted." The second is an address by Judge Dillon, before the Alabama State Bar Association, entitled "A Century of American Law." The third is an address by David Dudley Field before the Yale Kent Club at New Haven, entitled "Improvements in the Law," on which we have remarked before, we believe. These gentlemen are very eminent and influential authorities. Mr. Bishop is not a theoretical favorer of codification, although he is a practical illustration of how practicable and useful codification may be. Some of his reasoning against codification is extremely arrogant, extravagant, grotesque, childish and inconsequential. He speaks of "the Justinian folly," but a greater than Mr. Bishop says "the vain titles of the victories of Justinian are crumbled into dust, but the name of the legislator is inscribed on a fair and everlasting monument." Perhaps Mr. Bishop thinks the Livingston Code of Louisiana is also a folly. He should not be censorious. They read and cite his commentaries even there. His complaint is that codes will deprive judges of the power of reasoning. Well, grant it; what of it? We wish to Heaven it would put an end to the greater part of it. Their reasoning and their unreason have brought our laws into a truly deplorable condition. Then again he argues that if a proposed code is really good, it would answer every purpose as a text-book, and make itself authority. But it would have no sanction from the government, and no judge would be bound to recognize it. But Mr. Bishop lets up on this question after a while, and deviates into his well-known and well-worn and very shrill complaint about the piracy of text-books. He has never been able to forget that one machine text-book writer once stole from him, and that he was compelled to resort to legal proceedings for redress. Then Mr. Bishop gets another scare—he is very skittish—he rakes Harvard Law School over the coals for dispensing with text-books and teaching from cases alone. Well, we agree with him that it is a narrow and unwise theory, but it is a theory quite consonant with his own code-phobia. To propose to abolish Blackstone, Chitty, Kent, Greenleaf, Story, Bishop, Wharton, Benjamin, Jarman, Parsons, Cooley, Schouler, Dillon, Daniel, and all the rest of the eminent and universally recognized text-writers, and take instead

cases which some dry and inexperienced law professor chooses to consider the authoritative sources of the law, seems to us a limited and dangerous view. Mr. Bishop however lays too much stress on the practice of the Albany Law School. Text-writers are there not ignored, it is true, but they are not exclusively relied on. Speaking for ourselves, it is our practice to convert ourselves into a text-writer, and to refer to many cases as authorities and illustrations. We make many references to Mr. Bishop, but we do not stop at his books, but dive into cases which he cites. Mr. Bishop concludes in a doleful strain: "If codification succeeds to the extent of assassinating our common law, what but Heaven can we rely upon for the future! In the hope of better things, I turn from this picture of despair." But we shall still have Bishop, and given Heaven and Bishop, we see no need of despair, and on second thought he probably will agree with us.

Judge Dillon, who is quite as eminent an authority as Mr. Bishop, and a much more experienced, practical lawyer, is well known to be an advocate of codification. In his address he gives a very interesting view of the progress of American law for a hundred years, showing the increase of humanity, justice and common sense, especially in respect to codification, criminal law, evidence and marriage. In regard to codification he says: "In the sense that a code 'aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries,' as that experience is embodied in statutes, in the law reports and in the writings of the sages and masters of the law—in this practical sense—a code in England and a code in each of the United States is, I think, manifest destiny. I venture this prediction, because this is the only remedy which it is possible to suggest, to make the overgrown body of our law, I will not say convenient or symmetrical, but reasonably certain, public and accessible. Such a course has been found not simply desirable but necessary in the expanded and developed stage of every other jural system; and I am unable to perceive how we can permanently avoid it; whatever our timidity and however reluctant we may be to enter upon it." And he predicts that in the century to come, "while the law will in its development undoubtedly keep pace with the changes and changing wants of society, yet the work of jurists and legislators during the next century will be pre-eminently the work of systematic restatement of the body of our jurisprudence. Call it a code, or what you will, this work must be done. If not done from choice, the pitiless logic of necessity will compel its performance."

Then comes David Dudley Field, whom most men will concede to be the most eminent, the most widely known, and the most influential of living lawyers, and who, it is pretty generally understood, is rather in favor of codification. In this address,



in addition to this topic, he remarks on the unwise difference in dealing with real and with personal property, and asks, "why should not dealing in land be as free as dealing in cattle?" He disapproves the distinction between sealed and unsealed instruments. He advises the simplification and shortening of legal instruments. He advocates the assimilation of the commercial laws of all the States. But in respect to marriage laws he says: "Consider however the domestic relations, especially that of husband and wife, the most important and sacred of all. On this point the laws of the two States differ in material particulars. Marriage must be celebrated with certain formalities in Connecticut; there need be none in New York; but here it is easier to be dissolved than it is there, in other words marriage in Connecticut is harder to make but easier to unmake than it is in New York. The inconvenience of this condition of the law is great, so great indeed that some have proposed an amendment of the Federal Constitution which shall take marriage and divorce out of the control of the States and place them under the control of Congress. For my part I fear these encroachments on the autonomy of the States. I had rather keep the sanctity of our firesides under the guardianship of our own people. I would have the altar sacred from the touch of other hands than those which surround it; I would guard the concerns of the family, the 'lares and penates' of our homes, against the intrusion of stranger eyes or stranger hands. We live in danger of drifting into a consolidation of the States, and the danger is augmenting day by day. If the consolidation is once completed the end of our government is at hand, and with it the destruction of our liberties. For this reason I would not go another step in that direction, and so I would not accede to the proposal of placing marriage and divorce under the control of Congress. Assimilation however I would strive for."

Mr. Schouler, the well known legal author, contributes to the same magazine an interesting article on text-books, as to the proper relation between text and citations. He advocates the omission of tables of cases; the citation of fewer authorities, restricting it to a few of the latest from each State, and devoting the space thus gained to extension of the text. We like this, it smacks of codification. Mr. Schouler concludes: "If things go on however as hitherto, I fear that the individual teacher and expounder of general law will soon die from the exactions put upon him. What can be called leading cases when the Supreme Federal Court and the tribunals of leading States do not supply them, but every new and remote State claims equal respect for its sovereignty? Already the pages of our standard writers of the law, in the later editions, are becoming so honey-combed with this insect annotation that the text seems to belong to the foot-notes, not the foot-notes to the text. The opinion of the profession must determine whether it is better that the

text-writers, commentators and historians of our law should perish, and leave the field clear to local reports and the industrious digester." Moral: codify — *pace* Mr. Bishop.

A memorial has been presented to Congress by David Dudley Field, Andrew Carnegie, Dorman B. Eaton, Morris K. Jessup, Charles A. Peabody and Abram S. Hewett, in favor of arbitration for the settlement of international disputes. The paper shows that since 1815 there have been nearly sixty instances of such arbitration. It quotes the saying of General Grant, that "there was never a time when some way could not have been found of preventing the drawing of the sword." The paper is very humane and persuasive. It would be a great advance in civilization if such a measure could everywhere prevail. Then we should not behold the spectacle of millions of men, armed to the teeth, glaring like tigers upon one another, and like tigers ready to spring, removed from the productive and beneficial pursuits of peace, and heaping up heavy burdens of debt and taxation for other groaning millions to pay. Let all men do their utmost to get rid of war and rum, the two prime evils of human existence.

A clergyman writes us: "The Three Taverns joke of Ingersoll's is very stale. It is a bar-room jibe fifty years old. Paul didn't thank God when he saw the Three Taverns, but when he saw 'the brethren.' See Acts xxviii, 15. It is a piece of loafer sophistry, but as brilliant and logical as most of Bob's talk about the Scriptures. This recalls the *Nation's* recent argument on the tariff, where it speaks of 'robbing Peter and the other ten,' assuming Paul to have been one of the disciples. The world needs ministers to correct the mistakes of Ingersoll *et id omne genus*." It would be a good plan for counsel engaged against "Bob" to associate a clergyman so as to be prepared for his misquotations of holy writ. A recent number of a leading London law journal speaks of "the skin of his teeth" as a "vulgar" phrase. But it was good enough for Job. See Job xix, 20.

The opinions of the Supreme Court of California in the Sharon divorce case cover ten closely printed columns of the San Francisco *Bulletin*, and contain a very interesting discussion of the essentials of a common-law marriage, with a construction of the California Civil Code. This Code requires not only consent, but solemnization or consummation. The prevailing opinions are delivered by Judges Searls, McKinstry, Temple and Patterson, while Judges Thornton, Sharpstein and McFarland dissent.

#### NOTES OF CASES.

**I**N *Schwander v. Birge*, 46 Hun, 66, an action for the death of an employee who lost his life in trying

to escape from the defendant's burning mill, a witness was asked as to a single stairway: "Was it, in your judgment, a proper and sufficient mode of access and egress from the building, under any circumstances?" *Held*, improper. The court said: "The question was for the jury. That was one of the vital questions to be determined by them. And it is difficult to see that it came within the rule permitting the opinions of experts. \* \* \* The location of the stairs and door, the distance from them to remote parts of the room could be stated and a complete description of the room given so as to convey to the jury an intelligent understanding of the situation. And when that can be done the rule requires that the testimony of witnesses shall be confined to a statement of the facts, and that the conclusions or opinions of witnesses be not permitted as evidence. *Ferguson v. Hubbell*, 97 N. Y. 507; reversing 26 Hun, 250; *Hart v. Hudson R. R. Co.*, 84 id. 57, 60. But when elements enter into the subject of inquiry which cannot be described by witnesses so as to possess the jury with the information requisite to a complete understanding of it, the opinion of experts may be received. Such are the cases cited in support of the ruling. Whether a vessel was unseaworthy was held to be competent in *Baird v. Daly*, 68 N. Y. 547, because it involved the result of an examination which could not be fully communicated to a jury in any other manner. The same may be said of *Bellinger v. N. Y. Cent. R. Co.*, 23 N. Y. 42, where it was held competent for an engineer, familiar with the locality and with the structure, to state whether an embankment and bridges were skillfully constructed with reference to the creek. Also whether the fastenings of a schooner were sufficient for her safety was held competent in *Moore v. Westervelt*, 27 N. Y. 234, because the safety of the moorage of the vessel depended upon the sufficiency of the protecting power of the means employed to overcome the disturbing force of wind and water, which were matters of observation and experience and could not be embraced in a mere description of the causes and effects involved. The evidence of an expert, whether a machine was constructed in a workman-like manner, was held competent for a like reason in *Curtis v. Gano*, 26 N. Y. 426. The rule was applied in *Scattergood v. Wood*, 79 N. Y. 263. And the admissibility of the opinion of an expert witness whether marble was properly stowed in a vessel, *Price v. Powell*, 3 N. Y. 322, can be supported on no other ground. See *New England Glass Co. v. Lovell*, 7 Cush. 319; *White v. Ballou*, 8 Allen, 408. In sustaining the reception of the opinion of witnesses as to the safety of a highway in a certain locality, the court remarked that 'the elements entering into the question of reasonable safety are numerous and often difficult to describe.' *Taylor v. Town of Monroe*, 43 Conn. 36, 45. The application of the rule of evidence in cases of that character must be so qualified as to depend upon the circumstances, and cannot be treated as one to be followed in all cases where the question of the

safety of highway arises. The case last cited has for like reasons been given the support of the decision by a divided court in *Laughlin v. Street Railway*, 34 ALB. LAW JOUR. 134. See on the same subject *Lincoln Barre*, 5 Cush. 520. The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it. In the case at bar none of the elements requisite to the opinion of an expert seem to exist in reference to the subject of inquiry referred to. It involved no question of architecture as such, no combination of forces or strength of structural support requiring scientific or mechanical deduction. The building had its passage-ways provided. The difficulty in reaching and using them as a means of escape might be dependent somewhat upon the place where the fire should start, the knowledge of the danger, and the rapidity of its progress through the building. In this instance the stairway was very soon rendered unavailable as a means of escape, but there was no difficulty in going out through the door for those who reached it. The character of the business carried on there was not important except as it affected the spread of the fire and the combustibility of the structure. The reasons which might cause failure to escape from the room may be various and are not the subject for opinion of witnesses, as the inferences may, as well as by them, be determined by the jury from the situation furnished by evidence of the facts. The inquiry was not whether the defendant or his superintendent deemed the opportunities provided sufficient for the employees to safely get out of the building, but whether in the judgment of the jury due care had been used in furnishing the means to escape from it in cases of emergencies within reasonable apprehension. The situation and condition of the premises and of the facilities for egress could be clearly described by evidence, and we think did not come within the rule permitting the opinion of witnesses."

In *Young v. Johnson*, 46 Hun, 164, an action of assault and battery and with sexual intercourse, the court said, by Barker, J.: "The plaintiff testified that previous to the defendant's assault that she had never had sexual intercourse with any man. The defendant called a physician as a witness and asked him the hypothetical question, which in substance was an inquiry, whether in his opinion pregnancy would probably result from the first intercourse in a case where the woman had been ravished and the act accomplished against her will. The plaintiff objected to the question on the ground, among others, that the subject for inquiry was not such as to call for the opinion of expert witnesses,

and involved no question of science or skill, and that the answer, whether in the affirmative or negative, must necessarily be speculative in its character. The witness was permitted to answer the question and the defendants excepted and the witness gave his opinion that it would not. The object of the inquiry was to support the defendant's position that he was not the father of the plaintiff's child and that her story was a fabrication. We think the evidence was proper and the opinion of learned and experienced medical men on the subject of the inquiry would aid the jury in disposing of the issue, and the ruling did not contravene the general rule that fact and not opinions are to be given in evidence. The common mind does not readily comprehend the laws of nature which culminate in man's complex organism, and they cannot be solved without much study and observation, and are discovered only by most ingenious and profound research. The rules of evidence permit learned and scientific men to express their opinion, based on their study and observation as to what would probably be the result or direction of the laws of nature on an ascertained state of facts. If however these views are not correct, we are of the opinion that the defendant was entitled to the evidence, as the plaintiff had made proof of the same character by a medical witness, who stated that in his opinion conception might follow the first intercourse with a man. This evidence opened the way for the inquiry which the court permitted the defendant to make upon the same subject." Bradley, J., dissenting, said: "I am of the opinion that plaintiff's exception was well taken to the ruling which permitted the medical witness to answer the question, 'suppose a young lady of nineteen or twenty years, weighing one hundred and twenty pounds, who had never had sexual intercourse with a man, should be seized and thrown upon the floor and ravished against her will and her resistance, state whether or not, in your judgment, from your reading and experience it would be probable that pregnancy would follow such an intercourse;' that the opinion called for was conjectural and speculative in character and that no evidence had been given on the part of the plaintiff which waived her right to effectually take exception." We think this "takes the cake" for expertness.

#### LORD JUSTICE BOWEN'S VIRGIL.\*

THE appearance of this work gives us the opportunity, which we are always eager to embrace, of sprinkling our columns with a spice of literature from a lawyer. If his lordship had merely essayed a prose translation we should have deemed minion type sufficiently prominent, but a poetical version deserves celebration in bourgeois. On this side of

the ocean we have long been accustomed to good translations, one at least of which, Taylor's translation of *Faust*, has been universally pronounced the first in merit, with the rest nowhere. Longfellow's version of Dante is also admirable and celebrated. Bryant's translation of Homer is the first in poetic merit, if not in accuracy of scholarship, and makes Sotheby and Cowper, and especially the Earl of Derby, seem dry and unreadable. We boast one poetical translator of the *Æneid*, Mr. Cranch, who made an excellent version in blank verse. The winds have blown to us from the mother country, in recent years, two poetical versions of the *Æneid*, one by William Morris, the other by Prof. Conington. The metre of the latter, the eight syllable, prejudices the reader against it at the outset, making him recall "Lives there a man with soul so dead," and "On, Stanley, on! were the last words of Marmion." It is impossible to render the long, majestic Roman verse in this nursery ballad form. Nor has the professor, with all his skill and learning, expressed the spirit of the original. We thought his version unendurable until we read or tried to read Mr. Morris', and then we cheerfully conceded to the latter the palm of demerit — his version is the worst possible — strange, uncouth, affected, obscure, resembling some of those nightmare wall-papers and stuffs which he manufactures and imposes on a credulous public in the name and under the guise of estheticism. We are forced to this opinion with pain, because Mr. Morris has written some of the sweetest and most charming of recent English poetry — and he has also made some admirable wall-papers and stuffs. Lord Justice Bowen has therefore not had any formidable rival, except Dryden, and Dryden is no nearer to Virgil than Pope is to Homer; he has exceeded his original in rough vigor but fallen far short of him in elegance and suavity, and he has by no means translated him. As Lord Justice Bowen aptly says in his preface: "The silver trumpet has disappeared, and a manly strain is breathed through bronze." But his lordship has caught and expressed the real Virgilian spirit, and restored "the silver trumpet." Virgil was not a strong, simple, rapid, homely singer like Homer, chanting his numbers, attuned to the popular sentiment, in common and humble places, but a learned and elegant poet, singing in palaces to the monarchs and conquerors of the world, in an age of cultivation.

It is the first of the present translator's merits that his verses are as polished and limpid as those of his original. His rhythmical sense is perfect. He never is guilty of a false or ambiguous accent. His verses will endure the crucial test of reading aloud, under which so many fail. At the same time he has not sacrificed strength to polish; he has the same kind of strength which his original has. All his epithets are natural, vivid and picturesque. The second of the translator's merits is that he has combined elegance and readableness with fidelity. His theory, as expressed in the preface, is that a translation should be "*lineal* as well as *literal*."

\* Virgil in English Verse. Eclogues and *Æneid* I.—VI. By the Right Hon. Sir Charles Bowen, one of Her Majesty's Lords Justices of Appeal, once Fellow and now Visitor of Balliol College, F. R. S., Hon. D. C. L. of the University of Oxford. London, John Murray.

This he has carried out in a wonderful degree. His version is not a paraphrase, like Dryden's, but a remarkably close rendering. This he has been able to accomplish by inventing a metre for his purpose — rhymed hexameters in which the final dissyllabic foot is shortened by one syllable. The rhymes are frequently alternate and there are occasional triplets. This device has given him greater freedom and a better opportunity for rhyming than the ordinary hexameter affords. The very first lines of the *Æneid* exhibit the *lineal* capacity of this peculiar verse:

*Arma virumque cano, Trojæque primus ab oris  
Italiam, fato profugus, Lavinia venit  
Litora.  
War I sing, and the hero who first from the Trojan land  
Came to Italian shores and to this Lavinian strand —  
Exile guided of fate.*

Again, in the description of Polyphemus:  
*Monstrum horrendum, informe, ingens, cui lumen ademptum.  
Portent, appalling, shapeless, immense, all blind to the light.*

We might cite scores of other instances to prove the capacity of this ingenious verbal vehicle.

We could find much more to say in favor of this translation, but we must content ourselves by stating our opinion that it is at once the most faithful, the most elegant, and the most readable ever made.

We subjoin a few extracts to give our readers a taste of the excellencies which have so delighted us.

#### CORYDON TO ALERIS.

Beautiful one, come hither! For thee, look, nymphs of the glade

Bring full baskets of lilies; and one fair Naiad has made —  
Gathering violets pale, and the popples tall, by the way —  
Posies of scented anethus in flower, and daffodils gay;  
Then with casia twining the grasses sweet of the dells,  
Brightens with marigold yellow the bending hyacinth bells.  
Quinces myself will bring with a down of delicate white,  
Chestnuts in which my love Amaryllis used to delight;  
Waxen plums shall be honored — the fruit thou lovest — as well.

Ye too, boys, will I pluck, and the myrtles near ye that dwell  
Planted together, for sweetly beside each other ye smell.

— *Ecl. II.*, 45-55 (p. 11).

#### DEATH OF LAOCOON.

Portents weightier still, sights yet more awful confound  
Now an ill-fated people, whose eyes are in darkness bound.  
While at the hallowed altar the priest Laocoon stands,  
Chosen by lot for the service of Neptune, knife in his hand,  
Slaying a royal bull; from Tenedos, over a bright  
Slumbering sea — I shudder to tell even now of the sight —  
Two great snakes with enormous coils come swimming abreast,  
Making together for shore. Their bosom and blood-red crest  
Over the billows ride; on the surface skimming, the rest  
Follows in writhing circles. The waters, leaped to a surge,  
Ring as they come. Ere long on the Trojan plains they emerge,

Burning eyes suffused with fire and with blood, and between  
Jaws that forever hiss, forked tongues are flickering seen.  
Pale with terror we fly disbanding. In battle array  
They for Laocoon march, on the two slight forms of his sons  
Fastening first. In folds each serpent envelopes his prey,  
Crushes with cruel pleasure the children's innocent bones;  
Then on the sire, as he hastens to the rescue poisoning his spear,  
Both bear down and in coils overwhelm him, circle his breast,  
Twine their scale-clad bodies around and around him, and rear  
O'er him in triumph with fangs uplifted and towering crest.  
Vainly the knotted coils he essays in sunder to tear,  
Poison and clotted gore on his garlands. Loud to the air  
Echo his awful shrieks; as the wounded bull, when he breaks  
Loose from the shrine, and the ill-aimed axe from his shoulder  
shakes.

Then to the temple lofty the pair are presently seen  
Gliding in quest of the hill of the fierce Tritonian queen;  
Under her feet and beneath her shield take refuge at last.  
Over us horror steals. Due meed for impiety past,  
Lo! Laocoon reaps — is the cry — who pierced with his dart  
Timber of Pallas, and drove his unhallowed spear to its heart.  
— *Æn. II.*, 199-229 (p. 118).

#### FAME.

That same hour through the mightiest cities of Libya ran  
Fame most swift of the evils that Heaven inflicts upon man;  
Movement adds to her growth, and she gathers speed as she  
flies;

Flare at the outset dwarfs her, she mounts ere long to the skies;  
Plants on the ground her feet, with her forehead touches the  
Heaven.

Earth, at the anger of gods celestial to madness driven,  
Bare her, the last of the Titan and Giant brood — it is said —  
Fleet-winged, speedy of foot, a colossal monster and dread —  
One slumbering eye is beneath each feather she wears;  
Tongues as many, resounding mouths, all-vigilant ears.  
While night lasts, in the shadow she floats 'twixt earth and  
the skies

Shrieking loudly, nor ever in sweet sleep closes her eyes;  
When day comes, on the roof-top tall or the towers she alights,  
Sits as a sentinel there, and the world's great cities affrights,  
Cleaving to falsehood and folly, and yet truth's messenger too.  
— *Æn.*, IV., 173-187 (p. 195).

#### THE SHOOTING AT THE BIRD.

Thence *Æneas* invites all comers to feats of the bow;  
Places the prizes in view; with his own strong hand from below  
Lifts from the ship of *Serestus* a mast. On its summit in air  
Hangs, as a mark for the archers, a dove made fast in a snare.  
Yonder the concourse gathers. The lots in a helmet are flung;  
First from the brass amid thy name, Hippocoon sprung;  
Mnestheus second — in race of the vessels victor — but now —  
Still with the garland green of an olive bound on his brow;  
Third Eurytion; brother of thine, bright archer of Troy,  
Pandarus, chosen of old by a goddess the truce to destroy,  
First upon Danaan ranks that day thine arrow to cast.  
Buried deep in the helmet *Acestes* lay to the last,  
Ready to vie with the youths, though a veteran. Each one  
strings

Cord to the bow, from the quiver himself the artillery brings.  
First from the twanging thong Hippocoon's arrow impelled  
Cleaves as a lash the divided skies, then strikes and is held  
Fast in the timber; the stricken mast-tree shakes, and the bird  
Flutters with fear; all around them her pinions flapping are  
heard.

Next keen Mnestheus placed him, his bowstring drawn to the  
breast,  
Levelled his eye and his weapon, his keen glance upward  
addressed;

Fallen in an evil hour to the dove herself to attain,  
Broke with his shaft but her fetters, the hempen-cords of the  
chain;

Where by her captive feet from the masthead lofty she hung.  
Into the breezes she flew, to the dark clouds rapidly sprung.  
Now with his bow to the bolt-head drawn and his arrow dis-  
played,

Swift as a thought to his brother Eurytion prayed;  
Eyed her in clear sky sailing, with joy escaping the dart.  
Under a dark cloud flapping her wings — then pierced to her  
heart.

Breathless she fell, amid Heaven's bright stars left life, and  
restored

Home, as she downwards floated, the fatal bolt to its lord.  
— *Æn. V.*, 498-518 (p. 243).

#### NEPTUNE CALMS THE STORM.

Peace to the billows he gives, more swift than speech upon lips;  
Scatters the clouds that have gathered, the sun brings back from  
eclipse.

Triton and sea nymph lift with a strain each vessel that lies  
Spear on the sea-rock splinters. His trident Neptune plies;  
Opens a chamber in quick-sands wild. Each billow subsides,  
And on the face of the waters his light-wheeled chariot glides.  
As in a great assembly, when Discord leaps at a word  
Suddenly forth, and ignoble crowds with fury are stirred,  
Fire brands fly, stones volley, the weapons furnished of wrath —  
If peradventure among them a man stand forth in the path

\* Sharp (?). — Ed.

Loyal and grave, long honored for faithful service of years,  
 Seeing his face they are silent, and wait with listening ears:  
 He with his counsel calms their souls, assuages their ire.  
 So sank Ocean's thunder, as soon as the Ocean's sire  
 Looked on the deep, and riding at speed through firmament  
 blue  
 Guided his horses, and loosened the reins as his chariot flew.  
*Æn. I., 142-157 (p. 78).*

We hope that Lord Justice Bowen will complete his work, as he contemplates, and especially that he will give us the Georgics, the most exquisite of ancient poems.

#### HEARSAY EVIDENCE TO PROVE PEDIGREE.

**H** EARSAY evidence is one of those instances by which it is admissible to prove a pedigree or relationship. It is only admitted as a matter of necessity; for without it there must necessarily, from the nature of the question under investigation, and the lapse of time, be a failure of justice. It has been the boast of commentators on the common law that it does not require the performance of an impossible thing; and this rule is applied in cases requiring proof of pedigree.

Courts take judicial knowledge of matters of history; proof of them is not required. *Carr v. McCampbell*, 61 Ind. 97; *Romero v. United States*, 1 Wall. 721. Matters relating to a pedigree are historical, but in a limited sense only. They are of private nature, of such as courts do not take judicial notice. And the reason for the exception is obvious, for it would be impracticable to require a court to privately investigate the relationship of every one before it, where it is essential to a determination of rights. This exception however has been broken down in one instance, where "Debrett's Peerage" was used by the court; but it was used upon the ground that the personages referred to in it were historical characters, and their lives related to acts of public historical notoriety; and therefore comes within the general rule concerning matters of history. *Russell v. Jackson*, 22 Wend. 276; affirming 4 Wend. 543.

In speaking of proof of pedigree, Lord Mansfield said, that "from the necessity of the thing the hearsay of the family as to marriage, births and the like is admitted." *Berkeley Peerage case*, 4 Camp. 415; *Cope v. Pearce*, 7 Gill, 264; *Craufurd v. Blackburn*, 17 Md. 49; S. C., 77 Am. Dec. 323.

As it is only in matters of pedigree that such evidence is admissible, it is well to understand what is meant by that term. "The term 'pedigree' embraces not only descent and relationship, but also the facts of birth, marriage and death, and the time when those events happen." *Cope v. Pearce*, 7 Gill (Md.), 264; *Craufurd v. Blackburn*, 17 Md. 49; S. C., 77 Am. Dec. 323; *Swink v. French*, 11 Lea, 78; S. C., 47 Am. Rep. 277. Such declarations are not admissible to prove other facts. In an attempt to prove the freedom of a claimant, such evidence was held inadmissible for that purpose; but, not to prove his relationship. *Negro John Davis v. Wood*, 1 Wheat. 6; see *Pegram v. Isabel*, 2 Hen. & Munf. 193; *Mima Queen v. Helpburn*, 7 Cranoh, 290; *Jones v. Jones*, 36 Md. 447.

So if the declaration is that a certain person was an "heir" or a "relative" of the ancestor it is not admissible to prove such an inheritance; the particular relationship must be stated so that the court may know whether the person was an heir or not. *Chapman v. Chapman*, 2 Conn. 347; S. C., 7 Am. Dec. 277; cited, *Brown v. Crandall*, 11 Conn. 92.

The declarant need not have named from whom he obtained his information to render his declarations admissible; for knowledge of the facts relating to a

pedigree most generally exist in every family. *Jewell v. Jewell*, 3 How. 219; see *Van Sickle v. Gibson*, 40 Mich. 170.

In determining what may or may not be thus proven, the authorities are not always uniform; but we cite a few. Thus the declarations of a woman were held admissible to prove that a certain person is the son of her unmarried sister, although the effect is to show that he is a bastard. *Northrop v. Hale*, 76 Me. 306; 49 Am. Rep. 615; 31 Alb. L. J. 51.

So a mother's declaration was admitted to show the illegitimacy of her daughter, when it tended to prove that she was never married. *Haddock v. Boston, etc., R. Co.*, 3 Allen, 300; *Murray v. Milner*, 12 Ch. Div. 845; S. C., 36 Moak, 720.

So where the question was whether the plaintiff's mother was the legitimate child of the ancestor, whose land was in dispute, and the record showed the latter's marriage at a certain date, the ancestor's declaration to the effect that "unless he made a will, Louisa (the plaintiff's mother), could get nothing" was held competent to go to the jury on the question of her illegitimacy. *Viall v. Smith*, 6 R. I. 417.

So the declarations of a deceased member of a family are admissible to disprove the marriage of the parents; *Jewell v. Jewell*, 1 How. 219, or to prove it. *Chamberlain v. Chamberlain*, 71 N. Y. 423. But the declarations of a husband and wife at or subsequent to the birth of the child are inadmissible to prove it illegitimate, in the absence of proof of non-access at the time of the conception. *Dennison v. Page*, 29 Penn. St. 420; S. C., 72 Am. Dec. 644. Yet where the legitimacy of a child born in wedlock was in issue, previous statements by the mother that the child was a bastard were held admissible as evidence of her conduct, although she would not have been allowed to make such statements in the witness-box. *The Aylesford Peerage*, 11 App. Cas. 1; S. C., 33 Alb. L. J. 324. But when such husband or wife is called by the opposite party to testify.

The declarations made to a witness by the father of an illegitimate son are not proof of pedigree. *United States v. Brown*, 3 McArthur, 64, and see *Crispin v. Doglini*, 2 S. & Tr. 493, where the declarations of a brother were not admitted.

The time of the birth may be so proven even though there be a family register in existence; *Swink v. French*, 11 Lea, 78; S. C., 47 Am. Rep. 277, for one is no higher evidence than the other. *Clement v. Hunt*, 1 Jones L. 400, but not the place of the birth. *Vaughan v. Phebe*, Mart. & Yerg. 5; S. C., 17 Am. Dec. 770; *Carter v. Montgomery*, 2 Tenn. Ch. 216; see however *Tyler v. Flanders*, 57 N. H. 618; *King v. Erith*, 8 East, 539; so may the time of a death and lack of issue; *Flowers v. Harolson*, 6 Yerg. 494; *Saunders v. Fuller*, 4 Humph. 518, but not the place of death or a shade of color. *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Shearer v. Clay*, 1 Little, 266; *Wilmington v. Burlington*, 4 Pick. 174.

But the declarations of a deceased person, that he had a brother living at a certain place, were held competent to establish the right of the brother's children to inherit from the decedent. Here the statement of the place served to identify the claimant. *Wise v. Wynn*, 59 Miss. 588; S. C., 42 Ark. Rep. 38.

Hearsay information of the death of a person, derived from his immediate family, may be admitted as *prima facie* evidence of the fact. *Dupont v. Davis*, 30 Wis. 170; *Anderson v. Parker*, 6 Cal. 197; *Clark v. Owens*, 18 N. Y. 424.

According to recent English authorities it may be stated now as the law of England, that not only the age, but the place of both the birth and death may be proven by the declarations of a deceased ancestor. *Shields v. Boucher*, 1 DeG. & Sm. 40; *Haines v. Guthrie*

13 Q. B. 818; S. C., 37 Moak, 691; 24 Am. L. Reg. 170; *Figg v. Wedderburne*, 11 L. J. (Q. B.) 45; S. C., 6 Jur. 218; *Plant v. Taylor*.

Where a plaintiff claims to be the illegitimate son of a woman who had acted as his god-mother at his baptism, and had said to several strangers of the family that she was his mother, and to other strangers that he was her son and she would provide for him, the Imperial Supreme Court of Cassation (of Austria), held the evidence insufficient on account of the equivocal manner in which the terms "mother" and "son" were used. 24 Alb. L. J. 444.

The age of a deceased member of a family may be proven by hearsay. *Watson v. Brewster*, 1 Penn. St. 381. But actual residence cannot thus be proven for the purpose of creating a settlement. *Londonderry v. Andover*, 28 Vt. 416.

The declarant whose statements it is sought to use must have been related to the family by blood or marriage at the time he made them. Being thus related it is supposed he has a better knowledge of such matters than one not related. Thus the declaration of a husband concerning his wife's family, or of a wife concerning her husband's family, is equally admissible with those of either concerning his or her own family. *Stiller v. Gehr*, 105 Penn. St. 577; S. C., 51 Am. Rep. 207; *DeHaven v. DeHaven*, 77 Ind. 236; *Jewell v. Jewell*, 1 How. 218; *Cuddy v. Brown*, 78 Ill. 415; *Vowles v. Young*, 13 Vesey, 140; *Webb v. Richardson*, 42 Vt. 465.

In this phase of the matter there is no particular degree of relationship in the family required; but the remoteness of the declarant is a matter to be considered in weighing his testimony. The witness testifying to the declarations need not be related; it is the declarant that must be related. *Wilson v. Brownlee*, 24 Ark. 586; S. C., 91 Am. Dec. 523. There are however reported cases, in which declarations of servants of the family, intimate friends and even neighbors have been admitted; but those are no longer authorities. B. N. P. 296; *Weeks v. Sparke*, 1 M. & S. 679; *Higham v. Ridgway*, 10 East, 120; R. v. *Erismwell*, 3 T. R. 723; *Johnson v. Lawson*, 2 Bingh. 86.

Nor is it every relationship that is sufficient. Thus where A. claimed as a child of B. and C., and the question at issue was whether B. and C. had ever married, the declaration of D., the sister of C. (who was B.'s wife), that B. and C. were married, was held inadmissible. "To prove the relationship, it was competent for them to give in evidence the declaration of any deceased member of the family. But the declarations of a person belonging to another family—such person claiming to be connected with that family only by the inter-marriage of a member of each family—rests upon a different principle. A declaration from such a source of its marriage which constitutes the affinity of the declarant, is not such evidence *at unde* as the law requires." *Blackburn v. Crawford*, 3 Wall. 175. But the declaration of A. a blood relation of B., to show that he, B., was married to C. may be received without showing any other relationship between A. and C. *Monkton v. Attorney-General*, 2 Russ. & M. 156, see *Edwards v. Harvey*, Cooper Ch. 38; *Doe d. Fuller v. Randall*, 2 Moore & P. 24. So the declarations of an illegitimate child are not admissible to show relationship of the members of the family of his reputed father. *Doe v. Barton*, 2 M. & R. 28. A declaration of a wife that she had heard her first husband say that after his death the estate would go to F. and after F.'s death to his heir, under whom the lessor of the plaintiff claimed, was held admissible to show the relation of F. to the family. *Doe v. Randall*, 2 M. & P. 20.

Before the declarations of such a relative can be used, his death must be proven. *Blackburn v. Crav-*

*ford*, 3 Wall. 175; *Stiller v. Gehr*, 105 Penn. St. 577; S. C., 51 Am. Rep. 207, for the declarations of a person living are not admissible, because it is not the best of evidence. *Pendrel v. Pendrel*, 2 Str. 924; *Doe v. Ridgway*, 4 B. & A. 53. But the proof of death is not so strict as to require actual proof. Then showing by one of the family that a member of it went abroad many years ago, and was supposed to have died there, and that he, the witness, never heard in the family that he had ever been married, was held to be good evidence of the death of that person without issue. *Doe v. Griffin*, 15 East, 238; see *Doe v. Jesson*, 6 Id. 80. Of course the fact of death may be proven by any legitimate evidence.

The declarant must be shown to have been a member of the family, within the meaning or previously defined by evidence *dehors* his own declarations, before the declarations are admissible. *Stiller v. Gehr*, 105 Penn. St. 577; S. C., 51 Am. Rep. 207; *Blackburn v. Crawford*, 3 Wall. 175; *Monkton v. Attorney-General*, 2 Russ. & M. 157; *Thompson v. Woolf*, 8 Ore. 454; *Smith v. Tibbitt*, L. R., 1 P. D. 354. Thus the statement of a witness that he had received information verbally, and by letter, of the death of a person, it not appearing that he was related to the person, nor how he obtained his information, was held not competent evidence of that fact. *Wilson v. Brownlee*, 24 Ark. 586; S. C., 91 Am. Dec. 523; *Chapman v. Chapman*, 2 Conn. 347; S. C., 7 Am. Dec. 277.

Whether or not the relationship of the declarant is proven is a question for the court and not for the jury. *Jenkins v. Davis*, 10 Q. B. 813; *Bartlett v. Smith*, 11 M. & W. 483; *Crawford v. Blackburn*, 17 Md. 49; S. C., 77 Am. Dec. 323. A few cases may be found in which the declarations of the declarant were used to show his relationship. *Doe v. Davis*, 59 E. C. L. 314.

Where a claimant of certain property sought to prove his relationship, the fact of his birth, place of birth, his bringing up in the family of his aunt, whose declarations were sought to be introduced, and his name, was held ample evidence of relationship. *Northrop v. Hale*, 76 Me. 306; S. C., 49 Am. Rep. 615; 31 Alb. L. J. 51; see *Viall v. Smith*, 6 R. I. 417. A wife may testify to her husband's death and burial by letters from his folks to her. *Mason v. Fuller*, 45 Vt. 29. Such declarations of relationship are admissible in all kinds of cases where the investigation of a pedigree is necessary. As in ejectment, *Flowers v. Harolson*, 6 Yerg. 494, upon an issue of *devisavit vel non*; *Ford v. Ford*, 7 Humph. 92, or on a trial of incest, but this last is doubtful. *Ewell v. State*, 6 Yerg. 364; S. C., 27 Am. Dec. 480.

But such evidence does not apply to proof of the facts which constitute a pedigree when they may be proved for other purposes; as where the defense is infancy in an action on contract. *Haines v. Guthrie*, 13 Q. B. 818; S. C., 37 Moak, 691; 24 Am. L. Reg. 170; *Figg v. Wedderburne*, 11 L. J. (Q. B.) 45; S. C., 6 Jur. 218; *Plant v. Taylor*, 7 H. & N. 227. Nor is it admissible to prove the place of settlement of a pauper. *Rex v. Erismwell*, 3 T. R. 707; *Rex v. Erith*, 8 East, 539.

There is also evidence of a traditional character, such as general repute in a family, to which a member of the family may testify; and it is no objection that it is hearsay upon hearsay. *Doe v. Griffin*, 15 East, 29; *Doe v. Randall*, 2 M. & P. 20; *Monkton v. Attorney-General*, 2 Russ. & M. 165; *Elliott v. Piersoll*, 1 Pet. 328; *Jackson v. King*, 5 Cow. 237; S. C., 15 Am. Dec. 468. In such an instance it is for the judge to decide whether the declarant was related to the family; and when the evidence is admitted, for the jury to settle the fact to which the declarations related. *Doe v. Davis*, 11 Jur. 607; S. C., 10 Ad. & El. (N. S.) 814; *Copser v. Pearce*, 7 Gill, 247; *Clements v. Hunt*, 1 Jones L. 400. Such declarations, if they relate to events long

past, are not entitled to the weight they would have if related to more recent events. *Johnson v. Todd*, 5 Beavan, 599.

"And such statements of deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did any thing that amounted to showing that they recognized them." *Sturla v. Freccia*, 5 App. Cas. 623; S. C., 34 Moak, 1; 43 L. T. (N. S.) 209, see *Carter v. Montgomery*, 2 Tenn. Ch. 218; *Eaton v. Tallmadge*, 24 Wis. 217. But what the neighbors said or did cannot be proven. *DeHaven v. DeHaven*, 77 Ind. 236.

The acts and declarations of the ancestor, as to his treatment of the person whose pedigree is in dispute, are an entirety, and when particular instances are called forth upon direct examination, the general conduct of such ancestor may be proved on cross-examination; but it is not error, on the cross-examination, to refuse to permit a witness to answer a question which calls for a statement made by the ancestor while testifying as a witness in an action affecting his personal interests, and concerning the pedigree of a person who may have been many years dead. *DeHaven v. DeHaven*, 77 Ind. 236.

Besides the oral declarations of deceased relatives there is other hearsay evidence consisting of written statements that are admissible. These statements are treated as the oral declarations with some varying incidents.

The first of these is what is termed a family record, usually such as is kept in a Bible, for it is a practice of the earliest times of the Anglo-Saxons, after their conversion to Christianity, to keep a record of important events in the sacred volume, and a record thus kept of births, marriages and deaths is admissible in evidence in proving pedigree. See Kemble's Saxons; *Hunt v. Supreme Council of the Order of Chosen Friends*, 31 N. W. Rep. 576; *Douglass v. Sanderson*, 2 Dall. 116; *Caraskadden v. Poorman*, 10 Watts, 82; S. C., 36 Am. Dec. 145; *Lewis v. Marshall*, 5 Pet. 470; *Sitler v. Gehr*, 106 Penn. St. 577; S. C., 51 Am. Rep. 203, 207; *Berkeley Peerage*, 4 Camp. 401; *Monkton v. Attorney-General*, 2 Russ. & My. 147; *Jackson v. Cooley*, 8 Johns. 128; *Slane Peerage*, 5 Cl. & F. 24; *Sussex Peerage*, 11 id. 85. Such entries are admissible if they come from the proper source, although the handwriting of the person making them is not proved. *Hubbard v. Lees*, L. R., 1 Ex. 255; *Caraskadden v. Poorman*, 10 Watts, 82; S. C., 36 Am. Dec. 145. The rule is extended to entries in all kinds of books, and a hymn book. *Collins v. Grontham*, 12 Ind. 440; *Berkeley's Peerage*, 4 Camp. 401, or to an ancient deed containing recitals of family history, even against persons who are not parties to the deed, and who claim no right under it. *Deery v. Cray*, 5 Wall. 795; *Jackson v. Cooley*, 8 Johns. 128; *Slaney v. Wade*, 7 Sim. 595. So a letter containing statements as to its author's family, sworn to by his wife to have been written by him, in addition to her testimony that the facts stated in the letter had been frequently mentioned by her husband in his life time, was admitted. *Elliott v. Petrol*, 1 Pet. 328. And the same is true of letters generally of a like character. *Collins v. Grontham*, 12 Ind. 440; *Crouch v. Eveleth*, 15 Mass. 305.

A leaf from a family Bible, containing the names of the children of one deceased, under whom the plaintiff claimed, annexed to a notarial certificate from another State, that was out from the Bible in the notary's presence, and sworn before him to be the property and family Bible of the deceased, was admitted in evidence. *Douglass v. Sanderson*, 2 Dall. 116; see *Hunt v. Supreme Council of the Order of Chosen Friends*, 31 N. W. Rep. 576.

Where however the entry was in the handwriting of a brother of the child, who testified that he copied that and other entries respecting the ages of the family, from another book in which original entries were made in his father's handwriting, by his directions, the entry was held inadmissible unless it was shown that the original was lost. *Curtis v. Patton*, 6 S. & R. 15, see *Woodward v. Spiller*, 1 Dana, 182; S. C., 25 Am. Dec. 139. Even a memorandum of the father, giving the date of the birth of his child, is admissible. *Brune v. Rawlings*, 7 East, 290; *Collins v. Grontham*, 12 Ind. 440; *Hunt v. Supreme Council, etc.*, 31 N. W. Rep. 576. Such a paper was admitted, although it never was made public by the writer and was erroneous in several particulars and professed to be founded chiefly on hearsay. *Monkton v. Attorney-General*, 2 Russ. & My. 140. So a will may be admitted. *Doe v. Ormerod*, 1 Mo. & R. 483, but not if made after a controversy arose; *Sussex Peerage*, 11 Cl. & Fin. 85; S. C., 33 Alb. L. J. 324, or an *ex parte* affidavit made abroad; *Fogler v. Simpson*, 2 Dall. 117; S. C., 1 Yeates, 17; but not one made in another State of the Union. *Douglass v. Sanderson*, 2 Dall. 118, unless made several years before by statutory enactment. *Hurst v. Jones*, Wall. Jr. 373. Even though a will be found in a cancelled state, it is admissible. *Doe v. Earl of Pembroke*, 11 East, 504. Such records are not only admissible to prove pedigree, but to disprove the relationship. *Zouch v. Waters*, 12 Vin. Ab. T., b. 87, pl. 5.

Testimony copied into a bill of exceptions, where the original commission and testimony used in an action of ejectment were lost, was admitted to establish pedigree in a subsequent action for mesne profits. *Chitrac v. Reinecker*, 2 Pet. 618. Likewise a bill in chancery was admitted. *Taylor v. Cole*, 7 T. R. 5.

Entries in a church register of burials are admissible. *Lewis v. Marshall*, 5 Pet. 470; *Hunt v. Supreme Council, etc.*, 31 N. W. Rep. 576. So a copy of the register of births and deaths of Quakers in England, proved before the lord mayor of London, was admitted in evidence in Pennsylvania in 1759 to prove death. *Hyam v. Edwards*, 1 Dall. 2. Yet it has been held that such an entry is not evidence of the time of a birth, for the clergyman making it had no authority to make the entry, or to make an entry as to the time of the birth, and possessed no means for making any inquiry as to the facts. *Goodright v. Moss*, Cowp. 591.

In later times an extract from a register of births purporting to be signed and certified by a deputy superintendent registrar, as the person in whose custody the register book was, was held admissible in evidence on its mere production. *Queen v. Weaver*, L. R., 2 Cr. Cas. Res. 85; S. C., 7 Moak, 323. So monumental inscriptions are admissible if made by a deceased relative, or under his directions. *Kidney v. Cockburn*, 2 Russ. & My. 167; *Collins v. Grantham*, 12 Ind. 440.

In England the herald's original visitation books are evidence, since it was his business to make out pedigrees. *Sneymer v. Burgesses of Droitwich*, 8 Inn. 623; *Earl of Thanet's case*, 2 Jones, 224.

But a report of an official committee called a Giunta, which sat at Genoa, stating that a certain person was, in 1790, a native of Quarto, aged about forty-five, was rejected, in an attempt to prove his age and place of residence; although it was proven to be "an authentic public document of the Genoese government, to which as far as the good faith of those who made it is concerned, credit might be justly given." *Sturla v. Freccia*, 5 App. Cas. 623; S. C., 34 Moak, 1; affirming 12 Ch. Div. 411.

The communication however between the family and the declarant may have been so infrequent, or his knowledge of it may have been so scant as to render



it worthless or inadmissible. Thus the husband of a grandchild cannot state his conclusion from the statements of his wife and her uncles, unless it was held they were so frequent and under such circumstances that he can say what was the uncontradicted repute in the family. *Harland v. Eastman*, 107 Ill. 535; see *Birney v. Hann*, 3 A. K. Marsh. 322; S. C., 13 Am. Dec. 167. So mere general, vague and unsubstantial testimony tending to support the assertion is of no avail as against record evidence to the contrary. *Denoyer v. Ryan*, 24 Fed. Rep. 77. But general reputation in the family that issue was born alive is admissible. *Doe v. Killen*, 5 Del. 14.

And interrogatories relating to family relationship, dates of decease and marriages may all be answered on the basis of family tradition instead of direct personal knowledge. *Van Sickle v. Gibson*, 40 Mich. 170. So one may testify to his own age, although his parents are alive and present. *State v. Cain*, 9 W. Va. 559; *Chever v. Congdon*, 34 Mich. 296.

The proof of time and place should be made to establish identity of the person. "Mere identity of names must be accompanied with some circumstances of time or place before we can attach any value to it as affecting rights of property." *Stiller v. Gehr*, 105 Penn. St. 577; S. C., 51 Am. Rep. 207.

In transactions that are recent, mere identity of name is sufficient, or *prima facie* evidence. *McConeghy v. Kirk*, 68 Penn. St. 206.

"It would work great injustice if rights of property, after a great length of time, were allowed to depend upon mere identity of name. A *prima facie* case thus submitted to a jury might be extremely difficult, if not impossible to disprove. I know of no case in which mere identity of name has been held sufficient after the great lapse of time which exists here." *Stiller v. Gehr*, *supra*; see *Sevall v. Evans*, 4 Ad. & El. (N. S.) 426; *Sailor v. Hertzog*, 2 Penn. St. 182.

In order to establish identity the events of the life of the remote ancestor may be traced, and this may be done by the declarations of a deceased relative. Thus the events of a son of a remote ancestor were proven by the declarations of a deceased relative, to prove identity, by showing that such son was a military officer in the artillery service, and by such means identifying him. *Attorney-General v. Kohler*, 9 H. L. Cas. 653.

So producing letters-patent to one, and then tracing descent from one of the same name, was held *prima facie* evidence that the patentee and ancestor were the same person; and it further lies on the person opposing such a presumption to rebut it by showing another person of corresponding name, age and the like, or in some other way. *Jackson v. King*, 5 Cow. 287; S. C., 15 Am. Dec. 468.

There are no grades in such hearsay evidence. Of course if the declarant is alive he must be called; but if he is dead his declarations are not to be excluded because the fact of relationship may be proven by a living witness cognizant of the fact. The weight of such evidence is one exclusively for the jury; but in law the testimony of a living witness is of no more value than that of the dead declarant. *Craufurd v. Blackburn*, 17 Md. 49; S. C., 77 Am. Dec. 323; *Saunders v. Fuller*, 4 Humph. 516. But the testimony of living members of a family, and the declarations of its deceased members are entitled to more weight than the testimony of persons unconnected with the family. *Saunders v. Fuller*, *supra*; *Swink v. French*, 11 Lea, 78; S. C., 47 Am. Rep. 277; see *Dupoyster v. Gagoni* (Abst.), 84 Alb. L. J. 516.

In proving heirship, and right to certain property by virtue of such heirship, it often becomes a matter of consideration for the claimant, whether or not he will introduce evidence showing there are no other

heirs. If it be shown that there are collateral remote ancestors whose descendants would be entitled to share in the inheritance, yet it must be further shown that there were such descendants if it is desired to defeat the claimant; for the latter is not bound to do it. There is no presumption for or against a remote person having left children or heirs. It is a fact to be proven by the person claiming it. Slight evidence however is sufficient to show there are some — such as an advertisement in a public newspaper for them, especially if it state there is property to which they are entitled by descent. *Greaves v. Greenwood*, 2 Exch. Div. 289; S. C., 20 Moak, 547; see *Earl of Roscommon's Claim*, 6 Cl. & F. 97; *Doe v. Wolley*, 8 B. & C. 22; *Emmerson v. White*, 9 Post. 482; *Richards v. Richards*, 15 East, 294.

The declarations of a deceased member of a family are not only admitted because of necessity but for the reason that they were spoken at a time when the declarant had no other motive than to speak the truth. If therefore it appears that the declarant had any other motive than to speak the truth, or if any other possible motive existed, or if any other fact existed that may have impelled its speaking, his declarations are inadmissible. Before such declarations are admissible it must at least presumptively appear that they were made at a time when there was no temptation to misrepresent the facts. *Berkeley Peerage*, 4 Comp. 416; *Banbury Peerage*, 2 Wheat. Selw. N. P. 558; S. C., 1 Sim. & Sim. 153. They must be free from the presumption of interest or bias. *Chapman v. Chapman*, 2 Conn. 347; S. C., 7 Am. Dec. 277.

In such instances the mind must stand indifferently. The fact however that it is to the interest of the declarant to keep up his family history, and that he might derive an interest by proof of the fact, does not render them inadmissible. *Doe d. Tilman v. Tarver*, 1 Ry. & M. 141.

Thus in the case of *Doe d. Tilman v. Tarver*, such declarations were held inadmissible which tended to show that the parties making them were entitled to a remainder on failure of the issue of the then possessors of the estate. And in this same case it is added that a widow was allowed to prove, in the House of Lords, the declarations of her husband, in support of her title, though the husband, if living, would have had the right which the declarations went to establish. Not only must they be free from bias or interest, but they must have been made in point of time *ante litem motam*, before the controversy arose. *David v. Stittig*, 1 Martin, (N. S.), 147; S. C., 14 Am. Dec. 179; *Vowles v. Young*, 13 Ves. 143; *Elliott v. Pearol*, 10 Pet. 411; *Whitlock v. Baker*, 13 Ves. 514; *King v. Eswell*, 8 T. R. 723; *Stein v. Bowman*, 13 Pet. 209, *Elliott v. Pearol*, 1 id. 328; *Strickland v. Poole*, 1 Dall. 14; *Northrop v. Hale*, 76 Me. 306; S. C., 49 Am. Rep. 615; 81 Alb. L. J. 51.

But where a controversy had arisen between parties concerning the validity of a deed against which one of the parties claimed, and no controversy was then expected to arise about the heirship, a letter written, stating the pedigree of the claimants, was not excluded by the rule of law as to declarations made *post litem motam*. *Elliott v. Pearol*, 1 Pet. 328.

It is not enough that they were made before the suit was commenced; that cannot be taken as the criterion. *Berkeley Peerage*, 4 Comp. 401; *Monkton v. Attorney-General*, 2 Russ. & My. 161. What is the commencement of the controversy has been defined to be "the arising of that state of facts on which the claim is founded without any thing more." *Walker v. Countess of Beauchamp*, 6 C. & P. 552. A controversy in a family, though not at that moment the subject of a suit, constitutes sufficiently a *litem motam*, to

render inadmissible a letter written on that subject by one member of the family to another. *Butler v. Mountgarret*, 7 H. L. Cas. 633.

Within the meaning of the term, *lis mota*, as already expressed, is the further idea of a controversy upon the same particular subject in issue. The mere fact that a matter was under discussion at a trial when there was no controversy over it, although there was a controversy over some other branch of the subject, is not sufficient to exclude the declarations then made. In one case it was said that "the distinction had been correctly taken, that where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure, that in admitting the deposition of witnesses, selected and brought forward on a particular side of the question, who embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, that never has been a *lis mota*, and consequently the objection does not apply. *Freeman v. Phillips*, 4 M. & S. 486; see *Shedden v. Patrick*, 3 Sw. & Tr. 170.

Courts will not inquire whether or not the declarant had any knowledge of the controversy when he made the declarations. His ignorance is immaterial; for they must be excluded, although he at the time of their utterance knew nothing about the controversy. The unbending test is to exclude all declarations made at the time and after the controversy arose. To inquire whether a dead person had knowledge at the time he made the declaration of the controversy would raise too many issues, and lead on to confusion and erroneous conclusions. *Berkeley Peerage*, 4 Comp. 401. Even though an action be commenced fraudulently, with a view thereby to exclude such declarations, they are not, because of that fact, admissible. *Shedden v. Patrick*, 2 Sw. & Tr. 170; see *Jenkins v. Davies*, 10 Q. B. (N. S.) 314.

W. W. THORNTON,

CRAWFORDSVILLE, IND.

#### ATTORNEY — ADMISSION TO PRACTICE — REGENTS' EXAMINATION.

NEW YORK COURT OF APPEALS, JAN. 24, 1883.

IN THE MATTER OF THE APPLICATION OF FRANCIS G.  
MOORE, A STUDENT AT LAW.

It is requisite to admission to practice as an attorney, that the candidate shall have passed the regents' examination, prescribed by the rules, within three months from the commencement of his clerkship.

**PER CURIAM.** The above is one of a number of applications recently made to this court, requesting an order exempting the applicant from the obligations of subdivision 3, of rule No. 4, relating to the admission of attorneys and counselors, requiring proof that applicants for admission as attorneys had, within three months after commencing their clerkships, passed the regents' examination prescribed by the rules.

This rule was adopted by the court in 1882, has been extensively published in the rules and otherwise since, and has, from the time of its adoption, been uniformly enforced in the examination of students throughout the State.

There would seem to be no valid reason why a person called upon to determine the, to him, important question of selecting a vocation for life, should not have made himself familiar with the conditions imposed by law to the privilege of pursuing such avoca-

tion. Notwithstanding this fact, it is apparent that many students have heedlessly remained in ignorance of the rule until their periods of study had nearly, or quite expired, and have then come to this court with applications to be exempted from its operation. The object of this rule can be obtained only by its uniform and strict enforcement. It was clearly its intention, by requiring certain intellectual qualifications on the part of students when commencing their course of legal studies, to insure as far as possible, the attainment of the ability required, when finally licensed by the court, to perform the responsible and important duty of advising clients as to their legal rights and duties.

This rule, like all statutes, should be construed so as to promote the object which its framers had in view in adopting it. The rules of courts are made under special statutory authority and when made have the force and effect of statutes. *People, ex rel. Mayor, etc., v. Nichols*, 18 Hun. 535.

While a rule, which is merely directory in its provisions, may be disregarded or obviated by allowing the act required to be performed to be done *nunc pro tunc*, this is not so with reference to mandatory provisions. Here the object of the rule was to require, at the commencement of his clerkship, certain specified proof of the student's qualifications. This proof cannot be allowed to be subsequently supplied without defeating its object and practically annulling its provisions. We do not think we are at liberty to do this. When the rule was adopted it became the law for the court as well as to the citizens upon whom it was designed to operate, and we have no more power to disregard its provisions, in determining the rights of a student, than we should have to disregard the force of a statute in determining the rights of individuals thereunder. We conceive that it would be quite unfortunate for any lawyer to commence the practice of the law under the impression that obedience to the requirements of the law could safely be disregarded, and that he could trust to favor or indulgence to be relieved from the punishment which follows such conduct to the general public. It may be unfortunate for the individual that he should be obliged to continue the study of the law for a longer period of time than others who have complied with the provisions of the rules, but it is a misfortune which he has brought upon himself by inexcusable carelessness and a disregard of the most ordinary precaution.

The application should be denied.

All concur.

#### NEGLIGENCE—PROXIMATE CAUSE—WHEN QUESTION OF LAW.

SUPREME COURT OF PENNSYLVANIA, NOV. 11, 1887.

**SOUTH-SIDE PASSENGER RY. CO. v. TRICH.**

Plaintiff's wife was jolted off the platform of a car into the street by a sudden whipping up of the car horses. She alighted on her feet. While standing there she was struck and injured by a runaway horse and buggy. In a suit for damages against the car company, there being no dispute as to the facts, defendant's counsel asked the court to charge that if there was any negligence on the part of the driver of the car, it was not the proximate cause of the injury. The court refused, saying that it was a question for the jury under the evidence. *Held, error.*

**ERROR** to Court of Common Pleas No. 2, Allegheny county. Actions by Mr. and Mrs. Trich, against a passenger railway company in the city of Pittsburgh, to recover damages for personal injuries received by Mrs. Trich. The plaintiff in error was operating the

"South-Side Short Line," and its cars ran up Third avenue, across Smithfield street, in the city of Pittsburgh. The cars in use on the line were what are commonly called "bob-tailed" cars, having a driver, but no conductor, but with an ordinary platform at the rear end, with a step and rail at each side. Mrs. Trich was at that time living in the borough of McKeesport. Mrs. Trich and her father were standing on the lower side of Smithfield street at the corner of Third avenue, and hailed a car coming up Third avenue. Mrs. Trich says that she got on the car with one foot on the platform, and the other on the step, and had hold of the rail with her hand, when the car started. She stayed there on the platform till the car reached the middle of Smithfield street, about sixty or seventy feet away. When the car reached that point the driver saw a runaway horse and buggy coming down Smithfield street, and whipped up his horses to get across ahead and avoid a collision. When he whipped his horses the car gave a bounce or jolt, and Mrs. Trich fell off the platform, alighting on her feet in the street unhurt, and "a moment or two afterward" was struck by the runaway horse, knocked down and injured. Under this evidence counsel for the railroad company asked the court to instruct the jury, that if there was any negligence on the part of the driver of the car in starting too soon, such negligence was not the proximate cause of Mrs. Trich's injury, she having been hurt by the runaway horse and buggy. The court refused to give the instructions prayed for (which is assigned as error), and the jury found verdicts against the company amounting to \$1,810.25.

*John Dalsell and Geo. B. Gordon*, for plaintiff in error.

*A. & A. M. Blakeley*, for defendants in error.

GREEN, J. There is no manner of question as to what was the actual and immediate cause of the injury inflicted upon Mrs. Trich. It was an entirely undisputed fact that she was struck and injured by a runaway horse and buggy. All the witnesses who saw the occurrence so testify. Thus Mr. McCully, the father of Mrs. Trich, who was present with her at the time, and was examined on her behalf, after describing her attempt to get on the car, and saying that she was bounced off, adds: "A moment or two afterward, here comes a runaway horse and buggy down the street, and the shaft, I suppose it was, caught her under the arm, and dragged her to the street crossing, and she fell away." The only other witness examined for the plaintiff as to the facts of the occurrence, M. H. Harrington, testified: "There is a banking building there on the corner, and I saw the lady fall,—fall off; and when she fell, to the best of my knowledge, she kind of threw herself back this way, and there was a phaeton or buggy of some kind running—a horse running down the street with a buggy—and it struck her, and they picked her up and carried her into Mr. Johnson's drug store." There was no contradiction of this testimony. But one other witness, Mrs. Vrailling, examined by the defendant, testified to the fact of the injury, and she also said it was done by the buggy striking the woman. The learned court below, in the charge, said: "The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse." This was an understatement of the testimony which might have led the jury to suppose that there was an open question, with a preponderance of evidence only as to whether it was the runaway horse and buggy which inflicted the injury. The defendant had presented a point stating that it was the undisputed evidence that Mrs. Trich

was injured by being struck by a runaway horse, so that the question was directly before the court. In view of that circumstance, we think the court should have specifically so charged, and not left it as an open question for the jury to determine, with a mere expression of opinion that the evidence preponderated in that direction.

Assuming then, as we do, that it was the undisputed evidence that the injury was inflicted by the runaway horse and buggy, the only remaining question is whether it was the duty of the court to declare whether this was the proximate cause of the injury. The point presented by the defendant asked for such an instruction, but the court refused it, saying it was a question for the jury under the evidence. In this we think there was error. In the case of *West Mahanoy v. Watson*, 112 Penn. St. 574, we reversed the court below for making just such an answer to just such a point, and upon a review of the facts of the case we held that they did not constitute an instance of proximate cause as against the defendant, and therefore decided that the defendant's point should have been affirmed, which took the case from the jury. Mr. Justice Paxson, in delivering the opinion, said: "While it is undoubtedly true, as a general proposition, that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it." It is sufficient to refer to *Hoag v. Railroad Co.*, 85 Penn. St. 293. In that case this court, following *Railroad Co. v. Kerr*, 62 Penn. St. 353, and *Railroad Co. v. Hope*, 80 id. 373, laid down the rule as to proximate cause as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrong-doer as likely to flow from his act."

Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the natural and probable consequence of the car-driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed ever seen upon Smithfield street, where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural; for the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion, that in the fact of the present case, the direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy over which the defendant company had no sort of control, and for which it is not responsible; and therefore we conclude that the proximate cause of the injury, in the legal sense, was the collision of the horse and buggy with the person of Mrs. Trich, and not the negligence of the defendant.

The case of *West Mahanoy v. Watson*, came again

into this court, and is reported in 19 Weekly Notes Cas. 441; 9 Atl. Rep. 420. The present chief justice, in delivering the opinion of the court, said: "These facts narrow the case down to the single question, was the upset at the ash heap on the township road the immediate or direct cause of the loss of the horses? As we have seen, the facts themselves answer this interrogatory in the negative, and necessarily determine the case in favor of the plaintiff in error. In the case of *Hoag v. Railroad Co.*, 85 Penn. St. 293, Mr. Justice Trunkley, then president of the Common Pleas of Venango county, in his charge to the jury on the trial of the above-named cause, said: 'The immediate, and not the remote cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, did the cause alleged produce its effect without another cause intervening, or was it to operate through or by means of this intervening cause?' As the principle here stated was adopted by the affirmance of this court, following *Railroad Co. v. Kerr*, 62 Penn. St. 353, we may regard it as the settled law of this State.

In the facts of the present case we find a perfect illustration of this principle. Mrs. Trich herself testified that when she was "bounced" from the car she fell on her feet. Immediately after she was struck by the runaway horse and buggy, and from them received her injury. The jolting from the car simply landed her on her feet, and inflicted no injury. But another agency intervened, which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question. Following the doctrine of the last case cited, we feel clearly obliged to hold that the plaintiff's injury was inflicted by the special intervening agency stated, and therefore the defendant is not liable. In all of the cases cited, as in several others not referred to, this court finally determined them upon its own view of the facts, without regard to the verdicts of the juries.

The defendant's point should have been affirmed. Judgment reversed.

#### INSURANCE—MARINE—"IMPROPER NAVIGATION"—LOADING—PORT INEFFECTUALLY CLOSED.

ENGLISH COURT OF APPEAL, MAY 19, 1887.

#### CARMICHAEL V. LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION.\*

The members of the defendant association agreed to indemnify one another against (*inter alia*) "loss or damage of or to any goods or merchandise caused by improper navigation of the ship." The plaintiffs, members of the association, neglected to efficiently close a loading port in the side of their vessel, so that the cargo was damaged by sea-water, which leaked in during the voyage, but the leak did not endanger or impede the navigation of the ship. The act of negligence occurred before the completion of the loading. *Held* (affirming the judgment of the Queen's Bench Division), that the damage was "caused by improper navigation of the ship" within the meaning of the articles of association of the defendants.

Cohen, Q. C., and McCall, for defendants.

Bucknill, Q. C., and Aspinwall, for plaintiffs.

Lord Esher, M. R. The question is, what is the true meaning of the words "caused by improper navigation?" First of all, it seems to me that those words do not refer merely and simply to improper navigation with reference to the ship herself, but also

to improper navigation with reference to the safety of the goods in the ship. In this connection then, what is the true meaning of improper navigation? I think that those words imply something wrongly done or wrongly omitted to be done by the ship-owner or his servants, for whom he is responsible at some time or other. If neither the ship-owner nor any servants for whom he is responsible do any thing improper at any time, then I think no liability would arise under this clause. They ought not to be negligent, but if they are negligent, and consequently do something which they ought not to do, or omit something they ought to do, then I think they would have acted improperly, and that negligence must have some effect upon the navigation of the ship while she is being navigated. I do not think that improper navigation can exist except with regard to something happening while the ship is being navigated. But then this question arises, if negligence occurs before the navigation of the ship begins, which has an effect upon her navigation while she is being navigated, is that or not "improper navigation" within the meaning of those words? Now I think you could hardly find two greater authorities upon mercantile law or upon the construction of mercantile documents than Willes, J., and Montague Smith, J.; and although I do not say that they have laid down any binding rule, yet I think we may derive great assistance if we look at the principles enunciated by them in the case of *Good v. London Steamship Owners' Association*, L. R., 6 C. P. 563. It is true that in that case the words are confined to bad stowage, but I think that the principle may be easily enunciated with regard to something other than bad stowage. Supposing that counsel, in argument, had put his question in these terms: "Would negligence arising before the commencement of the voyage be within this deed?" Then I think those learned judges would have answered: "Certainly, if that negligence affected the safe sailing of the ship with regard to the safety of the goods on board during the voyage." I think that would have been a very sound answer to the question. Therefore it seems to me, if negligence occurs before the navigation of the ship begins, and that negligence of the ship-owner or his servants has the effect of causing the ship during her navigation to be unsafely navigated with regard to the safety of the goods, that makes the navigation improper navigation by the ship-owner, or those for whom he is liable, within the meaning of those words. Then the only remaining question is whether this case is within the proposition. Here there was negligence before the navigation—not the voyage, because there might be navigation without any voyage—commenced; but it was negligence of the shipowner and of his servants for whom he was responsible, and it had the effect of rendering it impossible, unless the matter were remedied, to navigate the ship properly, after her navigation began, with regard to the safety of the goods on board her. Under these circumstances, I think that the damage was caused by improper navigation within the meaning of the rule, and that the judgment of the Divisional Court was right.

FRY, L. J. I do not attempt to define all the cases which may come within the words "improper navigation," but I think those words as used in this rule include the case of something being negligently omitted to be done which ought to be done before the departure of the ship in order to enable her to carry her cargo safely from port to port, whereby it happens that the cargo is not safely and properly so carried. Now it has been argued that the words do not include such a case, for two reasons. First, it has been said that the omission to do some act must take place during the voyage, because navigation does not include

\*57 L. T. Rep. (N. S.) 550.

any thing happening outside the voyage. But in my judgment, it is impossible reasonably to contend that omission to do a proper act before the commencement of a voyage, which results in bad sailing and injury to the ship during the course of the voyage, is not improper navigation. Supposing, for instance, that a ship's captain omitted to take on board a compass, so that as a consequence the ship lost her way upon the ocean, and she and her cargo were lost. I think it could hardly be contended that in such a case there was not improper navigation, even though the captain during the course of the voyage may have done every thing that a man without a compass could possibly do. Such a case would be an instance of the omission of a proper act before the commencement of the voyage resulting in damage during the voyage. That was the view of the Court of Common Pleas in the case of *Good v. London Steamship Owners' Association*, *ubi supra*. They considered the case of bad stowage before the commencement of the voyage affecting the sailing of the ship during the voyage, and they thought that would be bad navigation. Next it was urged that navigation only refers to the transit of the ship through the water, without regard to the cargo which she carries. It may be that that contention may be true in some cases, but it seems to me that it is impossible to apply it to this case in which we are considering loss and damage to goods caused by improper navigation. It seems to me that navigation in this context relates to the carriage of the goods by a ship through the water from the *terminus a quo* to the *terminus ad quem*. And here again this conclusion is confirmed by the case of *Good v. London Steamship Owners' Association*, *ubi supra*, because the negligence there, which led to be improper navigation, was not closing a cock, which let in water to the injury of the cargo, and it was not shown, as far as I can see, that the letting in of that amount of water would have interfered with the transit of the hull. I therefore think that the arguments for the defendants fail. The question may be approached in another way. What is proper navigation? Can it be said that proper navigation does not include making proper preparations for navigation? I should hesitate to lay down any such principle. At any rate, I am clearly of opinion in this case, having regard to the words which we have to construe, that negligent omission by the plaintiffs has led to improper navigation.

Lopes, L. J., concurred.

### SHIP—BILL OF LADING—EXCEPTIONS—DANGERS AND ACCIDENTS OF THE SEAS—DAMAGE CAUSED BY RATS.

HOUSE OF LORDS, JULY 14, 1887.

HAMILTON V. PANDORF.\*

A cargo of rice was shipped under a charter-party and bills of lading, which excepted "dangers and accidents of the seas \* \* \* of whatever nature and kind." During the voyage the cargo was damaged by sea-water entering through a pipe which had been gnawed by rats. It was admitted that the ship was seaworthy, and that there was no negligence.

*Held*, that the damage was within the exception, and that the ship-owner was not liable.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M. R., Bowen and Fry, L. JJ.), reported in 55 L. T. Rep. (N. S.) 499, and 17 Q. B. Div. 670, who had reversed a judgment of Lopes,

L. J., upon further consideration of an action tried before him at the Liverpool Summer Assizes, 1885.

The appellants were the owners of the steamship *Inchrohona*, and the respondents were merchants in London and the rice ports. The question for decision was whether the respondents were entitled to recover from the appellants the sum of 1,000*l.* by way of damages for breach of contract contained in certain bills of lading, dated the 26th March, 1884, on a cargo of rice shipped by the respondents at Akyab, on board the *Inchrohona*, and delivered in a damaged condition. It appeared that the damage to the rice was occasioned by sea-water which had got into the hold through a hole which had been made in a pipe by rats. The appellants relied on the exceptions in the bills of lading as freeing them from liability for the damage so occasioned. The perils excepted in the bills of lading were "the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and steam navigation of whatever nature and kind soever excepted." There was a dispute at the trial as to whether the rats had been allowed to come on board by the shippers in the course of shipping the rice at Akyab. The jury found as to this that the rats that caused the damage were not brought on board by the shippers in the course of shipping the rice. A second question was left to the jury—namely, whether those on board the vessel took reasonable precautions to prevent rats coming on board during the shipping of the rice. This question the jury did not answer, as the appellants' counsel at the trial admitted that it became immaterial, having regard to the finding on the first question. There was no dispute at the trial as to the fact of damage or the amount thereof, and it was further agreed that the damage was caused during the voyage home, after the ship had left Akyab, by sea-water passing through a hole made by rats in a leaden discharge pipe connected with a bath-room in the vessel. It was admitted that the effect of the finding of the jury, having regard to the evidence, was that the rats which ate the pipe were in the ship before the cargo was loaded. The appellants did not offer any evidence to show that it was impossible to exclude rats altogether from the ship, or that it was not possible by reasonable care and skill to prevent rats when on board from doing the mischief which caused the damage in this case.

Lopes, L. J., gave judgment for the defendants (the present appellants), but his judgment was reversed, as above mentioned.

Bigham, Q. C., and Barnes appeared for the appellants.

Sir C. Russell, Q. C., and J. Walton, for respondents.

THE LORD CHANCELLOR (Halsbury). My Lords: In this case the admissions made at the trial reduce the question to this—whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea-water to come in and cause damage is a danger and accident of the sea. That this happened without any knowledge of the ship-owner is material in determining the rights of the parties in this particular case, but in my judgment has no relevancy to the question whether the facts, as I have stated them, constituted a danger or accident of the seas. With all respect to Bowen and Fry, L. JJ., they have not accepted the hypothesis of fact which the admissions at the trial render essential. It is admitted that the ship was seaworthy, and that there was no negligence, and these admissions are absolutely inconsistent with the reasoning of the lords justices, which suggests important difficulties in deciding those questions of fact to which I have referred, but seems beside the question

\* 57 L. T. Rep. (N. S.) 726. See 34 Alb. Law Jour. 488.

if these facts are proved or admitted, as I think it is clear they were. The other question with which the master of the rolls dealt is one which must be determined upon the ordinary rules of construction, whatever is the meaning of the document which is under debate; and it must be admitted that words may receive a limited meaning by reason of the other words with which they are associated, or by reason of the subject-matter with which they deal, or by reason of the mode in which they are commonly used. It is clear that the parties do not mean by such an instrument as we are construing to except all accidents of any kind or description whatsoever which may happen during the particular voyage which both parties are looking forward to. Some effect must be given to the words "perils of the sea." A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision in the Court of Exchequer, in *Laveroni v. Drury*, 8 Ex. 166; 22 L. J. 2 Ex. In the *Law Journal* report of that case, Pollock, C. B., and Alderson, B., distinctly pointed out, after the judgment of the court had been given, that the decision at which the court had arrived did not touch the question of whether the sea being let in by a hole made by a rat was an accident or danger of the sea. One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water getting into the vessel from the sea upon which the vessel was to sail in accomplishing her voyage—it would not necessarily be by a storm; the parties have not so limited the language of their contract—it might be by striking on a rock, or by excessive heat, so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in; but what the parties, I think, contemplated was that if any accident (not wear and tear or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract. A subtle analysis of all the events which lead up to and in that sense cause a thing may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal right of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness or their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed—each of these may be represented as the cause of the water entering; but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises. In the class of contract where the ship-owner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them, but because in those cases an additional term exists in the contract, which makes the negligence of the ship-owner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words "dangers and accidents of the seas." Now cases have been brought to your lordships' attention in which the decision has turned, not I think, upon the question of whether it was a sea peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, peril or accident; you could not speak of the danger of a ship's decay; you would know that it must decay; and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden

vessel sailing through certain seas. One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without—the sea-water did get in. I am therefore of opinion that the judgment should be reversed, and I move your lordships accordingly.

Lord WATSON. My Lords: The respondents sue for damages in respect of injury sustained, during transit, by a cargo of rice, which was carried in the appellants' steamship *Ichrhona* from Akyab to Bremen. The appellants plead, in defense, that the injury was occasioned by a danger or accident of the sea, within the meaning of the exception in the charter-party and bills of lading, which are in the usual terms. In point of fact, the rice was damaged by sea-water, which found its way into the hold of the *Ichrhona* through a hole gnawed by a rat in a leaden pipe connected with the bath-room of the vessel. If the respondents were preferring a claim under a contract of maritime insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say, that had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted, and there would have been no consequent damage. Your lordships have now disapproved of the novel doctrine, that in a contract of sea carriage, a meaning must be attached to the expression "dangers and accidents of the seas," different from that which it bears in a contract insuring cargo against sea risks; (a) that in the case of a charter-party or bill of lading the court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage, whereas in the case of a policy, the proximate cause can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them: that when a ship-owner, who is bound by the implied terms of his contract to carry with ordinary care, claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the ship-owner or of those for whom he is responsible. As Lord Blackburn said in *Steel v. State Line Steamship Co.*, 37 L. T. Rep. (N. S.) 333; 3 App. Cas. 72: "Although the things perished by a peril of the sea, still inasmuch as it was the negligence of the ship-owner and his servants that led to it, they cannot avail themselves of the exception." I am of opinion that the appellants must prevail, because it has not been shown that the peril which was the immediate and efficient cause of damage owed its existence to their negli-

(a) In *Wilson & Co. v. Owners of the Cargo of the Xantha*, 57 L. T. Rep. (N. S.) 701, decided immediately before the present case.

gence. In the course of the trial before Lopes, L. J., it does appear to have been at one time suggested that the appellants' servants failed to exercise due diligence in extirpating the rats, and also that the bathroom pipe ought not to have been of lead, but of some other material which a rat could not or would not gnaw. Neither of these points was submitted to the jury, who negatived the only charge of negligence which was ultimately insisted on by the respondents. I accordingly concur in the judgment which has been moved.

**Lord BRAMWELL.** My Lords: I am of opinion that this judgment must be reversed. This is the third case in which this House has had to consider whether a peril of the sea or other peril within the general words was shown. The arguments and discussions in all three have been very useful in helping to a conclusion. As I have said elsewhere, I think the definition of Lopes, L. J., very good—"It is a sea damage occurring at sea, and nobody's fault." What is the "peril?" It is that the ship or goods will be lost or damaged; but it must be "of the sea." "Fire" would not be a peril of the sea; so loss or damage from it would not be insured against by the general words. So of lightning. In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in; and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shown in this case. Then I am of opinion that "perils of the seas" is a phrase having the same meaning in bills of lading and charter-parties as in policies of insurance. I repeat my illustration; if underwriters paid this loss as through a peril of the sea, how would they, in the name of the assured, claim from the ship-owner, because it was not a peril of the sea? I do not go through the cases; I say there is none opposed to this opinion. The doubt or hesitation expressed in the case where the ship was sunk by being fired into is certainly a doubt the other way, but only a doubt. *Cullen v. Butler*, 5 M. & S. 461. An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behavior or ill-condition. But that is met by the argument that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence. No question of negligence exists in this case. The damage was caused by the sea in the course of navigation, with no default in any one. I am therefore of opinion that the damage was caused by peril of the sea within the meaning of the bill of lading, that Lopes, L. J., was right, and that the judgment must be reversed.

**Lord FITZGERALD.** My Lords: The damage to a portion of the cargo of rice carried by the defendants' ship was not occasioned either remotely or immediately by any negligence of the defendants, as alleged in the statement of claim, but they may nevertheless be liable, and the real question is, whether the defendants have established that it arose from a peril of the sea coming within the exception contained in the charter-party and in the bill of lading. I agree with Lord Watson that the exception, "peril of the sea," has the same meaning whether it occurs in a marine policy or in a charter-party, or bill of lading, and it is to be so interpreted, but that when the action is on the contract of carriage you may look behind the proximate or immediate cause for the purpose of as-

certaining whether the remote cause may not have been the negligence of the carrier, and indeed the carrier is usually under the necessity of establishing that no negligence of his had led to the calamity. Thus for instance, if a ship is cast on the rocks by force of the winds or sea, that is a loss by a peril of the sea within the exception; but in an action against the carrier it would be open to consider whether the ship being placed in that position did not originate in negligent navigation. At the close of the argument I was slightly inclined to the opinion that the loss in question might be more accurately described as arising from a peril of the ship than caused by a peril of the sea; but on consideration of the very careful and elaborate judgments in the Court of Appeal, and the authorities referred to, and looking at the reason of the thing, I have come to a conclusion in accord with that announced by my noble and learned friends, adopting the reasons and the decision of Lopes, L. J. The accident was fortuitous, unforeseen and actually unknown until the ship had reached her destination and commenced unloading. I do not however mean to suggest that to constitute a peril of the sea, the accident or calamity should have been of an unforeseen character. The remote cause was in a certain sense the action of the rats on the lead pipe, but the immediate cause of the damage was the irruption of seawater from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage. There having been no negligence on the part of the defendants, I am of opinion that they have brought the case within the exception, and are protected.

**Lord HERSCHELL.** My Lords: I have so recently expressed, in the case of *Wilson & Co. v. Owners of the Cargo of the Xantho*, my views upon the interpretation to be put upon the words "dangers and accidents of the seas" occurring in a bill of lading, that I need trouble your lordships with but few observations in this case. I take the facts to be that the damage occurred by the sea entering through a leak caused by rats without any neglect or default on the part of the ship-owner or those for whom he was responsible, and that this was not an ordinary incident of the voyage which he was bound to anticipate. In saying so, I am differing from the ground upon which two of the learned judges in the Court of Appeal (Bowen and Fry, L.JJ.) based their judgment. But when those learned judges say that "it was consistent with the findings that the mischief done to the pipe and the incursion of seawater which followed would never have happened but for either a defect in the condition of the ship or some want of prudence in the ship-owner," I think they overlook the course which the case took at the trial. It was suggested during the trial, by the learned counsel for the plaintiffs, that due care had not been taken to exclude or exterminate the rats, and that if the pipe had been made of some other material the accident would not have happened. But I think these points were distinctly and unequivocally abandoned by him. If intended to be insisted upon, they raised questions upon which the opinion of the jury ought to have been taken, and with the assent of the plaintiff's counsel, the only questions put were upon a totally different point. The master of the rolls rested his judgment altogether upon another ground. He considered that the rats were the real cause of the damage, and that it was therefore not due to a danger or accident of the seas. I quite concur in the view expressed in *Laveroni v. Drury*, 8 Ex. 166; 22 L. J., 2 Ex., that injury done to a vessel or its cargo by rats is not damage by perils of the sea. But in that very case Pollock, C. B., said: "If indeed the rats had made a hole in the ship through which water came and damaged the cargo, that might very likely be a



case of sea damage." The master of the rolls says that the distinction is a very fine one between damage done by rats, which it may be so eat into the timbers of a ship as to render it unfit to proceed to sea, and the loss of the vessel, owing to the incursion of water when its sides have been completely penetrated by the same cause. I own I think the distinction a substantial one, and it seems to me obvious that Pollock, C. B., shared this view. It has been held in the United States, in the case of *Garrigues v. Coxe*, 1 Binney (Penn. Rep.) 592, that a leak occasioned by the eating of rats, without negligence on the part of the ship-owner, was a risk covered in a marine policy by the words "perils of the sea." Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage, and therefore to be anticipated. And inasmuch as it was not the result of any act or default on the part of the ship-owner or his crew, I think, for the reason I have given in my opinion in the case already alluded to, that it is within the exception in the bill of lading. I accordingly concur in the motion which has been made.

LORD MACNAGHTEN. My Lords: The goods which were carried under the bill of lading were damaged during the voyage by the incursion of sea-water. The water came in through a hole gnawed by rats in a pipe connecting the bath-room with the sea. At the trial various charges and suggestions were made of negligence on the part of the ship-owner, but they were all either withdrawn or negatived by the jury. Under these circumstances, it seems to me that the accident which caused the damage was one of the excepted perils or accidents, and there was no reason why the ship-owner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care. I agree therefore with the judgment of Lopes, L. J. I do not think the case could be summed up better than it was by him in the words which have already been quoted, "Sea damage occurring at sea, and nobody's fault." I concur in the motion which has been made.

Order appealed from reversed; order of Lopes, L. J., restored; the respondents to pay to the appellants the costs in both courts below and of the appeal to this House; cause remitted to the Queen's Bench Division.

#### UNITED STATES SUPREME COURT ABSTRACT.

INSURANCE—FORFEITURE—ANSWERS IN APPLICATION—USE OF STIMULANTS.—(1) An application for life insurance contained the question, "has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily?" The answer was "No," and the court instructed the jury that it was not untrue unless, prior to the application, he was addicted to their use or habitually used them daily or often. *Held*, that the charge was not erroneous. (2) A life insurance policy provided that it should be void if the insured "shall become so far intemperate as to impair health, or induce delirium tremens." The court, in effect, instructed the jury that the impairment of health was not the indisposition arising from a drunken debauch, but such as arose from such frequency of use as indicated an injurious addiction to the practice. *Held*, that it was error, and it was for the jury to de-

side if the death of the insured was caused by excessive use of alcoholic stimulants. The defendant asked the court to say to the jury that the words in the policy, "become so far intemperate as to impair health," do not necessarily imply habitual intemperance, and that an act of intemperance, producing impairment of health, was within the conditions of the policy, and rendered it null and void, except as provided where the premiums for three entire years had been paid, and the policy had ceased upon other grounds than fraud, misrepresentation, concealment, or false statement of the insured. The court declined to so instruct the jury, and said: "The words of the condition are to be expounded according to the common and popular acceptance of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance; but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence." The effect of these and other instructions was that the condition that the policy should be void if the insured became so far intemperate as to impair his health, was not broken unless intemperance became the habit or rule of his life after the policy was issued. The jury may have believed, and there was some, we do not say conclusive, evidence to justify them in so believing that the efficient, controlling cause of the death of the insured was an excessive and continuous use of strong drinks for several days and nights immediately preceding his death; yet they were not at liberty, under the instructions, to find that he became so far intemperate as to impair his health, unless it further appeared that his intemperance in the use of alcoholic stimulants covered such a period of time as to constitute the habit of his life. This construction of the contract is, in our judgment, erroneous. If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words, "so far intemperate as to impair his health," although he may not have had delirium tremens, and although, previous to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether death was so caused is a matter to be determined by the jury under all the evidence. It is supposed by the plaintiff that the instructions of the court are sustained by *Insurance Co. v. Bank*, 122 U. S. 502. In that case the insured answered "Yes, occasionally," to the question whether he then was or had ever been "in the habit of using alcoholic beverages or other stimulants;" and stipulated, in the application, that he was not then, and would not become, "habitually intemperate." The policy contained a provision, not fully set out in the report of the case, that it should be null and void if the insured "shall become either habitually intemperate or so far intemperate as to impair health or induce delirium tremens." No question was made or could have been made in this court in respect to the meaning of the words, "so far intemperate as to impair health," because the jury were instructed, at the request of the company, that if the insured, Comstock, became so far intemperate as to impair his health, they must find for the defendant. The contest in this court was as to what constituted habitual intemperance, and as to the rulings in the court below upon that point. Indeed it was assumed at the trial of that case, as well as in this court, that there was, or might be, a difference between habitual intemperance and intemperance that impaired health. There was consequently no occasion for this court in that case to decide what construction was to be put upon the words "so far intemperate as to impair health," when standing alone

in a policy. The jury having found under proper instructions, that the insured had not become so far intemperate as to impair his health, that finding was not open to review here. It is clear therefore that there is nothing in *Insurance Co. v. Bank* that concludes the present case, or that militates against our interpretation of the policy here in suit. Dec. 19, 1887. *Etna Life Ins. Co. of Hartford v. Davey*. Opinion by Harlan, J.

**JUDGMENT — RES ADJUDICATA.**— In an action of ejectment, the defendants claimed under a tax deed issued in 1874 to their grantor. Prior to that action, the plaintiff had brought an action to foreclose a mortgage executed in 1870, on the land in controversy, making defendants' grantor a party thereto, and had obtained a decree declaring the lien of the mortgage prior and paramount to the lien of the tax deed, and of each and every of the other defendants therein. Held, that the decree was a conclusive adjudication which could not be impeached collaterally by defendants' grantor, or those claiming under him, and which estopped them from setting up the tax title in the present action. It is contended in behalf of the defendants that the only proper object of the suit to foreclose the mortgage was to sell the title of the mortgagor, and to cut off the equity of redemption of all persons claiming under him any title, lien, or interest inferior or subject to the mortgage; and that the title under the tax deed, being adverse and paramount to the rights both of the mortgagor and of the mortgagee, could not be contested in that suit, and was not barred by the decree therein. But the authorities cited fall short of supporting that contention. As a general rule, a court of equity in a suit to foreclose a mortgage will not undertake to determine the validity of a title prior to the mortgage, and adverse to both mortgagor and mortgagee; because such a controversy is independent of the controversy between the mortgagor and the mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious. Upon that ground it has been held by this court, as well as by the courts of New York, California and Michigan, on appeals from decrees for foreclosure of mortgages, that the holders of a prior adverse title were not proper parties; and judges have sometimes used such strong expressions as that the mortgagee "cannot make them parties," or that their title "cannot be belittled," in a suit for foreclosure. *Dial v. Reynolds*, 96 U. S. 340; *Peters v. Bowman*, 98 Id. 56, 60; *Insurance Co. v. Lent*, 1 Edw. Ch. 301; 6 Paige, 635; *Bank v. Walker*, 2 Sandf. Ch. 344; 3 Barb. Ch. 438; *Corning v. Smith*, 6 N. Y. 82; *San Francisco v. Lawton*, 18 Cal. 465; *Summers v. Bromley*, 28 Mich. 125. But in none of the cases just cited was any question presented or adjudged of the effect that a decree of foreclosure, rendered in a suit in which such adverse claimants were made parties and their claims were directly put in issue and determined, might have against them in a subsequent action. The cases of *Strobe v. Downer*, 13 Wis. 11, and *Palmer v. Yager*, 20 Id. 97, were also appeals from decrees of foreclosure; and in a later case in Wisconsin the court summed up the law thus: "It is freely admitted that a foreclosure suit is not an appropriate proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor, and that if such rights be so litigated, and be determined upon pleadings and proofs, the decree will be erroneous, and will be reversed. But whether, until reversed, such decree is *coram non judice* and void, so that it may be collaterally impeached, is quite another question. The conclusion would seem to follow, from all of the decisions, that it is not." *Board Sup'r v. Railroad*, 24 Wis. 93, 121. There are indeed two cases

in the Court of Appeals of New York, in which a common decree of foreclosure *pro confesso* was held to be no bar to a subsequent action at law by the owner of a title prior and paramount to the mortgage. But the decision in either case, turned on the form in which the plaintiff at law had been made a defendant to the bill of foreclosure. In the one case, a widow was held not to be barred of her dower by a decree of foreclosure, obtained after the death of her husband, of a mortgage executed by him alone during the coverture, on a bill against her and others as executors and devisees under his will, alleging that she and the other defendants "have or claim to have some interest in the aforesaid mortgaged premises, as subsequent purchasers or incumbrancers, or otherwise; but what particular interest your orator is not informed," and praying that they might be foreclosed "of and from all equity of redemption and claim of, in and to" the mortgaged premises. The ground of the decision was that under the statutes and rules of court, the allegations and decree were limited to rights subsequent and subject to the mortgage; and Judge Denio, in delivering judgment, said: "It is not intended to decide, that if a party claiming a title prior to the mortgage should be made a party to the suit, and should answer and litigate the question, and should have a decree against him, it would not conclude him in a collateral action." *Lewis v. Smith*, 9 N. Y. 502, 516. In the other cases, a testator, having devised land to his granddaughter in trust for his daughter for life, with remainder to the granddaughter in fee, the two afterward executed a mortgage; the granddaughter not executing it as trustee, and having no power by law to execute it as such. The bill and decree of foreclosure were against them as individuals, and therefore the title of the granddaughter as trustee was held not to be barred by the decree, the court, saying: "Her interest in remainder was subordinate to the prior estate for life in trust, created by the will, and she was not bound to set up her claim as trustee, when made a party to the foreclosure, in the absence of any averment in the complaint in respect to that interest, or claim that it was subject to the mortgage." *Rathbone v. Hooney*, 58 N. Y. 463, 467. So in a recent case in California, not yet published in the official reports, in which a decree, upon a bill against husband and wife, foreclosing a mortgage, executed by the wife alone, of land held by them in community, was held not to bar a subsequent action of ejectment by the husband, the bill to foreclose contained no averment that the husband had or asserted any claim adverse to the title of the mortgagor, and the decree in terms only barred the equity of redemption. *McComb v. Spangler*, 12 Pac. Rep. 347. To a bill in equity to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet at least when he holds the legal title, and his debt is due and payable, he may, and when the property is ordered to be sold free of all incumbrances, must be made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage. *Finley v. Bank*, 11 Wheat. 304; *Hagan v. Walker*, 14 How. 29, 37; *Jerome v. McCarter*, 94 U. S. 734; *Miltnerberger v. Railway*, 106 Id. 286, 307; *Woodworth v. Blair*, 112 U. S. 8; *Haines v. Beach*, 3 Johns. Ch. 459; *Hudn't v. Nash*, 16 N. J. Eq. 550. In all the cases heretofore referred to, the adverse title was prior to the mortgage foreclosed. But in the case at bar the tax title, though adverse to the mortgage title, was not prior to it. The whole title in the land was in the mortgagor at the date of the mortgage, and the title under the tax deed, if valid, was subsequent in time, although paramount in right, to

the title acquired under the mortgage and the decree of foreclosure. Upon the question whether the validity of a tax title subsequent in date to the mortgage may properly be litigated and determined in a suit for foreclosure, there has been a difference of opinion in the courts of the States. The courts of California and of Michigan have held that it may. *Kelsey v. Abbott*, 13 Cal. 609; *Horton v. Ingersoll*, 13 Mich. 409; *Wilkinson v. Green*, 34 id. 221, 223. Those of Wisconsin and of Kansas have decided that it should not. *Pelton v. Farmin*, 18 Wis. 234; *Roberts v. Wood*, 38 id. 60; *Short v. Nooner*, 16 Kan. 220. But the question in each of those cases arose upon appeal from the decree of foreclosure; and there is no case, so far as we are informed, in which a decree upon apt allegations in a bill to foreclose a mortgage, adjudging a subsequent tax title to be invalid, has been allowed to be collaterally impeached by the holder of that title in a subsequent action. Upon principle, it was within the jurisdiction and authority of the court upon a bill in equity for the foreclosure of the plaintiff's mortgage, to determine the validity or invalidity of Callanan's tax title, and he was a proper, if not a necessary party to such a bill. If the mortgagor or the mortgagee had made a conveyance or assignment after the date of the mortgage, the purchaser or assignee would have been a necessary party to the bill to foreclose. *Story Eq. Pl.*, §§ 193, 199, 201; *Terrell v. Allison*, 21 Wall. 289. And in *Stevenson v. Railway*, 105 U. S. 703, the Circuit Court, and this court on appeal, upon a bill in equity to foreclose a mortgage, tried the validity of an adverse title under a sale on execution against the mortgagor upon judgments recovered since the mortgage was made, and adjudged that title to be valid, because the judgments were recovered before the mortgage was recorded. At the date of the plaintiff's mortgage, the entire estate in the land was in the mortgagor, and was included in the mortgage. The subsequent assessment of the taxes created a lien upon that estate, which upon the sale for non-payment of the taxes passed to Callanan; but the mortgagor, so long as his right of redemption from that sale existed, still held the legal title, subject first to the lien for taxes, and then to the mortgage. The deed afterward executed by the county treasurer to Callanan, if valid, conveyed to him all the rights and interests, both of the mortgagor and of the mortgagee, and vested in him a complete title, so that the mortgagor had no title and no equity of redemption, and the mortgagee no lien and no right of foreclosure. There would seem to be no less reason for making Callanan a party to the bill than if he had claimed under a conveyance from or judgment against the mortgagor or the mortgagee since the date of the mortgage. But if Callanan was not a necessary party to the bill to foreclose the mortgage, clearly the mortgagor, if not the mortgagee, might have filed a bill in equity against him to redeem the land from the tax sale, alleging that he had a lien only, and not an absolute title; and by such a bill the issue whether he had or had not such a title would have been directly presented. The question whether that issue should be determined in the suit to foreclose the mortgage, or in a separate suit, was a question of multifariousness or of convenience, affecting the discretion only, and not the jurisdiction, of the court. By determining, before finally decreeing a foreclosure and sale, the question whether Callanan had a good title under the tax deed, the probability of obtaining a fair price at a sale under the decree of foreclosure would be increased, the rights of all the parties secured and further litigation avoided. As was said by Lord Chancellor Talbot, and repeated by Chief Justice Marshall: "The court of equity in all cases delights to do complete justice, and not by halves." *Knight v. Knight*, 3 P. Wms. 331, 334; *Corbet v. Johnson*, 1 Brock, 77, 81.

Dec. 19, 1887. *Hefner v. Northwestern Mut. Life. Ins. Co.* Opinion by Gray, J.

**TAXATION—ASSESSMENT—OVER-VALUATION.**—A sale of lands for delinquent taxes will not be set aside, on the ground of unjust valuation, where no such purpose appears on the part of the assessor or township board of equalization, and the evidence shows that although unimproved lands were assessed at a higher rate of valuation than improved lands owned by residents, yet no discrimination was made between unimproved lands owned by residents and such owned by non-residents, and the error in valuation could have been objected to and corrected by appropriate proceedings before the tax sale. Jan. 9, 1888. *Beeson v. Johns*. Opinion by Miller, J.

### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**DEFINITION—HIGHWAY—FERRY.**—A ferry is not included in the term "highway." It is however argued, that although the act makes no express reference to a ferry or its usual appliances, it does expressly allow an action for damages caused by "a defect in a highway;" and as the flat-boat at the ferry crossed the stream, and connected the highway on one side with the same continuing on the other side, it may be regarded as the highway from bank to bank, and therefore within the purview of the act. This is certainly ingenious, but is it sound? The definition of a "highway" is: "A passage that is open to all the public. Thus public rivers are in law considered as highways. A highway need not necessarily be considered a thoroughfare. The interest of the public in a highway consists solely in the right of passage over it. Thus a highway overland (which is what is usually meant by a highway), gives the right of walking, driving, and riding," etc. 1 Rap. & L. Law Dict., tit. "Highway." As we understand it, there is "no right of passage" at any particular point across a river, except where there is a legally chartered ferry, conferring a franchise to keep a boat for ferrying passengers, etc. The act here authorizing the establishment of a free bridge did not include a ferry, for the words "at or near by Gordon's ferry" only indicate the location of the bridge. Possibly the means employed, such as a flat or boat, in connecting the highway on one bank with its continuation on the other, might in some general sense be called a part of the highway, even without a charter. But the question here is one of construction—in what sense did the Legislature use the word "highway?" As indicated in the definition given above, the ordinary meaning of the word "highway" is a passage on land. It was used in the act in connection with the words "causeway" and "bridge." A bridge spanning the water, and connecting the banks, would seem nearer to being a "highway" than a ferryboat; and as it was deemed proper or necessary to express the case of "a bridge," it would seem to be a strained construction that it was unnecessary to mention a "flatboat" or ferry, for the reason that it was already included in the word "highway." As the law-makers were fixing a list of exceptions to the rule, it would seem, that if they had intended to include a flatboat running across the river, they would have said so. S. C. Sup. Ct., Oct. 26, 1887. *Chick v. Newberry Co.* Opinion by McGowan, J.

**FIXTURES—MACHINERY TRUSTED TO THIRD PERSON.**—When the owner of a machine adapted for use in a flouring-mill consigns it to himself in the care of another, to have it tested in a flouring-mill belonging

to a third person, and the machine is set up by that other in the mill on legs, and attached to the floor with screws, and to the main shafting of the mill with belts and pulleys, the machine does not thereby become a fixture as between the owner and the purchaser of the realty. In *Taylor v. Collins*, 51 Wis. 123, Mr. Justice Orton lays down the following rules or tests for determining whether articles of machinery are fixtures: "(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold." In the present case the requirement of the third rule is entirely wanting. The machine was not furnished to Pomeroy by the plaintiffs to be made a permanent accession to the freehold, unless some person interested should thereafter purchase it, and there is no evidence that Pomeroy had any such intention. He had no right to make the same a permanent accession to the freehold, and the legal presumption is that he did not. The fact that it was attached in the manner above stated to the building and freehold is not significant. It was not so incorporated with the building as to lose its identity, or to render it difficult or injurious to the building to remove it. In *Bank v. O. E. Merrill Co.* it was held that a large amount of machinery in a foundry building, indeed all the machinery therein over and beyond the water wheel, much of which was attached to the building more extensively and firmly than was the machine in controversy here, was not permanent fixtures, but personal property, which the tenant who placed the machinery there had a right to remove. This case illustrates of how little importance the mere fact of attachment to the freehold is, so long as the identity of the property remains, and its capacity to be removed and used elsewhere. The principal consideration in such cases is the intention of the party putting in the machinery. Counsel for the defendant greatly rely upon the case of *Iron Works v. Adams*, 37 Conn. 233. An examination of that case shows that it was decided upon the ground that the property in controversy was so attached to the building as to lose its identity. The same is true of the case of *Fryatt v. Sullivan Co.*, 5 Hill, 116, affirmed by the Court of Errors, 7 id. 529, also relied upon by counsel for defendant. The principle of these cases will apply where boards, timber, brick, or stone are incorporated in a building. They necessarily become a part of the building, and thus lose their identity as personal property. It should be observed that in both the above cases the owners of the freehold had paid their vendor or contractor for the articles thus made fixtures in good faith, and without notice that such articles belonged to other parties. The case of *Railway Co. v. Busch*, 43 Mich. 571, as well as many other cases cited to the same proposition, belong to this class. In the latter case it was held that ties used in the building of a railroad thereby lost their identity as personal property, and an action for their conversion could not lie. Other cases are cited on behalf of the defendant, in which the judgments were controlled by the consideration that the owners of the buildings in which the machinery in controversy had been placed by contractors had paid therefor in good faith, believing that such contractors owned the machinery, when in fact they did not. We have already seen that this is not such a case. Wis. Sup. Ct., Nov. 22, 1887. *Walker v. Grand Rapids Flouring-Mill Co.* Opinion by Lyon, J.

**INSURANCE—"PREMISES."**—An insurance policy prohibited the keeping of fireworks on the insured premises. The building insured was situated in Exposition grounds, where there was also a stable some twenty-five

or fifty feet distant, in which fireworks were stored at the time of the fire. *Held*, that the meaning of the word "premises" is confined to the building insured, and the policy was not avoided. As a contract of insurance is one of indemnity, and the language of the policy is the language of the company, we are not to strain it in favor of the latter as against the assured; on the contrary, we must resolve a doubt about the meaning of the policy, if any exists, against the company, and in favor of the assured. Penn. Sup. Ct., Nov. 7, 1887. *Allemania Fire Ins. Co. v. Pitts Exposition Soc.* Opinion per Curiam.

## NEW BOOKS AND NEW EDITIONS.

### RANDOLPH ON COMMERCIAL PAPER.

The third and concluding volume of this work is now issued by the publishers, F. D. Linn & Co., of Jersey City. We see no reason to modify the opinion which we expressed on the issue of the first two volumes. It is a work of broad learning and research, and will form an adequate, independent resource or a judicious addition to the practitioner's authorities on this all important topic.

### BENJAMIN ON SALES.

This is a new edition of this standard treatise, edited by Prof. Edmund H. Bennett. The references to American are very copious, and "have been entirely re-written, and are embraced in one continuous note at the end of each chapter, rather than in the detached fragmentary manner heretofore used." This is certainly a convenient arrangement. The editor also says he has "not made a single quotation in the entire work." This in a text-book is perhaps a virtue so far as the annotation is concerned. The text of this work is subject to criticism on account of its mosaic character, made up of long quotations and statements of decisions. By the adoption of this condensation and the use of a large page the editor has been able to compress an immense amount into this single volume, and it ought to supplant all other editions in this country. The annotation appears to be most thorough and exhaustive. Published by Houghton, Mifflin & Co., Boston.

### HISTORY OF A LAWSUIT.

By Abraham Caruthers. Third edition, enlarged, annotated and revised, by Andrew B. Martin. Cincinnati: Robert Clark & Co., 1888. Pp. vii, 688.

This is a work by two professors in the Law School of Cumberland University, Tennessee. The former is dead. His work was originally published some twenty-seven years ago. It was originally designed as a work of Tennessee practice, but the present editor's design has been to enlarge its scope and make it less local in character. The reader should not allow himself to be prejudiced by his assertion, in regard to the system of pleading which it teaches, that it is neither common law nor code pleading, but disregards the technicalities of the former and "the dangerous laxity" of the latter. Judging from the forms interspersed we should say that it teaches the best kind of code pleading, except perhaps that it does not state things exactly in the form of facts. Under a system of verification of pleadings an oath would mean nothing when attached to a declaration like this: "The plaintiff sues the defendant for \$300 as damages for wrongfully cutting off the ears of one black horse, the property of the plaintiff, whereby the value of said horse was greatly impaired." But putting this form in the shape of a positive allegation, with date, place,

etc., nothing better could be devised. There would be no "dangerous laxity" about it. Some of the forms are exactly conformable to our system. Considered as a book of Tennessee practice it seems quite admirable, but it apparently does not possess much practical value for the majority of the States where codes prevail. But we have been very much pleased by the intelligent and scholarly construction of the work, and have no hesitation in recommending it to students and practitioners in States where such a practice prevails.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Friday, Feb. 10, 1888:

Judgment affirmed, with costs—William H. Leonard, respondent, v. James E. Spencer and others, appellants. —Judgment affirmed with costs—John B. de Villers, respondent, v. New York Central and Hudson River Railroad Company, appellant. —Judgment affirmed with costs—Norman L. Hubbard, respondent, v. Long Island Railroad Company, appellant. —Judgment affirmed with costs—Anthony J. Meagher, respondent, v. George W. T. Lord and others, appellants. —Judgment affirmed with costs—George W. Varian, respondent, v. Robert A. Johnston, appellant. —Judgment affirmed with costs—Kate V. Mœbus, respondent, v. Henry Hermann, appellant. —Orders affirmed with costs—Melvin L. Tuller v. Joshua J. Beck, and Frederick O. Pierce v. Same. —Judgment affirmed with costs—Clayton Platt, appellant, v. Richmond, York River and Chesapeake Railroad Company, respondent. —Judgment affirmed with costs—Catharine Shook, respondent, v. City of Cohoes, appellant. Judge Earl writes the opinion, in which all the judges concur. The plaintiff fell on a slippery sidewalk, covered with mud and clay, and was injured. She recovered a verdict for \$3,000. —Motion to substitute John Bowen for deceased administratrix granted, and judgment affirmed in favor of substituted plaintiff with costs—Margaret Bowen, administratrix, etc., respondent, v. State of New York, appellant.

The court adjourned till February 27.

#### NOTES.

The Cincinnati *Weekly Law Bulletin* vouches for a deed drawn in the following form: Warranty deed given to the two law partners in their individual names, signed by the two grantees as witnesses, and the acknowledgment taken before one of the grantees as notary public.

The following is from Sir Frederick Pollock's "Remembrances: "My father's circuit-golings were great events in the family. He travelled in a landaulet which opened and shut easily. There was no box-seat in front, but there was a 'rubble' behind for the clerks. The capacity for luggage was small, but there was a front boot and a strangely-shaped oaken case to fill the whole of the space under the seat inside, and there were the sword case and the pockets for books and small articles. Provision was always made for a dinner on the road, and in the summer a morella cherry pie was specially prepared for it, and of course there would be two or three bottles of the excellent wine for which my father's cellar was famous. The start was generally made in the evening, and the first night would be passed at Stevenage or Alconbury Hill, the second at Scarthgill Moor or Barnby Moor,

where stood capital roadside inns with large gardens." The following example of an old-fashioned habit of Lord Ellenborough's is given: "Lord Westmoreland was on his legs in the House of Lords, and giving his opinion on the question in debate, said: 'My Lords, at this point I asked myself a question.'

\* \* \* Lord Ellenborough, in a loud aside: 'And a d—d stupid answer you'll be sure to get to it.'

We have frequently referred in these columns to the fallaciousness of evidence of personal identity. A remarkable illustration of this has been chronicled this week. On Monday week the East Surrey coroner held an inquest on the body of a woman who had been found dead in bed at a common lodging-house. Previous to her death, the deceased woman had informed a fellow-lodger that her name was Eliza Gorham, and that her solicitor's name was a Mr. Mayo. At the inquest Mr. Mayo, Jr., and a sister of Eliza Gorham positively identified her as Eliza Gorham, whose husband had obtained a decree nisi in the Divorce Court in December last. On the other hand, Mr. Gorham, the husband of Eliza Gorham, was as equally positive that the woman was not his wife, and Mr. Mayo, Sr., and Eliza Gorham's mother and brother also failed to identify her. The matter became more complicated when it appeared that Eliza Gorham had an old-out scar at the back of her head and a piece off one of her lower teeth, and the woman, who laid the body out, swore that the deceased woman had such a scar on the head, and there was also a piece off one of the lower teeth. It further appeared that Mrs. Gorham was given to habits of intemperance, as also was the deceased woman. Eventually the case was taken as that of a woman unknown, and a verdict of death from an affection of the heart brought on by drink was returned. In consequence of the publicity of the proceedings at the coroner's inquiry and the description given of the dead woman, a Mr. Frederick Ralph Fussell, an artist, of Mablethorpe, Louth, Lincolnshire, who is instituting divorce proceedings against his wife Elizabeth, aged forty-five years, and which cause is in the list for hearing next week, came to London, and having consulted with his London solicitor, the two repaired to Ewer Street Mortuary to view the body of the woman lying there dead, and having done so, they both immediately identified her as Elizabeth Fussell, as well as recognized her clothing.—*Law Journal (Lond.)*

#### A LEADING CASE.

Her name was Sniggs—it didn't suit  
Her rich, æsthetic nature,  
And so she thought she'd have it changed  
By act of Legislature.

She sought a limb—a legal man  
With lots of subtle learning,  
And unto him she did confide  
Her soul's most faithful yearning.

He heard her through, he asked her wealth,  
He pondered o'er her story,  
And then he said he would consult  
His volumes statutory.

She sighed and rose; he took her hand,  
And sudden said, "How stupid!  
I did forget the precedent  
Of 'Hymen v. Cupid!'

"Just substitute my name for yours."  
The maiden blushed and faltered,  
But in two weeks she took her name  
To church and had it altar'd.

—*Cleveland Sun.*

# The Albany Law Journal.

ALBANY, FEBRUARY 25, 1888.

## CURRENT TOPICS.

THE time of the passing of codes has come, and the voice of the lawyer is heard in the land. His voice was heard before the joint judiciary committee of the Legislature on the 8th and 16th of this month, to the extent of seven or eight hours. The committee was very good natured and patient, although only three remained in at the death—medals should be awarded them. Against the Code were heard Messrs. Carter, Noah Davis, Charles Coudert, Hornblower, and in favor of it, Messrs. Field and John Winslow. Some new blood on both sides. The bar association of the city of New York sent up its ablest men, and all lawyers in this State know their excellent abilities. But we feel constrained to say that utterances were heard from some of these gentlemen which for absurdity, and recklessness, and extravagance, could not be equalled outside a lunatic asylum. If we were a common editor of a political newspaper we should probably add that their "allegations were false and the alligators knew it." But we are all politeness and good nature, and so shall only say that we wonder that any man could utter such things and keep his countenance. Cicero says that the augurs of Rome could not meet without laughing in one another's faces over the gullibility of the populace. The same remark might well be applied to these lawyers. For example, Mr. Carter said loudly and eloquently, that "the common law is reasonably certain and ascertainable"—to be sure, a year ago he defined his idea of "reasonable certainty" by averring that the practitioner in ordinary cases needed not more than four or five hundred volumes. Judge Davis said the original Code of Civil Procedure was a "historic calamity." Mr. Coudert agreed with him, and added that justice is reasonably "speedy" in this State—any case can be reached in the city of New York, if the parties desire, "in four months." As for this nonsense about the original Code of Civil Procedure, there is no use in arguing with men who can aver that a measure which has become the law of twenty-six of our States, and has been followed to a great extent in England, is a "historic calamity." One might as well argue with "Bob" Ingersoll on religion. Mr. Ruskin or Mr. Wilde said that we have no "antiques" in this country. He was mistaken. We heard two of them yesterday. We had supposed that they were all dead, but here were two eminent and excellent lawyers willing to render themselves ridiculous by asserting that a measure which abolished the distinction between courts of law and of equity, abolished forms of action, and abolished the old system of pleading, was a "historic calamity." Mr. Coudert went so far as to say that it has

made the bar a set of "pettifoggers." Let him speak for his own place; he slanders the bar of the country. Even "Noah" in the ark would have been ashamed to hear his modern and judicial namesake.

We were not informed whether Mr. Carter has read the Code yet. He had not read it last year, although by virtue of not having read it he was once able to pronounce it "not worth a dime novel." We wish he would read it. Perhaps it might help him convince the court that Sam. Tilden knew enough to construct a valid trust for charity in his own will. But Judge Davis, who spent an hour and a half in criticising, misrepresenting and misquoting it, admitted that he had not even seen it until three days before! And had only examined it on the previous evening and on his way up in the cars! He was as ignorant as those early christians who had not even heard of the holy ghost. Here is an "eminent jurist" for you,—so Mr. Hornblower introduced him. The most important measure now or for many years before the people—eighteen years old—and he had not seen it until three days before! These facts speak loudly for the patriotism and unselfishness of Messrs. Carter and Davis—gentlemen so earnestly engaged in making fortunes that they cannot find time to read the measure which they condemn and denounce as a "revolution," a "calamity," and as Mr. Coudert declared, with his native effusiveness, a "thunder-bolt."

We dare say Mr. Coudert has read the Code, because he is a Frenchman. He glorified the Code Napoleon, but he said that its success was due to the precise and expressive character of the language, and to the "eagle eye" of its great promoter. (Mr. Coudert evidently has a higher opinion of his native language than Mr. Lillivick, the water-rates collector, had, who "didn't think any thing of a language" in which "water" was "low.") A code could not be written in English, he said. Such a poverty-stricken tongue! Perhaps this is the reason why Mr. Coudert declined the post on the Court of Appeals bench which the governor offered him the other day; he felt that he could not express the law in English. To all which absurdity Mr. Field very properly responded by using the famous Napoleonic argument, "Bah!" Mr. Coudert said the French Code was the work of three years of the wisest lawyers of France, but he did not refer to the fact that the New York Code was the work of the wisest lawyers of this State for three times that period, and that it had been for seventeen years under criticism and amendment. But that was no part of his retainer as *amicus societatis*.

Mr. Hornblower remarked, in speaking of the California Code, that there are more reports there than in New Jersey, a State of equal population. The exact fact is that since the adoption of the



California Code there have been twenty-six volumes of reports there, and thirty-three in New Jersey. Of course this has been the period of construction, and it is a fair inference that cases of mere construction will be fewer in the future. But what shall be said of the comparative certainty of the law in the two States! In New Jersey there are two courts of review, and the ultimate court, consisting of fifteen members, frequently unanimously reverses the unanimous opinion of the first court of review. And a great and influential body of the bar are praying for the "historic calamity" to overwhelm them and blot out their Court of Chancery! Let Mr. Hornblower take all the comfort he can out of New Jersey. Meantime, while we can find an average of only four common-law cases in a California volume to report, we find nine in a New Jersey volume, to say nothing of the separate equity series. In seventeen other States, the statistics of which we published last year, the average was only seven. An ounce of experience is worth a ton of theorizing.

A word may be permitted upon the idea of the anti-code people as to what constitutes "reasonable certainty." To waive, for the purpose of argument, the evident necessity of finding out the contents of the eight thousand volumes of judicial reports, and to adopt Mr. Carter's measure of "reasonable certainty"—"four or five hundred volumes"—what should we say to a teacher of any thing else but law, who should tell the student that he could not know its rudiments except by consulting, all the time, four or five hundred volumes? We should regard it as a very uncertain science, should we not? But so wonted to their slavery have lawyers become, that they regard such a number of repositories as very moderate. We may add that if Mr. Carter is sincere in this statement, it is altogether probable that his practice does not conform to his theory. His private library probably has ten times that number, and he cannot depend even on that. There is really no "reasonable certainty"—unless, like brother Moak, one has sixteen thousand volumes, with the privilege of the State library in addition, and even then there is not.

Mr. Aaron Kahn of New York has sent us some "suggestions for a proposed bill to amend the lunacy laws of the State of New York." He urges, with reason, that our present laws on this subject are defective and unsafe. He proposes the establishment of a board of three commissioners in each county having a population of four hundred thousand, and in every group of counties having that population, with exclusive original authority, independent of the Supreme Court, but subject to appeal as now, and constituting a court of record. With a liberal idea of compensation he proposes that the commissioners should each have "a salary of say \$10,000 a year." This scheme would set up twelve or thirteen new courts, at an expense of

\$360,000 or \$390,000 a year. This will hardly do, when we have county judges who are not over-worked, and who would naturally know much more about the circumstances of each case. His suggestion of having a physician among the commissioners is a good one, and might be carried out in connection with the county judges. But we should not be in favor of setting up a new and independent court, consisting of a lawyer, a physician and a layman, to oust the ordinary courts of jurisdiction. Suppose the physician and the layman should join against the lawyer, then what? The worst part of Mr. Kahn's scheme is that he proposes to invest these commissioners with the exclusive right to issue a writ of *habeas corpus* to inquire into lunacy cases. On the whole we think Mr. Kahn's suggestions will hardly meet with general approval.

#### NOTES OF CASES.

IN *State v. Divine*, North Carolina Supreme Court, Dec. 5, 1887, it was held that a statute providing that whenever any live stock shall be killed by the engines or cars on any of the railroads mentioned, and such killing is proved, it shall be *prima facie* evidence of negligence in any indictment therefor, is unconstitutional. The court said: "1. In its whole structure and manifest purpose it creates out of a private civil injury a public prosecution to subserve the interest of the injured party, and to be put in operation or arrested at his instance and election. 2. It assumes a criminal liability to have been incurred by an officer of a railroad corporation without his concurrence in the act of the subordinate, and assuming negligence and guilt, puts him on the defensive, and requires him to repel the presumption where he in no manner participated in what was done. 3. It undertakes to drive the accused to an adjustment of the claim for damages by assenting to a reference to arbitration, and to deprive him of his constitutional right to be tried in the courts of the State, tribunals provided under the Constitution, and by a properly constituted jury acting under a judge. 4. It places at the election of the claimant the institution of the prosecution, which otherwise is suspended, by making a proposition for a reference. 5. It discriminates, without apparent difference, between counties and railroads, giving partial operation to a law general in its provisions, and equally applicable to all, by which the same act is rendered criminal in one locality, which is not so in another, and raising out of an act done by one employee a presumption of guilt against another employee, who did not in any way participate in it. We do not perceive any difficulty in the act of 1856-7 (Code, § 3826) raising a presumption of negligence on the part of the company from the fact of killing or injuring stock, in a civil suit for reparation brought within six months thereafter, as is explained in the opinion in *Doggett v. Railroad*, 81 N. C. 459, and whose validity has not been questioned in the nu-



merous cases which have been before the court. But the present case passes far beyond the limits of that enactment in fastening a criminal responsibility, not upon the principal whose agent does the injury, but upon a co-employee in the same general service; and this, not upon all, but specially upon railroads that run through or in particular counties. We do not say that there may not be local legislation, for it is very common in our statute books, but that an act, divested of any peculiar circumstances, and *per se* made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation. \* \* \*

Judge Cooley, in his work on Constitutional Limitations, at page 809, referring to a trial for criminal offenses of different grades, uses this impressive language: 'The mode of investigating the facts however is the same in all, and this is through a trial by jury, surrounded by certain safeguards, which are a well understood part of the system, and which the government cannot dispense with;' meaning, as we understand, that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done. In *Cummings v. Missouri*, 4 Wall. 328, Mr. Justice Field, referring to certain enactments in that State, said: 'The clauses in question subvert the presumption of innocence, and alter the rules of evidence which heretofore under the universally recognized principles of the common law have been supposed to be fundamental and unchangeable.' 'But I have no hesitation in saying,' remarks Selden, J., in *Wynehamer v. People*, 13 N. Y. 446, 'that they (the Legislature) cannot subvert that fundamental rule of justice which holds that every one shall be presumed innocent until he is found guilty.' The case is not analogous to that wherein, for civil purposes, negligence is inferred from the fact of killing stock, and requiring matters in excuse to be shown, which lie peculiarly within the knowledge of the agent who perpetrates the act, or controls the running of the engine when it is done; nor to the statute (Code, § 1005) which makes the having about the person one of the deadly weapons forbidden to be carried or worn, *prima facie* evidence of concealment, for this is the sole personal act of the party, of the consequences of which he is aware, and because a small weapon, if concealed, would be almost impossible of proof direct, while the possession of such is intimately and naturally connected with the secret carrying, and furnishes strong evidence of the fact. In *San Mateo v. Railroad*, 8 Am. & Eng. R. Cas. 10, in construing the fourteenth amendment to the Constitution of the United States, it is said: 'Whatever the State may do it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms in his life, his liberty, his property, and in the pursuit of happiness.' Substantially the same doctrine is announced, and by the same eminent judge (Mr.

Justice Field), in *Barbier v. Connolly*, 113 U. S. 81, in which he adds 'that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.' In *Graves v. Railroad Co.*, 5 Mont. 556; S. C., 51 Am. Rep. 81, a statute of Montana rendering railroad companies liable for cattle killed by them, at a valuation to be conclusively fixed by appraisers, was held void.

The Texas Court of Appeals cannot have it all its own way about taxation of drummers, for in *Ex parte Stockton*, District Court, Eastern District of Texas, Dec. 6, 1887, it was held that a statute providing, under penalties, that every commercial traveler soliciting trade by sample or otherwise shall pay an annual occupation tax, and if he does not on demand exhibit to the proper officers the comptroller's receipts therefor, he shall be guilty of a misdemeanor, is unconstitutional. The court, Sabin, J., said: "What representation has the citizen of one State in the laws of another State affecting his commerce therein? Precisely none. But the Congress alone represents the people of the United States, as well as the States, in their mutual affairs. Neither State can say for itself what taxes it will place upon the lawful commerce of citizens of another State within its borders; the property of such other citizens not being therein. This is simply a question of power. If a State can make a tax at all upon inter-State commerce, it can do almost anything in that line. What would be thought of New York or the New England States if they were to tax the citizens of Texas or other southern States for the sale of all cotton, hides, wool, pecans and moss, or other articles of commerce sought to be sold them by their agents, drummers or factors, by levying a tax on such sales by sample therein? Why, it would be claimed by every citizen of the United States, who adheres to the doctrine of no taxation without representation, that the citizens of Texas and other States were not represented in the making of such laws, and that they were void as to them and their agents, as a tax on their agents was a practical tax on their business, and if carried out or tolerated, would allow any one State virtually to lay an embargo on the commerce of any one or more States, which would be preposterous. The idea of a citizen of the United States being challenged anywhere in this nation by any power other than national, in the conduct of his lawful business in States other than his own, is decidedly absurd and ridiculous. He never has had a chance to vote in the State not his own upon that subject. He has voted in his congressional district, no doubt, for his representative in Congress, and it is not unlikely that citizens of other States have voted in their respective congressional districts for their representatives, and when they all meet in Congress whatever they may lawfully determine therein will be obeyed and observed by each and every citizen in this broad land. The people of this nation, no matter of what State citizenship, bow to nothing save the will of Heaven and their own. In domes-

tic affairs they express that will through their Legislatures, and it is observed by all good people; in inter-State matters they express that will, if any, through Congress, and it is the pride of all good citizens, as well as States, to observe and respect it. If the power by the Constitution has been lodged in Congress, as in this case, and Congress shall not have acted, both States and people must wait until Congress legislates upon the subject. There is no State or community of individuals that can make any law at all upon that subject. \* \* \* The following are the authorities relied upon as settling the law in this case, viz.: *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489; *Fargo v. Michigan*, 121 id. 230; *Steamship Co. v. Pennsylvania*, 122 id. 326." The law in question excepted drummers for "nurseries, newspapers and gravestones!"

In *Commonwealth v. Weidner*, Pennsylvania Common Pleas, it was held that charging and receiving compulsory prices for admission to a camp-meeting on Sunday is worldly employment or business, and is not within the exception of "works of necessity and charity." The court said: "Under this exception the Supreme Court, in *Commonwealth v. Nesbit*, 10 Casey, 398, decided that conducting and attending religious worship are among the very purposes for which the law protects the day, and therefore all the ordinary and usual means employed for said purposes, making due allowance for the different circumstances in which people are placed, are recognized as lawful. All worldly employments are allowed which in their nature consist of necessity or charity. Therefore in the case of *Dale v. Knapp*, 98 Penn. St. 389; S. C., 42 Am. Rep. 624, the custom of soliciting contributions on Sunday from congregations assembled for religious worship, for religious and charitable purposes, and for church extension, was recognized as lawful; but no case that has been brought to our attention warrants the charge of a compulsory admission price as the 'usual' means of grace or act of necessity or charity. The grace is free and the subscription voluntary. When the wayward sinner is forbidden entrance to the church unless he hands over his nickel to the doorkeeper, the church so demanding and receiving on Sunday is in no better position, so far as 'worldly business' is concerned, than would be the circus man with his one price of admission to all the several and combined shows of his monster aggregation, or the peddler with his busy booth. In the present case the evidence on both sides conclusively proves that the defendant was the representative of a stock company, with the pastor as principal stockholder and sharer in the dividends. Fence with boards eight feet high and barbed wire inclosed the grounds within which services were held. It was not purely the case of a religious body inviting the sinners in from the broad highway to hear the gospel without money and without price. Its doors were closed in the face of the penitent seeker after truth unless he

came with five cents as the open sesame in his hand. This fee was exacted, according to the statement of a witness, from man, woman and child alike. There was not the usual half price for children in arms. The pass system was abolished, and no return checks given to those who were luckless enough to leave before services and might wish to return. The sole defense for such enforced price of admission is that it kept out the wayward and disorderly young man who would rather stay out than pay, and thus prevented disturbances of the peace. But the wayward youth are the very class that church and camp-meeting services are designed to reach, and who of all others need to be gathered in the fold, and the laws of our Commonwealth afford special protection and special police to check and suppress disorder and tumult."

#### GRAVINA'S MEMOIR OF PAPINIAN.

GRAVINA, the distinguished Italian professor of law of two centuries ago, prefixed to his work on the Origins of the Civil Law biographical sketches of the principal jurisconsults whose writings furnished the materials for the digest. The following is his notice of Papinian:

The life of Papinian was more illustrious than happy, for he met that fate which the brave and noble often obtain under a tyrant. He was the son of Hostilius Papinian and Eugenia Gracilis. His reputation progressing with his years, he early entered upon the office of prosecutor of the fisc. Then he became adsector to the pretorian præfect. He was so much endeared to Septimius Severus, not only by affinity through the latter's second wife, but by community of studies and pursuits, that no sooner did that emperor obtain the imperial authority than he made Papinian pretorian præfect—the highest station next to the prince; and when Severus was dying Papinian received from him the guardianship of his sons. This confidence Papinian repaid with his head. For Geta and Caracalla, being actuated by mutual hatred, he spared no pains to reconcile them. With these good offices Caracalla was offended, for he regarded as an enemy every one who did not hate his brother; and either because Papinian inveighed against Geta's death, or refused to excuse the parricide, or declined to compose the emperor's oration made to palliate the atrocity with the people, he delivered him to his soldiers to be killed. When Papinian was about to die he is said to have uttered the following words, indicating the noblest intrepidity of soul: "It is not so easy to excuse parricide as to commit it." And when the emperor insisted that he should persuade the people that Geta had justly suffered on account of his crimes, he answered: "It is a second parricide to accuse the innocent dead." And as he approached his fate he predicted the subsequent crime of Macrinus, who, when he became pretorian præfect, deprived Caracalla, the murderer of Papinian, of his empire and his life.

For Papinian had said that his successor would be guilty of great folly if he did not avenge the præfecture which had been insulted in his own person. When Caracalla heard that Papinian was beheaded with an axe he rebuked the executioner for not using a sword. Socinus says that in his time a silver urn was found in Rome by a rustic with this inscription: "*Aemilii Papiniani J. C. et Præfecti Prætorio requiescunt hic ossa, cui infelix Pater et Mater sacrum fecerunt mortuo anno sua ætatis trigesimo sexto.*" There also exists this other inscription: "*Aemiliano Papiniano Præfecto Prætorio J. C. qui vixit annos triginta sex M. quatuor D. decem Papinianus Hostilius Eugenia Gracilis turbato ordine in senio seu parentes fecerunt filio opt.*" A witty retort is told of a robber, who being asked by Papinian, when brought before him, why he committed robbery, replied: "*Et tu cur Præfectus es?*" "Why art thou a præfect?" So great was his authority in the civil law that he was never mentioned by the emperors (in subsequent laws and Constitutions) but with the greatest honor; and among the varying opinions of juriconsults that was preferred by which Papinian stood. With him the law itself was thought to abide, and whilst others lean for support on the authority of Papinian, he himself never seeks the authority of any, so that his responses seem so many oracles. Hence those frequent and high eulogiums of our greatest lawyer (Cujacius): "*Nimirum Asilus juris, et legalis doctrinae Thesaurus.*" "Truly he was the sanctuary of the law, the treasure-house of legal learning." Law students, in their third year, took up Papinian's books, and were called Papinianists, and at the commencement of that year they dedicated a feast day to Papinian. Jerome says: "Our Paul says one thing, Papinian commands another." And he gives to Papinian in human law the same pre-eminence which Paul holds in divine law. He was certainly a great accession to jurisprudence, and worthy of the early times of the republic. He taught Roman justice by his writings and by the atrocity of his own death. What genius shines in all his responses, and in every kind of composition proceeding from his pen! For besides the elegance and purity of his Latinity, familiar to every lawyer, he has such weight that he seems more a maker than an interpreter of the laws.

How well this eulogium on Papinian, as the master of law, befits our own Marshall!

**MARINE INSURANCE—GENERAL WORDS—  
PERILS OF THE SEA—SPLITTING OF CHAMBER OF DONKEY-ENGINE.**

HOUSE OF LORDS, JULY 14, 1887.

**THAMES AND MERSEY MARINE INSURANCE COMPANY  
V. HAMILTON.\***

A steamer was insured by a time policy in the ordinary form on the ship and machinery, including a donkey-engine. In the ordinary course of navigation the donkey-engine

was employed in pumping water into the boiler, and in consequence of a screw-valve being accidentally or negligently left closed, the water was forced into the air-chamber of the donkey-engine, and split it open.

Held, that the injury was not a peril insured against under the general words of the policy, not being *ejusdem generis* with those specially enumerated.

THIS was an appeal from a judgment of the majority of the Court of Appeal (Lindley and Lopes, L.J.J.), Lord Esher, M. R., dissenting, reported in 17 Q. B. D. 195, who had affirmed a judgment of the Queen's Bench Division (Mathew and Smith, J.J.), in favor of the plaintiffs, upon a special case.

The action was brought by the respondents against the appellants upon a policy of marine insurance.

The plaintiffs were the owners of the *Inchmaree*, a steam vessel of 1,287 tons net and 1,976 tons gross register. In August, 1883, the plaintiffs effected with the defendants a policy of marine insurance for 2,500*l.* on the hull, masts, spars, sails, boats, materials, and all stores, valued at 20,000*l.*, and machinery, shafting, propeller, boilers and connections, including donkey-engine and boilers, pumps and all connections, valued at 11,000*l.*—total, 31,000*l.*—of the vessel for twelve months. The adventures and perils insured against were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the aforesaid subject-matter of insurance or any part thereof.

On the 2d of March, 1884, and during the continuance of the policy, the *Inchmaree* was at anchor off Diamond Island awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers by means of the donkey-pump and engine in the usual way. At the time of effecting the insurance the donkey-pump and engine, and all pipes, valves and machinery connected therewith, were efficient and in good condition, and worked satisfactorily up to the time of the occurrence hereinafter mentioned, and the engineers and men working them were capable and efficient for their duties. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw. This valve should have been open and clear when the boilers were being pumped up. This valve was either closed or salted up at the time when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler, and the consequence was that when the donkey-pump was set to work at the time aforesaid the pipes and water-chamber in the donkey-pump and air-chamber therein became over-charged, and the water was forced up into the air-chamber, which in consequence split, and the pump was thereby damaged. It was admitted that the check-valve was either allowed to remain closed or become and be salted up by the negligence of one of the engineers, or was accidentally salted up without notice. It was also admitted that the closing of the valve and the accident were not due to ordinary wear and tear. The question was whether the damage was covered by the policy of insurance.

The Attorney-General (Sir R. Webster, Q. C.), Sir C. Russell, Q. C., French, Q. C., and Synnott, for appellants.

Cohen, Q. C., Myburgh, Q. C., and Barnes, for respondents.

LORD CHANCELLOR (Halsbury). My Lords: In this case a policy of marine insurance for twelve months

\*57 L. T. Rep. (N. S.) 695.

was effected upon, among other things, a pump on board the *Inchmaree* steamer. The adventures and perils which the capital stock and funds of the defendant company were made liable to by the policy of insurance were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes and people of what nation, condition or quality soever, bar-batry of the master and mariners, and of all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the aforesaid subject-matter of insurance, or any part thereof. It is certain that a loss or misfortune has happened to the pump while the pump was being used for the purpose of filling the boilers of the *Inchmaree*, and the sole question is, whether the loss or misfortune, which did happen, was one of the losses or misfortunes against which the insuring company agree to indemnify the owners of the *Inchmaree*. If understood in their widest sense, the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to a subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them. There is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction, it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used. Now the facts here are very simple: a part of the pump was burst because a valve which should have let the water into the boiler was stopped up, while the pump was being worked by a donkey-engine. On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other, it is said that the accident, peril or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated. In the long line of cases quoted at the bar there was only one (with which I will attempt to deal presently) which enun-ciated any different principles of construction from those I have endeavored to set forth above, although I think there is some difficulty in reconciling the facts with respect to which some of them are decided with the principle upon which they profess to be decided, conspicuously I think, *De Vaux v. P. Anson*, 5 Bing. N. C. 519, where Tindal, C. J., rests upon authorities which, as applicable to the particular facts of the cases to which he refers, hardly support the decision then arrived at. The great difficulty I have had in this case is the decision of Lord Selborne, L. C., and Cockburn, C. J., in the case of the *West India and Panama Telegraph Co. v. Home and Colonial Marine Ins. Co.*, 43 L. T. Rep. (N. S.) 420; 6 Q. B. Div. 51. I cannot agree with the master of the rolls that that case does not, as matter of reasoning, cover the present case. With the utmost respect, I can draw no real distinction between the explosion of the boiler and the bursting of the air chamber of the pump, nor can any real distinction depend upon whether it was steam generated by fire which caused the explosion or air and water forced into the chamber by ordinary mechanical action. But before your lordships that case is open to review, and I cannot think that that case is reconcilable with the principles upon which policies of marine insurance have hitherto been con-

strued. It introduces analogy as the guide by which you are to ascertain the genus to which the different species are to be attributed, so that in the future one must introduce as the true exposition of general words, not the genus you find as applicable to the species enumerated, but any analogous genus. Seapereils or the like become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships. I cannot think that even were the analogy perfect, which I do not think it is, this is a satisfactory mode of ascer-taining what the parties meant by the words they have used; and as I have said, this is a real function of a court in construing an instrument. It might be reasonable for the parties to provide for such a peril, and one knows that "dangers of and incident to steam navigation" are words which have been used to provide for such casualties; but I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy. I think the subject-matter, marine risks, limits the meaning of the general words. I think the genus "perils of the sea" limits the meaning. I think the meaning attributed to these words for more than half a century by decision makes it probable that the parties used them in that accepted sense. I therefore think the judgment of the Court of Appeal wrong, and I move your lordships that it be reversed.

LORD BRAMWELL. My Lords: I cannot agree with the judgment in this case. The donkey-engine was insured. The adventures and perils which the defendants were to make good specified a great many perils, and "all other perils, losses and misfortunes that shall come to the hurt, detriment or damage of the aforesaid subject-matter of insurance, or any part thereof." Words could hardly be more extensive, and if the question, I ought to say a question on them, arose for the first time, I might perhaps give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question. Definitions are most difficult, but Lord Ellenborough's seems right: "All cases of marine damages of the like kind with those specially enumerated and occasioned by similar causes." I have had given to me the following definition or description of what would be included in the general words: "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance." Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L. J., in *Pandorf v. Hamilton*, 54 L. T. Rep. (N. S.) 536; 16 Q. B. D. 629, very good: "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody" is a damage from a peril of the sea. I have thought that the following might suffice: "All perils, losses and misfortunes of a marine character, or of a character incidental to a ship as such." I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps the *West India Telegraph Co. v. Home and Colonial Ins. Co.* For example, it would include the case of a ship blown over while in dock, of the ship damaged by its moorings giving way, of the ship fired into by another ship. It would not include the cases put by Lord Esher, M. R., nor the case I put of the captain seized with giddiness dropping the chronometer into the hold, nor would it include the present case. The damage to the donkey-

engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land, if the same mismanagement had taken place. The sea, waves and winds had nothing to do with it. As a matter of principle and reasoning, I think the decision wrong. I think the judgment in the *West India and Panama Telegraph Co. v. Home and Colonial Marine Ins. Co.*, *ubi supra*, wrong on the reasoning I have used. With most sincere respect, though it is true that what the winds are to a sailing vessel, steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to Lord Esher's judgment in that case, I concur in his criticism on it in the present case. And I agree with Lopes, L. J., that the word "fire" in the policy will not sustain that judgment. The lord justice puts the case of a spar falling on the deck, while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would, it would be because it was a loss in navigation, a loss which could not have happened except on a ship. But suppose the spar was being used to erect an awning on deck to give shelter to danciers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss in which the sea, or navigation, or the ship as a ship had any thing to do. I do not like cutting down the natural meaning of words: there is always a great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss; so that the judgment of Lord Esher, M. R., is, I think, right, and that of the other judges wrong, and their decision should be reversed.

**LORD HERSCHELL.** My Lords: This action undoubtedly raises an important question. It turns on the construction to be put upon the general words which follow the specific enumeration of the risks against which the insurance is effected in an ordinary marine policy. The policy sued on was a time policy for twelve months, from the 20th of August, 1883, to the 20th of August, 1884; and the subject-matter of insurance, "the hull, masts, spars, sails, boats, materials and all stores, valued at 20,000*l.*; and machinery, shafting, propellers, boilers and connections, including donkey-engines and boilers, pumps and all connections, valued at 11,000*l.*" The risks against which the insurance was effected are thus described: "And touching the adventures and perils which the capital, stock and funds of the said company are made liable unto by this insurance, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people of what nation, condition or quality soever, barratry of the masters and mariners, and of all such perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance, or any part thereof." The facts lie in a narrow compass. They are set out in a special case, stated by agreement between the parties. On the 2d of March, 1884, the *Inchmaree* (the vessel insured) was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had be-

come salted up when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler. The consequence was, that when the donkey-pump was set to work, the pipes and water chamber in the donkey-pump, and the air chamber therein, became overcharged, and the water was forced up into the air chamber, which in consequence split, and the pump was thereby damaged. It was admitted for the purposes of the case that the check-valve was either allowed to remain closed or to become salted up by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up and accident were not due to ordinary wear and tear. The cost of replacing the pump was about 72*l.* 10*s.* The ship and freight were warranted free from average under three per cent unless the ship was stranded; but as she did become stranded during the voyage, the loss was not excluded from the warranty. The parties were unable to agree as to whether there was negligence in allowing the check-valve to remain closed or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave the question for trial (if material) after the decision of the case. The questions stated for the opinion of the court were whether the defendants were liable under the policy in respect of the loss, (1) if it could have been avoided by proper care, and occurred through negligence; (2) if it occurred accidentally, without negligence. The Queen's Bench Division gave judgment for the plaintiffs, and this judgment was affirmed by the majority of the Court of Appeal (Lindley and Lopes, L. J.), the master of the rolls dissenting. It was not contended at the bar on behalf of the respondents that the loss was within any of the specific risks enumerated. Reliance was placed exclusively upon the general words: "All other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance, or any part thereof." It cannot be denied that if these words are to be taken without any limitation, a loss or misfortune did come to the damage of a part of the subject-matter of the insurance. But it is contended on behalf of the appellants that these general words, following a specific enumeration, must be limited to perils *ejusdem generis* with those specified, or to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur, viz., a policy of marine insurance. If the matter now presented itself for consideration for the first time, untouched by authority, I should not myself be inclined to construe these general words without some limitation. Indeed the learned counsel for the defendants themselves did not contend for so wide an interpretation. The view which they put before the House was that they should be confined to accidents happening to the subject-matter of the insurance in the course of, and incidental to, the navigation. I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your lordships would do well to adhere. The instrument is one in daily use, and if your lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to the intention of the parties. Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question. In a case which came before the Court of King's Bench,

as long ago as 1816, Lord Ellenborough, C. J., in delivering the judgment of the court, in clear and unambiguous terms expressed their view as to the meaning of the words in question. I refer to the case of *Cullen v. Butler*, 5 M. & S. 461. It was an action on a policy of insurance where the ship and goods had been sunk at sea by another ship firing upon her in mistake for an enemy. The court inclined to the opinion that the loss was not one by "perils of the sea," but held that it was covered by the general words. Lord Ellenborough said: "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must however be considered as introduced into the policy in furtherance of the objects of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument, and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." No case was cited at the bar for the date when his opinion was expressed (unless it be the recent case of the *West India and Panama Telegraph Co. v. Home and Colonial Marine Ins. Co.*, 48 L. T. Rep. (N. S.) 420; 6 Q. B. D. 61, to which I will presently advert), which has proceeded upon a construction of the policy different from that enunciated by Lord Ellenborough. I will briefly review the subsequent authorities. The first is *Butler v. Wildman*, 3 B. & Ald. 398. There the captain of a ship had thrown a large quantity of dollars overboard to prevent their falling into the hands of an enemy, by whom he was pursued. It was held, that if not a loss by jettison, it was covered by the general words. Abbott, C. J., says: "If not, strictly speaking, jettison, it is *ejusdem generis*, and therefore falls within the general words." The other judges concurred in this view. Holroyd, J., saying that the general words include "all losses of the same nature with those described in the enumerated risks." Next in order of time comes *Phillips v. Barber*, 5 B. & Ald. 161. A vessel placed in a graving dock for repair was by the violence of wind and weather thrown over on her side, whereby she struck the ground with great violence and was bilged. Abbott, C. J., in a judgment holding that the underwriters were liable, after quoting the general words contained in the policy, said: "These general words are indeed restrained in construction to perils *ejusdem generis* with those more particularly enumerated in the policy. In this case however the loss was occasioned by the violence of the wind and weather in port, and it seems to me therefore to have been produced by a peril *ejusdem generis* with those specified, and to fall within the general words of the policy." The next case, *De Vaux v. P. Anson*, 5 Bing. N. C. 519, was much relied on by the counsel for the respondents. But though I feel some difficulty in explaining the grounds of that decision, it certainly purported to be based on the antecedent authorities, and not upon any different view of the law. The ship had in that case been put into a dry-dock for repairs. These being completed, preparations were made for getting her afloat. She was for this purpose made fast by four cables, whilst the workmen removed the sand which was under the vessel, and which consolidated the shores upon which the ship was resting. The cables strained the vessel, forcing in the ribs. The stanchions of the keelsons having all fallen from the force of the lower masts upon the keel, the garboard strake gave way, and when at last the ship was no longer upon the shores

she sank into a muddy sand. At the time of her sustaining the injury the depth of water in the dock was about four feet. She was abandoned as a constructive total loss, and the question arose whether she was lost by perils insured against. Tindal, C. J., in delivering the judgment of the court, held that she was. He said: "It is to be observed the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the subject-matter of the insurance.' And the cases cited and relied on by the plaintiff—*Carruthers v. Sydebotham*, *Fletcher v. Ingils* and *Phillips v. Barber*—are sufficient authority to show that a loss occasioned by the endeavor to get the vessel afloat from the dock in which she had just been repaired, was a loss within the policy." It is not easy, I confess, to see how the authorities referred to were sufficient to establish the propositions they are supposed to support. In *Carruthers v. Sydebotham*, 4 M. & S. 77, the pilot navigating a vessel had fastened her to the pier of a dock basin in the Mersey by a rope to the shore. She took the ground, and when the tide left her fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water, and her cargo was wetted. It was held that this was a stranding entitling the assured to recover for an average loss upon the goods. After a careful perusal of the judgments in this case, I am unable to see its bearing upon the point which had to be determined in *De Vaux v. P. Anson*. Nor do I see the application of *Fletcher v. Ingils*, 2 B. & Ald. 315. A vessel insured for twelve months was in a harbor with a hard, uneven bottom; the tide having left the vessel, on its return there was a considerable swell in the harbor and the ship struck the ground hard several times and was found to be considerably injured. It was held that this was a loss by peril of the sea. Still less am I able to perceive the applicability of *Phillips v. Barber*, *ubi supra*, to which I have referred above. There was nothing in *De Vaux v. P. Anson* that I can see corresponding with the wind and weather in port, which was held in *Phillips v. Barber* to be *ejusdem generis* with a storm at sea. It is unnecessary to inquire whether the decision in *De Vaux v. P. Anson* was correct. It cannot be regarded as throwing any doubt upon the canon of construction laid down by Lord Ellenborough, and more than once recognized and acted upon by Lord Tenterden. Nor is it possible to evolve any principle from it applicable to other cases. No reasons are given for the judgment, which is based solely on prior authorities, and when these authorities are examined they only determine the one, that a ship damaged by a storm when in dry-dock is damaged by causes similar to perils of the sea; the others, that vessels injured by ceasing to be waterborne, and being driven against the ground by the action of the tide, are injured by "perils of the sea." The last case to which I need refer on this point is *Davidson v. Burnand*, 19 L. T. Rep. (N. S.) 782; L. R., 4 C. P. 117, where Willes, J., expressly recognized the rule of construction laid down in *Cullen v. Butler*. He said: "The question is not whether the loss here was strictly one occasioned by perils of the sea, but whether it was such other loss within the policy, which of course must be a loss of the same or a similar kind to one happening from the perils of the sea." I think therefore that the case now before your lordships must be determined by a consideration of the question whether the loss falls within the general words as construed by Lord Ellenborough; that is, whether it is a case "of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." When the facts are borne in mind it seems necessary only to state the

question in this way to see that the answer must be in the negative. To which of the specially enumerated perils is it similar? The only one that could be suggested is "perils of the seas." The damage here arose from the air chamber of the donkey-pump giving way under an excessive pressure of water, owing to the proper outlet being closed. It is, I think, impossible to say that this is damage occasioned by a cause similar to "perils of the sea" on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance. The respondents placed their main reliance upon the case of the *West India Telegraph Co. v. Home and Colonial Ins. Co.*, 43 L. T. Rep. (N.S.) 420; 6 Q. B. D. 51, and naturally so, because the majority of the Court of Appeal thought the present case undistinguishable from it. Lord Selborne, L. C., and Cockburn, C. J., in that case held that the damage done by the explosion of the boiler of a steamer was covered by the general words of a marine policy. Lord Selborne, after referring to the effect given to these words in *De Vaux v. P. Anson* said: "I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boilers or from defects of safety valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of wind, and defects or mismanagement of a ship's sails or tackle." I have already given my reasons for doubting whether *De Vaux v. P. Anson* involved any principle which could possibly be extended by analogy to a case not precisely similar in its facts. Moreover it is to be observed that in *De Vaux v. P. Anson* the damage done was done to the ship as such. It arose from her being constructed for the purpose of being waterborne, and thus needing some substituted support, if the support of the water was withdrawn; and the damage to the ship was due to her grounding, and the failure to keep her safely supported. It is on this view alone, I think, that the case can be sustained. But the explosion of the boiler on board the *Panama* had no marine character at all. It might have happened in precisely the same way and done the same kind of damage, if the steam engine had been in use for the purpose of moving manufacturing machinery on shore. The real ground of Lord Selborne's judgment appears to have been the analogy between damage done by the excessive pressure of the winds in the case of a sailing vessel, and the excessive pressure of steam in the boiler, when the motive power used to propel the vessel is steam. I am not satisfied that this analogy is a sound one, but even if it be so, I am unable to see how it can be treated as an authority in the present case, still less as concluding it. The water in the donkey-engine, the over-pressure of which caused the damage, was certainly not to the steamer "what the winds are to a sailing vessel," and the damage was not, as it seems to me, in any way similar to the injury done to a sailing vessel by a storm of wind. The present master of the rolls, although he concurred in

the judgment of the majority of the court in the *West India Telegraph Co. v. Home and Colonial Ins. Co.*, differed in his reasons. He based his judgment solely on the ground that the explosion was *ejusdem generis* with fire, and therefore the loss was within the general words. In the case now under appeal he intimated that this reasoning was somewhat fanciful, and that he should not be sorry to see it dissented from. I am certainly disposed to prefer the later view of the learned judge; but it is not necessary to discuss the point, as it is obvious that such a ground of decision can have no bearing upon the case we have to deal with. I may add however that since the term "fire" has been added to the specially-enumerated risks (which has taken place in comparatively recent times) I think the general words may properly be extended to similar risks which would not have been included before. Upon the whole, I have come to the conclusion that the judgment of the master of the rolls in the court below was correct. I believe it not only to have been in accordance with the authorities, but in harmony with the common understanding of those who enter into contracts of marine insurance. Several instances were put in the course of the argument of disasters which are of common occurrence, and would seem to be just as much within the general words as that which is now in question, but in respect of which it has never been suggested that the underwriters were liable. I accordingly concur in the judgment which has been moved.

LORD MACNAGHTEN. My Lords: In March, 1884, the *Inchmaree* was off Diamond Island lying at anchor, and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey-engine and a donkey-pump on board, and the donkey-engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water, being unable to make its way into the boiler, was forced back and split the air chamber, and so disabled the pump. That was the beginning and the end of the misfortune. At this time the *Inchmaree*, with her machinery, including the donkey-engine, was insured by a time policy. The question is, was the loss which resulted from this mishap covered by the policy or not? The policy contained the common clause describing the risks which the underwriters were content to bear. The clause begins in the usual way by specifying certain particular cases, perils of the seas and other well-known risks, to which the indemnity was to extend. Then follow general words apparently providing for every conceivable loss or misfortune that could happen to the subject-matter of the insurance. It was not contended that the mishap in question fell within any of the particular cases enumerated. The argument turned on the effect of the general words. According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were no doubt inserted to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases. For example, if the expression "perils of the seas" is given its widest sense, the general words have little or no effect as applied to that case. If on the other hand that expression is to receive a limited construction, as apparently it did in *Cullen v. Butler*, 5 M. & S. 461, and loss by perils of the seas is to be confined to loss *ex marina tempestatis discrimine*, the general words become most important.



But still, ever since the case of *Cullen v. Butler*, when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases "akin to" or "resembling" or "of the same kind" as those specially mentioned. I see no reason for departing from this settled rule. In marine insurance it is above all things necessary to abide by settled rules, and to avoid any thing like novel refinements or a new departure. It was objected by Mr. Cohen that the rule of *ejusdem generis* does not apply unless you can find a common characteristic running through or underlying the previous words. I do not know that this is so—at any rate, where several cases are enumerated leading to a common result or intended to be met by a common remedy. A familiar instance occurs in the Companies Act, 1862, and the earlier act of 1848, in the sections which provide for winding up. There are several subsections specifying various cases in which a winding-up order may be made, and then there is a sub-section providing that the court may make an order whenever it thinks it just and equitable. Under both acts those general words have always been held to be restricted to cases *ejusdem generis* with those previously mentioned, and not to give the court a general power to make an order whenever it thinks right to do so. Your lordships were asked to draw the line, and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" explained or enlarged by or in connection with the general words. For my part, I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad, common-sense view, and not by the light of strained analogies and fanciful resemblances. In the present case, although the Court of Appeal has properly treated the general words as restricted to cases *ejusdem generis* with those specially enumerated, the majority of the court has held the accident within the policy. I am unable to adopt their conclusion. The accident, in my opinion, was not due to the "perils of the seas," using that expression in the widest sense that I can give to it, nor did it result in sea damage of any kind. I am therefore of opinion that the view of the master of the rolls is correct, and that the judgment of the Court of Appeal must be reversed.

Order appealed from reversed, the respondents to pay the costs of the appellants in the courts below and in this House.

#### WITNESS—ACCUSED AS—CROSS-EXAMINATION.

NORTH CAROLINA SUPREME COURT, DEC. 21, 1887.

STATE V. THOMAS.

A defendant in a criminal action who offers himself as a witness in his own behalf, may be asked if he was accused of the commission of a criminal offense in the State from which he came, and what such offense was.

**A**PPPEAL from Superior Court, Henderson county.

The Attorney-General, for State.

J. C. L. Gudger, for defendant.

SMITH, C. J. The prisoner is charged with the crime of murder, committed upon the body of one Joseph R. Barnett, and upon his plea of not guilty, was convicted and sentenced at Fall Term in 1887, of the Superior Court of Henderson. Upon the trial, the pris-

oner was examined as a witness on his own behalf, and gave evidence tending to reduce the crime to the grade of manslaughter. Upon his cross-examination, the solicitor prosecuting for the State put to him the following interrogatory: (1) "Were you accused of the commission of any offense in Alabama?" The prisoner, who had recently removed from that State to this, hesitated to make answer until he was instructed by his counsel to do so, and then said, "Yea." Thereupon, the solicitor propounded this further question: (2) "What offense were you accused of committing in that State?" The prisoner objected to being required to answer the question for the reason: *First*, that the answer would tend to criminate him; *second*, for that it was irrelevant; and *third*, for that he cannot be compelled to give evidence against himself. The court overruled the objection, and the prisoner, in response, said he had been accused of murder in Alabama, and the prisoner excepted. In admitting the testimony, the judge remarked, and repeated the remark in the charge to the jury, that the evidence could only be considered as affecting the credibility of the prisoner as a witness in the case.

[Omitting other matters.]

The first objection to be considered is to the compelling the prisoner to tell with what crime he was charged before removing from Alabama. When a prisoner, on trial for a criminal offense, shall avail himself of the right conferred by the act of 1881 (Code, § 1353), to become a witness on his own behalf, he occupies, as such, the same position that any other witness would, and exposes himself to the same discrediting and impeaching evidence. *State v. Effer*, 85 N. C. 585. This results from the necessity of ascertaining the value and weight to be given to his testimony by the jury; and it is certainly a material inquiry whether the witness is entitled to credit, and deserving their confidence in the truthfulness of his statements. In the absence of direct rulings on the point, it would seem that a question ought to be allowed to be put to an involuntary witness, not a party to the cause, the answer to which would criminate, so that the refusal to answer, and the inferences to be drawn from it, would be almost, if not quite, as prejudicial and disparaging as a direct and affirmative reply. In the language of Battle, J.: "It is manifest that the only mode by which a complete protection can be afforded to the witness is to prevent the question from being put at all. *State v. Garrett*, Busb. 367. But the ruling in this court has been otherwise, and the case cited, the refusal of the witness to answer the inquiry, "Have you not been indicted, convicted, and whipped in the County Court of Warren for stealing?" was allowed to be commented on before a jury to the discredit of the witness. As the disparaging question may be asked, and a refusal to answer can be used to discredit, the judge in the opinion from which we have quoted adds: "We are inclined to think, with the very eminent judges who decided the cases of *State v. Patterson*, 2 Ired. 348, that it follows as a necessary consequence that the witness is bound to answer." The testimony sought to be elicited in this case was disparaging only, and would not expose the witness to the perils of a criminal prosecution if true, for that is assumed to have already taken place.

In the more recent case of *State v. Murray*, 63 N. C. 31, which was on an indictment for rape, the prosecutrix was asked "if she had not been delivered of a bastard child, and had had sexual intercourse with other men," and the judge below would not allow the question to be put. Upon appeal, Pearson, C. J., speaking for the court, declared this to be error. But in *State v. March*, 1 Jones (N. C.), 523, a witness was asked if he had not committed willful and corrupt perjury in Georgia, by swearing that he had not

brought negroes into the State, and this question was propounded to impeach the credibility of the witness. It was ruled out, and upon appeal, Battle, J., delivering the opinion, thus disposes of the exception: "If the witness had been asked whether he had not committed perjury in this State, he certainly would have been protected from answering what might have exposed him to a criminal prosecution in our courts, and in such case, we are inclined to think that the question ought not to be allowed to be put at all. But our courts, in administering justice among their suitors, will not notice the criminal laws of another State or country so far as to protect a witness from being asked if he had not violated them. We are of the opinion therefore that the question was improperly ruled out, and that the defendant is entitled to the benefit of another trial." This ruling proceeds upon the principle that self-implicating evidence cannot be drawn from the witness against his will, when it relates to offenses committed beyond its jurisdiction, and which violate the laws of another State or country. The crime of perjury exists under the common law, and is recognized as such, in like manner as homicide. This case is not distinguishable in principle from that before us. We prefer however to put our decision upon other grounds, more satisfactory to our own minds, and well sustained by adjudications in other courts.

A person charged with crime may, "at his own request, but not otherwise," become a witness on his own behalf upon the trial, and his failure to claim the privilege and offer his own testimony is not permitted to become the subject of comment to his prejudice by counsel of the prosecution. Code, §1363. He is, when he chooses to testify, bound to disclose all he knows, whether incriminating or disparaging to himself, as does an ordinary witness, when testifying on matters of which he might claim the privilege of being silent, bind himself to tell the whole truth, and all that he knows of the transaction, to part of which only he has testified. In either such case the privilege is waived.

In *McGarry v. People*, 2 Laus. 227-234. It is said of a party testifying: "It was not compelling him to be a witness against himself," within art. 1, § 6, of the Constitution of this State. He was a volunteer witness under the provisions of chapter 578 of the Laws of 1869. He was not only a volunteer, but had taken the necessary oath to enable him to testify, "to tell the truth, the whole truth, and nothing but the truth," upon the whole issue of traverse between himself and the people. He could not have been compelled to give evidence at all; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor, and subjected himself to the peril of being examined as to any and every matter pertinent to the issue. To the same effect is *Burdick v. People*, 58 Barb. 51-58. In *Brandon v. People*, 42 N. Y. 365, upon the trial of the accused for larceny, she was asked: "Have you ever been arrested before for theft?" An objection to the testimony was overruled, and she answered in the affirmative. The ruling was sustained. In *Com. v. Lannan*, 13 Allen, 563-569, Hoar, J., uses this language: "The defendant, by offering himself as a witness, waives his right to object to any question pertinent to the issue on the ground that the answer may tend to criminate him. He is not required to testify, and may protect himself by omitting to do so;" citing *Com. v. Price*, 10 Gray, 472. Again says Bigelow, C. J., in *Com. v. Mullen*, 97 Mass. 545, 546: "If he offers himself as a witness he waives his constitutional privilege of refusing to furnish evidence against himself, and may be interrogated as a general witness in the cause." "By taking the stand as a witness," to use the words of Colt, J., "he waived his constitutional privilege of refusing to furnish evidence

against himself, and subjected himself to be treated as a witness." *Com. v. Morgan*, 107 Mass. 199-205. These references, in connection with *State v. March*, *supra*, dispose of the exception. *State v. Neville*, 6 Jones (N. C.), 423; *State v. Boon*, 82 N. C. 637; *Bencher v. Wynne*, 86 id. 268.

It must be declared there is no error.

#### MUNICIPAL CORPORATIONS — CONSTRUCTION OF SEWERS—LIABILITY FOR NEGLIGENCE.

MARYLAND COURT OF APPEALS, DEC. 15, 1887.

HITCHINS v. MAYOR, ETC., OF FROSTBURG.

A municipal corporation invested by its charter with authority to construct such gutters and sewers as in its judgment the public convenience requires, although not compellable to exercise its powers, must, if it undertakes to make improvements, adopt reasonable plans, and is liable for any negligence or unskillfulness in the execution or construction of the work whereby the property of private persons is injured.

**A**PPeAL from Circuit Court, Alleghany county. Action to recover damages caused by the overflow of water, mud and debris upon plaintiffs' property from a sewer. Verdict for defendant. Plaintiffs appeal.

Wm. Brace, for appellants.

Wm. Devecmon and Ferd. Williams, for appellees.

ALVEY, J. This action was brought to recover damages alleged to have been suffered by reason of the backing and overflow of water, mud, etc., upon the property of the plaintiffs, caused, as it is alleged, by a badly constructed and insufficient underground sewer, in the town of Frostburg. It is alleged, that in the grading of two of the streets of the town, the surface water was diverted from its natural course and flow, and collected into artificial drains or gutters in large volumes, and thereby caused to flow to a point in Bowery street opposite and near to the property of the plaintiffs, on the north side of that street, where the defendant caused to be constructed a sewer or culvert under and across Bowery street, by which such water was designed to be carried off, and emptied on the south side of said street; but by reason of the negligent, unskillful and defective construction and maintenance of such culvert, the same was insufficient, and failed to carry off the water conducted to the mouth thereof, and consequently the water and debris so collected and conducted was backed up and made to overflow upon the property of the plaintiffs, thereby causing great injury. The case was tried upon the general issue plea of not guilty. By the charter of the town, full authority is conferred upon the mayor and councilmen to open, grade and pave streets, and to construct such gutters and sewers as in their judgment the public convenience may require, and to repair the same whenever needed. They are also empowered to remove all nuisances and obstructions from the streets, and they are clothed with power to pass all such ordinances as may be deemed beneficial to the town, and necessary for the safety and protection of the persons and property of the inhabitants thereof. Acts 1870, chap. 77; 1873, chap. 255. The evidence shows that the town of Frostburg is built on the slope of a mountain, and the grades of its streets are in many places, and in different directions, quite steep. Charles street has a heavy down grade to the point where it joins or intersects Bowery street, and the latter has a considerable ascent in both directions, east and west, from the point where such streets join at right angles. Artificial

gutters have been made on the north side of Bowery street, and on the east side of Charles street, whereby the surface water, which flows on both streets in large quantities during heavy rain-falls, is collected and made to flow in the artificial gutters to the mouth of the sewer constructed diagonally across Bowery street, at the junction of Bowery and Charles streets. It is shown by the proof on the part of the plaintiffs, and indeed not controverted by the defendant, that this sewer or culvert was not of sufficient capacity, even if it had been otherwise well constructed, to carry off the water frequently flowing to it; but that according to the proof offered by the plaintiffs, it was so unskillfully, negligently and defectively constructed that the flow of water was obstructed, and consequently dammed up, and made to overflow the adjoining premises of the plaintiffs, sometimes to the depth of two feet or more, carrying dirt and debris upon the same, thereby doing serious damage to the property. Proof was also adduced to show that the defendant was for several years before suit brought well aware of the defective and insufficient condition of the sewer, and of the injury suffered therefrom by the plaintiffs, but that it had failed to take any steps to remedy the defect. On the part of the defendant, proof was given to controvert, in several important particulars, the evidence on the part of the plaintiffs. The defendant also offered proof to show that the prior owner of the plaintiffs' property cut down and lowered the floor of the cellar of the house, and removed the earth between the house and the street, so that when the water was raised a few inches in the gutter on the street, it ran into the cellar or basement of the house. This however was controverted by testimony for the plaintiffs. Upon the whole evidence, both parties applied to the court for instructions to the jury; but of the prayers offered, the one single prayer by the plaintiffs, and all those by the defendant, except the first and fourth, were rejected. It was therefore upon the first and fourth prayers of the defendant, given as instructions, that the case was placed before the jury. The plaintiffs objected to the refusal to grant their one prayer, and to the granting of the two prayers on the part of the defendant. And this court is now called upon to determine whether there was error, in this ruling upon the prayers, committed by the court below.

Before proceeding to notice particularly the prayers under review, we deem it proper to state the general doctrine of the law upon the subject, as we find it laid down by the most approved authorities. How far the common law, independently of the special provisions of the statute incorporating the defendant, would furnish a remedy against a municipality for an injury such as that complained of here, is a question not necessarily involved in this case; for as we have seen, the statute, with a view to the improvement and benefit of the town, confers large powers upon the mayor and councilmen with respect to streets, drains, sewers, etc., and also power to remove and prevent nuisances. It is out of these powers, and the manner of their exercise, and the duty resulting therefrom, that the liability here insisted upon arises to the plaintiffs, if it can be maintained at all, in respect to the facts of the case, as we have stated them. In *Cooley Const. Lim.* 248, it is laid down as the result of the decisions upon the subject that the grant by the State to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise, on the part of the corporation, to perform the corporate duties; and this implied contract, made with the sovereign power, inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the

same position as private corporations, which having accepted a valuable franchise, on condition of the performance of certain public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations however the liability is contingent on the law, affording the means of performing the duty, which in some cases, by reason of restrictions upon the power of taxation, they might not possess. But assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village, vested with control of its streets, for any neglect to keep them in repair, or for any improper construction, has been determined in many cases. A similar liability would exist in other cases where the same reasons would be applicable. In support of this text, the learned author refers to a number of cases; and the principle stated by him is in accord with the decisions of this court in the case of *Baltimore City v. Marriott*, 9 Md. 160, and the recent case of *Taylor v. Cumberland*, 64 id. 68. And on the next succeeding page of the author just cited he says: "In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporations, as to construct works to supply a city with water, or gas-works, or sewers, and the like, the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner in which the work is constructed or guarded," etc. But notwithstanding this duty and liability of the municipality in respect to powers delegated, there is a class of powers, defined as discretionary or quasi-judicial, which the corporate authorities cannot be compelled to execute; as for instance, the opening, widening, or extension of streets, the adoption of a particular grade, or the adoption of any particular plan for improvement, and the like, unless the terms of the statute are imperative. But any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the rights of the citizen, a mere ministerial duty; and for any negligence or unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible. This is the principle maintained by the great preponderance of authority; and there is nothing in the case of *City of Cumberland v. Willson*, 50 Md. 138, at all opposed to this principle, as would seem to be supposed by counsel for the defendant. In that case, the authority delegated to the corporation to grade and improve its streets was held to have been properly exercised, with no want of reasonable care and skill. It was not attempted to be shown that the injury complained of had been produced by the want of care and skill in the grading and draining of the street; and there was no question of negligence or want of skill raised in the case. But in the recent case of *Krans v. Baltimore City*, 64 Md. 491, where the action was brought for injury sustained by a property holder, caused by obstructions in a sewer, and the overflow therefrom, upon the premises of the plaintiff, of water, mud, filth, etc., the result of the bad condition and want of repair of the sewer, this court held that the city was liable, as well for the consequences of the negligent failure to keep the sewer in repair, as for negligence and unskillfulness in actually making the repairs. And the general proposition was maintained that where a municipal corporation undertakes, in the discharge of its duties, to construct or repair such a work as a sewer or culvert, it is responsible for damage caused by the negligent, careless, or unskillful manner of performing the work; and 2 Dill. Mun. Corp., § 1049, is cited with approval. And in that same work, in section 1061, where the author sums up and states the results of the authorities upon

the subject of municipal liability for injuries caused by surface water, the following among other propositions is formulated: "There is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or the negligent failure to keep the same in repair and free from obstruction; and this whether the lots are below the grade of the streets or not." The cases, says Judge Dillon, support this proposition with great unanimity. Of the many cases cited by the author, we need only refer to those of *White Lead Co. v. Rochester*, 8 N. Y. 468; *Barton v. City of Syracuse*, 36 id. 54; *Rowe v. Portsmouth*, 56 N. H. 291; S. C., 22 Am. Rep. 464, and *Noonan v. City of Albany*, 76 N. Y. 470; S. C., 35 Am. Rep. 540.

[Omitting minor points.]

But we think there was error in granting the prayers of the defendant. The first of these prayers, as construed by the court, in the course of the argument of counsel to the jury, is based upon the theory that the plaintiffs could not recover, notwithstanding the jury might find from the evidence that the surface water was diverted from its natural flow by the elevation and improvement of the streets, and by the artificial gutters and drains, whereby such surface water was collected in volume, and conducted to the mouth of the sewer opposite the adjoining property of the plaintiffs, whence it could not escape, except by flowing over the premises of the plaintiffs, "if the jury should find that the cause of the back-flow of the water was the elevation of the street, and that said culvert was insufficient in size to carry off all of such water in times of heavy rain; provided the construction of the culvert did not place or leave the said property in a worse condition than if no culvert had been made at all." To this proposition we cannot assent. Reason as well as authority would seem clearly to oppose it. We fully agree with Judge Dillon in the principle stated by him in section 1042, vol. 2, of his work on Municipal Corporations. In that section, after referring to the general doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street, he says: "It is possible there may be no middle ground, but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom as a mode of protecting the streets, and to discharge it, by artificial means, in increased quantities, and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner." Here Bowery street runs east and west from the mouth of the sewer; and the declivity of the hill, along the side of which that street is made, is to the south. The natural flow of the surface water therefore, as shown by the proof and the plat exhibited, is to the south. But this natural flow has been interrupted by the elevation of Bowery street, on the south side thereof, and the water has been concentrated in a gutter, and made to flow to the mouth of the sewer, opposite the property of the plaintiffs, on the north side of that street. If then it be true, as it clearly is, upon unquestionable authority (*Lynch v. Mayor*, 76 N. Y. 60; S. C., 32 Am. Rep. 271; *Byrnes v. Cohoes*, 67 N. Y. 204; *O'Brien v. City of St. Paul*, 25 Minn. 333; *Inhabitants of West Orange v. Field*, 37 N. J. Eq. 600; *Ashley v. Port Huron*, 35 Mich. 296; S. C., 24 Am. Rep. 552), that the corporation cannot thus divert the flow of surface water, concentrate it in volume and force, and empty it upon private property, without becoming liable, it next follows that there is a duty

incumbent upon the corporation to provide, by adequate means, for passing off the water there concentrated in volumes, so as to avoid doing damage to private property. The street may be properly graded, and the drains properly made, but the sewer made for the purpose of receiving and carrying off the water cannot be said to be skillfully and carefully constructed, or kept in repair, if from any structural cause, it be insufficient to pass off the water flowing to it through the artificial channels provided. If it be true, as alleged and shown by the plaintiffs, that the surface water was gathered into artificial channels or gutters, and made to flow to the mouth of the sewer, where it was allowed to accumulate in large quantities, and thence flow back upon the property of the plaintiffs, this constituted a nuisance, and as such, it was certainly the duty of the defendant to remove it, and for the neglect of such duty the defendant is liable. For as was said by the Court of Appeals of New York in the case of *Noonan v. City of Albany*, 79 N. Y. 470; S. C., 35 Am. Rep. 540, "a municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the land of another; nor has it any immunity from legal responsibility for creating or maintaining a nuisance." The second prayer granted on the part of the defendant is obnoxious to the same objection that applies to the first. The plaintiffs, and those under whom they claim, had clearly the right to the use and enjoyment of their property in any reasonable way, and for any reasonable purpose, and to make any alteration or new adaptation therein that they deemed proper, without thereby subjecting themselves to the loss of protection to their property from wrongful invasion by inundation or otherwise. Hence it was error to instruct the jury upon certain enumerated facts, in respect to the lowering of the cellar floor (as was done by granting this prayer), "that the plaintiffs could not recover for any injury to said house caused by said inflow of surface water to such basement or cellar, notwithstanding the jury might find that the grade of said street, and the insufficient size of said culvert, caused the inflow of said surface water to said basement in time of heavy rain." If the injury complained of was sustained by reason of the backing of the water from the mouth of the culvert, where it had been brought in large quantities by artificial drains, and that such backing and overflow was caused by the defective and insufficient sewer or culvert, and would not have occurred but for that cause, then the fact that the floor of the plaintiffs' cellar had been lowered afforded no justification to the defendant for the defective and insufficient sewer. The cause of the injury was the fault of the defendant and not of the plaintiffs.

It follows from what we have said in regard to the two prayers granted on the part of the defendant, that the judgment must be reversed and a new trial awarded.

#### WILL—TESTAMENTARY PAPER—OBLIGATION FOR THE PAYMENT OF MONEY.

MARYLAND COURT OF APPEALS, APRIL TERM, 1887.

COVER V. STEM.\*

A sealed instrument in the following form: "At my death, my estate or my executor pay to July Ann Cover \$3,000, David Engel," and subscribed by only one witness. Held, not an obligation for the payment of money, and not a valid testamentary paper.

APPEAL from the Circuit Court for Carroll county. The case is stated in the opinion of the court.

\*67 Md. 449.

*James A. C. Bond, and Wm. H. Thomas, for appellant.*

*Charles B. Roberts, Attorney-General, for appellee.*

ALVER, C. J. This is an action of debt brought by the appellant against the appellee as executor of David Engel, deceased, to recover the sum of \$3,000, alleged to be due and owing by virtue of what is described in the declaration as a writing obligatory, made and delivered by the appellee's testator, on the 4th day of Sept. 1884.

The declaration contains several counts, all founded upon the supposed writing obligatory; and which writing was filed with the declaration, and by agreement is incorporated in and made part of the declaration. The appellee demurred to the entire declaration, and the court below sustained the demurrer, and gave judgment for the defendant. It is from that judgment that this appeal is taken.

The instrument declared on is in the following form:

"MD., September 4, 1884.

At my death, my estate or my executor pay to July Ann Cover the sum of \$3,000.

Witness: DAVID ENGEL, OF P. [SEAL]  
COLUMBUS COVER."

It is contended on the part of the appellant, that this instrument is a bill obligatory, and imports a legal obligation of the maker, the time of payment only being deferred until after his death, when his administrator or executor was directed to pay the amount. While on the other hand it is contended by the appellee, that the instrument has all the characteristics of a testamentary paper, and did not, in any proper sense, create a legal obligation upon the maker, such as that of a bond or single bill.

What the consideration may have been to induce the maker to pass such an instrument does not appear. But it is insisted that the seal to the instrument imports a sufficient consideration for the obligation of the maker; and this, as a general proposition, is certainly true, as applied to bonds and deeds generally. But still the question here is, whether the instrument declared on be in its nature a bill obligatory, binding and conclusive upon the maker, or whether it be a mere posthumous disposition of \$3,000, part of his estate, to be paid by his executor as any other pecuniary legacy given by the testator.

An obligation is defined to be a deed in writing, whereby one man doth bind himself to another to pay a sum of money, or do some other thing. Shep. Touch., tit. Obligation, p. 367. The same definition is given in Com. Dig., tit. Obligation (B) and in Bacon's Abr., tit. Obligation (B). It is true, no precise form of words is necessary to create a bond or obligation. Therefore any memorandum in writing under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay; for it is said that any words which prove a man to be a debtor, if they be under seal, will charge him with the payment of the money. *Core's case*, Dyer, 228; Shep. Touch., 368, 369, 370, and Bac. Abr. Obligation (B) and the examples there given of what form of words will be sufficient to create a valid obligation. It is however laid down in Bac. Abr. Obligation (B) as essentially necessary, to create a valid obligation, that words be employed to declare the intention of the party, and which must clearly denote his being bound; "because such obligation is only in the nature of a contract, or a security for the performance of a contract, which ought to be construed according to the intention of the parties." In other words, there must be terms employed to create a *debitum in presenti*, though the *solvendum* may be in *futuro*, and even after the death of the obligor. It would seem to be clear, that the relation of debtor and creditor must be created and subsist in

the life-time of the parties to the instrument, though the time of payment may be deferred until after the death of one of the parties. Shep. Touch. 368, 369; *Hannon v. State*, 9 Gill, 448; *Carey v. Dennis*, 18 Md. 1; Story Prom. Notes, § 27.

Here in the instrument before us, there are no words that create a *debitum in presenti*; there are no words that create the relation of debtor and creditor in the life-time of the parties to the instrument; but the words employed simply import a posthumous disposition of a part of the estate of the maker of the instrument, and nothing more.

This case is not substantially distinguishable from the case of *Byers v. Hoppe*, 61 Md. 208; S. C., 48 Am. Rep. 89. In that case, Hoppe, the writer of the letter to Ann Byers, the party to whom the letter was addressed and delivered, said: "Ann, after my death, you are to have \$40,000; this you are to have, will or no will; take care of this until my death." That was declared to be a testamentary paper; and the only real distinguishing feature between the paper in that case and the paper in this is, that the paper in the former was not under seal, and the paper in this case is. That however can make no substantial distinction in determining the real character of the instrument; as wills are more frequently executed under seal than otherwise. Nor can the fact, that the instrument was delivered to the party to whom payment was directed to be made, change the real nature of the instrument. For the principle is well settled, that an instrument may be in the form of a deed, signed, sealed and delivered as such, and still if it be apparent that the party intended a posthumous disposition of his property, the instrument not being operative until after his death, such instrument will be regarded as testamentary.

A will is defined to be any instrument whereby a person makes a disposition of his property to take effect after his death. By the terms of the instrument in question, the \$3,000 are simply directed to be paid out of his estate by his executor. No language could be more expressive of a testamentary purpose. And this court has declared in *Carey v. Dennis*, 18 Md. 17, adopting the language of Mr. Justice Buller, in *Huberg-ham v. Vincent*, 2 Ves. Jr. 231, that "the cases have established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will."

It is urged however in argument that as the instrument in question was made since the act of 1884, chap. 233, requiring at least two witnesses to bequests of personal estate, it is ineffectual as a testamentary paper, because it has but one witness, and therefore it should, if possible, be construed to have effect as a bond or obligation. But whether the instrument shall be declared a valid obligation, or to have a testamentary character only, must be determined from the terms and provisions of the instrument itself. *Carey v. Dennis*, 18 Md. 17. We have shown that the instrument has not the essential terms to create a *debitum*, personally binding the deceased in his life-time; and this construction cannot be affected by the fact, that the instrument being testamentary in its character, must fail of effect, because of insufficient witnesses under the statute.

It follows that the judgment of the court below must be affirmed.

Judgment affirmed.

UNITED STATES SUPREME COURT ABSTRACT.

STATUTE OF FRAUDS—ACCEPTANCE AND DELIVERY.  
—In an action to recover the value of certain securi-

ties, sold under a verbal contract alleged to have been made with defendant personally, who claimed that he entered into it as representative of a corporation of which he was trustee, it was shown that in pursuance thereof plaintiff handed the securities to a third party, treasurer of said corporation, taking his receipt, reciting a condition precedent to their delivery. Defendant, when advised of what had been done with the securities, made no objection; and at another time, his attention being called thereto, said, "Yes; that's all right;" and again, introducing plaintiff to a friend as the man from whom he had the securities. Held, not sufficient evidence of acceptance and delivery to take the contract out of the statute of frauds. In order to take the contract out of the operation of the statute, it was said by the New York Court of Appeals, in *Marsh v. Rouse*, 44 N. Y. 643, that there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price." This is adopted in the text of Benj. Sales (Bennett's 4th Am. ed.), § 179, as the language of the decisions in America. In *Shindler v. Houston*, 1 N. Y. 261; 49 Am. Dec. 316, Gardiner, J., adopts the language of the court in *Phillips v. Bristol*, 2 Barn. & C. 511, "that to satisfy the statute there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intent of taking possession as owner;" and adds: "This I apprehend is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. *Bailey v. Ogden*, 3 Johns. 421; 3 Am. Dec. 509. \* \* \* In a word, the statute of fraudulent conveyances and contracts pronounces these agreements, when made, void, unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance." In the same case *Wright, J.*, said: "The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. \* \* \* Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. \* \* \* I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract." This case is regarded as a leading authority on the subject in the State of New York and has been uniformly followed there, and is recognized and supported by the decisions of the highest courts in many other States, as will appear from the note to the case as reported in 49 Am. Dec. 316, where a large number of them is collected. So in *Remick v. Sandford*, 120 Mass. 309, 316, it was said by Devens, J., speaking of the distinction between an acceptance which would satisfy the statute and an acceptance which would show that the goods corresponded with the warranty of the contract, that "if the buyer accepts the goods as those which he purchased, he may afterward reject them if they were not what they were warranted to be; but the statute is satisfied.

But while such an acceptance satisfies the statute, in order to have that effect, it must be by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with; although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. That there has been an acceptance of this character, or that the buyer has conducted himself in regard to the goods as owner, is to be proved by the party setting up the contract." Mr. Benjamin, in his treatise on Sales, § 187, says: "It will already have been perceived that in many of the cases the test for determining whether there has been an actual receipt by the purchaser has been to inquire whether the vendor has lost his lien. Receipt implies delivery, and it is plain that so long as vendor has not delivered there can be no actual receipt by vendee. The subject was placed in a very clear light by *Holroyd, J.*, in the decision in *Baldey v. Parker*, 2 Barn. & C. 37: 'Upon a sale of specific goods for a specific price by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.' No exception is known in the whole series of decisions to the proposition here enunciated; and it is safe to assume, as a general rule, that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted upon in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note." In accordance with this, the rule is stated in *Browne Stat. Frauds*, § 317a, as follows: "Where by the terms of the contract the sale is to be for cash, or any other condition precedent to the buyer's acquiring title in the goods be imposed, or the goods be at the time of the alleged receipt not fitted for delivery according to the contract, or any thing remain to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer. There must be first a delivery by the seller, with intent to give possession of the goods to the buyer." Jan. 9, 1888. *Hinchman v. Lincoln*. Opinion by Matthews, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**ARREST — DETENTION OF PROPERTY BY OFFICER — LIABILITY.** — An officer, making an arrest for violation of a city ordinance in beating drums, is not justified in detaining the drums after the trial without an order of court, even though he has reason to believe, and does believe, that the arrested party will immediately use the drums in violation of the same ordinance. The principle thus contended for by the officer would enable him to detain the team of a person arrested for too fast driving, so long as he (the officer) believed with reason the owner would immediately repeat his offense of too fast driving if the team were restored to him. An officer making an arrest upon a criminal charge may also take from the prisoner the instruments of the crime, and such other articles as may be of use as evidence upon the trial. These may not be confiscated or destroyed by the officer however

without some order or judgment of a court. We do not find any authority or reason for the officer's rendering any judgment in the matter. He holds the property, as he does the prisoner, to await, and subject to, the order of the court. The officer having taken into his possession such articles as will supply evidence, "holds them to be disposed of as the court shall direct." Bish. Crim. Pro. 211. "The taking of things from the arrested person does not change the property in them. The officer holds all such property subject to the order of court." Id. 212. Wharton, in his Criminal Practice (8th ed.), § 60, says: "They (the articles taken from the prisoner) should be carefully preserved for the purposes of the trial, and after its close returned to the person whose property they lawfully are." In *Spaulding v. Preston*, 21 Vt. 9, relied upon by the defendant, the prisoner was committed for trial, and the officer was preserving the property (counterfeit coin) to be used as evidence at the trial. The court held that the officer could lawfully retain them for that purpose. In the case before us, it is not claimed that the drums were detained for evidence. The trial was presumably long over. There is an evident difference, also between articles which can only have an unlawful use, like counterfeit coin, and articles in themselves innocent like drums. If an officer may indefinitely hold the former, it does not follow that he can so hold the latter. Yet in the former case it is provided by our statute (Rev. Stat., chap. 125, § 12), that all such contraband articles are to be kept "by the direction of the court or magistrate having cognizance of the case." Me. Sup. Jud. Ct., Dec. 17, 1887. *Thatcher v. Weeks*. Opinion by Emery, J.

**CARRIERS—BAGGAGE—MERCHANDISE.**—By the sale of a ticket to a passenger, a railroad company is rendered liable for the safe transportation of the passenger and his reasonable personal baggage, but not for merchandise delivered by the passenger as baggage, without clear proof of an agreement to that effect. A passenger presenting a valise to the baggage master in the ordinary way to be checked, represents by implication that it contains his personal baggage, and if it in fact contains merchandise, he is guilty of such legal fraud as to absolve the carrier from liability for failure to transport it. Nor is the company rendered liable because there is evidence tending to show that baggage masters at other stations on the same line had previously checked the same valise, with a knowledge of its contents. Me. Sup. Jud. Ct., Dec. 17, 1887. *Blumenthal v. Maine Cent. R. Co.* Opinion by Emery, J.

**— LIMITING LIABILITY BY STIPULATION ON TICKET.**—Where a limitation is inserted in a railroad ticket, limiting the liability of the company to \$100 in case of loss of baggage checked by virtue of the purchase of said ticket, *held*, that said limitation is not binding on the purchaser of said ticket unless, with a knowledge of such limitation, he agrees to it. It is perhaps true that the defendant might, by a special contract, limit its liability so as not to be responsible in case of loss of baggage beyond a given sum, provided the contract was a reasonable restriction. In this case there was no contract on the part of the plaintiff, and no knowledge was conveyed to her of any intention on the part of the defendant to limit its liability, save and except what the ticket itself contained; and this was not read, or its contents made known to the plaintiff. Can this be called or implied a contract? We think that before the plaintiff can be bound by the declaration in the ticket for transportation on a passenger train, the restrictions or limitations sought to be made must be known to her, and she must have accepted the ticket with a full knowledge of the restrictions contained therein. This ticket contained a blank

for the signature of the purchaser; and that signature was to be witnessed by some one. This was not done in this case. The object of that blank space being left there was doubtless that the attention of a purchaser might be called to the conditions of the ticket, and when called to sign it he would then know its contents. This would constitute a contract between them, but without it there would be no contract, and no restriction or limitation of the liability of the company. The ticket is not a contract of itself; it is simply evidence of a contract. Lawson Cont., §§ 106, 107. Before the giving of this ticket there was nothing said between the parties that one was to limit his liability under certain conditions or circumstances, and consequently the ticket could not be evidence of a contract that did not exist. Again where a person purchases a ticket, he does not expect that thereby he is making a contract limiting the liability of the railroad company, but simply that he is receiving a check showing that the fare has been paid over the line to the place of destination, wherever that may be. *Railroad Co. v. Campbell*, 36 Ohio St. 657; *Railroad Co. v. Fialoff*, 100 U. S. 24; *Railroad Co. v. Roach*, 35 Kan. 740; 12 Pac. Rep. 93, and cases there cited. Kan. Sup. Ct., Dec. 10, 1887. *Kansas City, etc. R. Co. v. Rudebaugh*. Opinion by Clogston, C.

**CONSTITUTIONAL LAW—IMPAIRING CONTRACTS—EXEMPTION OF HOMESTEAD PURCHASED WITH PENSION MONEY.**—A homestead purchased with pension money, and levied upon in satisfaction of a debt contracted prior to such purchase, is not exempt from execution, under a statute providing for the exemption of pension money, or the property purchased therewith, and that such exemption "shall apply to debts of such pensioners contracted prior to the purchase of such homestead." Such latter provision is in conflict with Const. U. S. art. 1, § 10, which declares that "no State shall pass any law impairing the obligation of contracts." Iowa Sup. Ct., Dec. 15, 1887. *Foster v. Byrne*. Opinion by Reed, J.

**CRIMINAL LAW—ADULTERY—PROOF OF RAPE.**—On the trial of an indictment for fornication and adultery, the evidence proved the offense of unlawful cohabitation alleged; and also that the prisoner had at times also been guilty of rape. *Held*, that defendant might be convicted of the offense charged, although he may have been guilty of rape as well. Evidence of the moral character of the accused is competent to guide the court in determining the punishment to be imposed. If at times when the female defendant, from a sense of shame or any other reason, was not in a yielding or complying mood, he used violence and forced her, against her will, to yield to his brutal lusts, he may have been guilty of the more heinous crime of rape, he is none the less guilty of fornication and adultery in bedding and cohabiting with her in the manner testified to by the witnesses. The mistake that he commits is in supposing that he may not have been guilty of fornication and adultery in the habitual illicit intercourse to which she freely and voluntarily assented, and at other times of rape, if by violence he forced her to yield to his will. Of the former, the proof of his guilt seems conclusive; and he cannot evade the effect of this indictment by admitting, as he seems to do, that the evidence shows that he is guilty of the latter; he may be guilty of both offenses, but in this indictment he and his co-defendant can only be convicted and punished for the former. N. C. Sup. Ct., Nov. 28, 1887. *State v. Summers*. Opinion by Davis, J.

**EASEMENT—RIGHT OF WAY—PRESCRIPTION.**—In an action for obstructing a right of way the court instructed the jury that a private way might cross a



public road. *Held*, that this was error, and a private way cannot be obtained by prescription across a public highway, as against the owner of the soil. Washb. Easem., §§ 138, 164; Wait Act. & Def. 695; State v. Jefeocat, 11 Rich. 529; Hamilton v. White, 5 N. Y. 9. Besides the principles upon which a private right of way may be prescribed for would seem to exclude this. Prescription is founded upon adverse use for a period of at least twenty years, adverse to some one who has the right to object, and who did not object. Upon such use, the law presumes a grant from the former owner arising from his long acquiescence. To give this prescription a safe foundation however, of course the former owner must know of the adverse use, and must have been in condition to have opposed it, with the right to do so. Now in the case of a public highway, every citizen has the right to be upon it, and to use it as he may desire—to go up and down or across it—and we do not see how using a public highway can be adverse to the rights of the owner of the soil upon which it runs. Every one has the right to be there, because it is a public highway, and the owner of the soil, even if he knows that one is there, has no right to object, and his acquiescence cannot be properly construed into an acknowledgment that the party is there by virtue of some private claim, to which he is presumed to have assented, and which may ripen into the presumption of a grant. 8. C. Sup. C., Dec. 12, 1887. *Whaley v. Stevens*. Opinion by Simpson, C. J.

**EVIDENCE—SECTION OF HUMAN BODY—DISCRETION OF COURT.**—In an action for damages for personal injuries, it appears that the wagon in which plaintiff was riding was run into by defendant's wagon, and plaintiff was thrown out, and one of her ribs broken. Defendant, to contradict certain evidence introduced by plaintiff, offered to show the exact location of the ribs in the human system by means of a section of a human body. *Held*, that such an exhibition being unnecessary and offensive, it was a proper exercise of discretion for the court to refuse it. Conn. Sup. Ct., Oct. 19, 1887. *Knowles v. Crampton*. Opinion by Carpenter, J.

**GIFT OF LAND—EVIDENCE TO SUPPORT.**—In a suit for an accounting by a ward against his guardian, who was also his grandfather, in which it was sought to charge the guardian with the income of certain property alleged to have been given by him to his children and grandchildren, including complainants, there was evidence that defendant placed the property in the hands of two sons for the purpose of managing it, and paying over the income to the beneficiaries; that the income was disbursed to defendant's children and grandchildren, except complainants, the amount coming to whom was paid to defendant as guardian. *Held*, sufficient evidence to support a finding of a gift of the property, and that complainants were entitled to an account for their share of the income. The great point insisted upon in the argument of respondent's counsel was as to the incompleteness of the gift, for the want of delivery of the thing donated. But upon that point we have no difficulty at all. To constitute a valid gift there must be the intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by the law in lieu thereof. Code, § 2657. A parent, guardian, or friend may accept for an infant. Id., § 2658. Actual manual delivery is not essential to the validity of a gift. Any act which indicates a renunciation of dominion by the donor, and the transfer of dominion to the donee, is a constructive delivery. Code, § 2660. But going outside of the Code, the principles announced here had, as we take it, been settled, by decisions both by common-law courts and courts of equity long prior to the adoption of the Code. It has been held that a

*donatio inter vivos*, as distinguished from *donatio mortis causa*, does not require actual delivery. It is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership in the chattels had been changed. *Flore v. Denny*, 7 Exch. 583; *Ward v. Audland*, 16 Mees. & W. 862. Again where a check was given by A. to B., and presented without delay, the bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the check not having been paid. It was held by Sir John Stuart, V. C., to be a complete gift *inter vivos* of the amount of the check, and he ordered its payment, with interest, by the executors of the donor. *Bromley v. Brunton*, L. R., 6 Eq., 275. In *Grant v. Grant*, 34 Beav. 623, it is held, that "in order to establish the fact of a gift of chattels from a husband to his wife, there must be clear and distinct evidence corroborative of the wife's testimony. It is not necessary that he should deliver them to a trustee for his wife. It is sufficient if he constitutes himself a trustee for her by making the gift in the presence of a witness, or by subsequent statements to a witness that he has made the gift." So in *Ex parte Pye*, *Ex parte Dubost*, 18 Ves. 140, 145, Lord Eldon held, that although there had been no actual transfer of the legal interest in the property to trustees, yet if the settlor had constituted himself a trustee for volunteers a court of equity would enforce the trust. In *Wheatley v. Purr*, 1 Keen. 551, H. O. directed her bankers to place \$2,000 in the joint names of her children, J. R. W., M. W., and H. W., and her own, as trustee for her children. That sum was accordingly entered in the books of the bankers to the account of H. O., as trustee for her said children. The bankers gave her, as such trustee for the children named, a promissory note for the amount, with interest, and she gave the bankers a receipt for the same. Lord Langdale, M. R., was of opinion that she had constituted herself a trustee for the plaintiffs, her children and that a trust was completely declared, so as to give them a title to relief. These cases, and a number of others illustrating this principle, will be found in the notes to *Ellison v. Ellison*, 1 White & T. Lead. Cas. Eq., marg. pp. 260-262. Ga. Sup. Ct., April 21, 1887. *Poullain v. Poullain*. Opinion by Hall, J.

**LANDLORD AND TENANT—DUTY OF LANDLORD TO REPAIR—LATENT DEFECTS.**—When the owner of a building divides it into several tenements, which he lets to various tenants, but retaining to himself control of the halls and stairways for the common use of the occupants, and those having lawful occasion to be there, he is bound to see that reasonable care and skill are exercised to render the halls and stairways reasonably fit for the uses which he thus invites others to make of them; and he is responsible for any injury which others, lawfully using them with due care, sustain through his failure to discharge this duty; but he is not answerable for defects which do not render the halls or stairways reasonably unfit for use, or which reasonable care and skill would not prevent. The defendant's testator was the owner of a four-story building in Jersey City, divided into eight tenements, which he let to as many families, all of whom had right of passage to and from their respective tenements by means of the common halls and stairways. The plaintiffs were tenants of four rooms on the second floor. The evidence shows that the plaintiff Alice, while going down the flight of stairs leading from her apartments to the street, caught the heel of her boot in the oilcloth on the stairs, and fell, sustaining the injury for which this suit is brought. The trial justice charged the jury that "the point was whether there was a tear or wear or defect in the oilcloth, and whether that threw her down. If they were satisfied of defect there, then they should render their verdict

for damages; there was liability on the part of the landlord if there was defect in that particular." The jury found for the plaintiffs, and we are now asked to grant a new trial. The testimony does not disclose any contract by the landlord for the repair of the demised premises, and consequently he is not to be deemed responsible for their condition. *Mullen v. Rainear*, 45 N. J. L. 520. But we think that under the evidence, the halls and stairways should not be regarded as part of the demised premises, within the scope of the rule. It appears to have been the understanding that the landlord should retain control of these portions of the building, lighting the halls and covering the floors at his pleasure, and affording to the tenants and those having lawful occasion to visit their apartments the right of passage to and fro. With respect therefore to the halls and stairways, the landlord was under the responsibility of a general owner of real estate who holds out invitations or inducements to other persons to use his property. *Looney v. McLean*, 129 Mass. 83. The obligation resting upon such an owner is that reasonable care and skill have been exercised to render the premises reasonably fit for the uses which he has invited others to make of them. *Vanderbeek v. Hendry*, 34 N. J. Law, 467, 471; *Francois v. Cookrell*, L. R., 5 Q. B. 184, 501; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, *supra*; *Watkins v. Goodall*, 138 Mass. 533; *Camp v. Wood*, 78 N. Y. 92; *Edwards v. Railroad Co.*, 98 id. 245. It is plain that the directions given to the jury at the trial carried the responsibility of the landlord beyond what the law will warrant. The sole conditions of his liability were declared to be a defect in the oilcloth, and the plaintiff's being thrown down by reason of it. Although the testimony was conflicting as to the existence of any noticeable defect, the attention of the jury was not called to, but was diverted from the important inquiries whether the defect was of such a nature as to render the stairs not reasonably fit for the purpose of passage, and whether the landlord had failed to exercise reasonable care in the matter. The case also presents the question whether the plaintiff was in the exercise of due care, for she testifies that she knew of the defect before the accident; yet this subject also was ignored in the charge. A new trial should be granted. N. J. Sup. Ct., Nov. 26, 1887. *Gallowan v. Kelly*. Opinion by Dixon, J.

**MASTER AND SERVANT—TRAIN DISPATCHER AND ENGINEER.**—A train dispatcher, vested with the power and authority of moving trains, of changing the schedule time, or making new schedules, as regards the employees engaged in moving trains is a "vice-principal," and not a fellow-employee; and in case of an injury resulting to an employee in consequence of his negligence, the company is liable. Upon this point the authorities are numerous, and far from uniform. A volume might be written upon it and not exhaust the subject. I prefer to state our conclusions without elaborating them to any considerable extent. The precise question is whether Sellers, the train dispatcher, was a fellow-workman with the plaintiff within the meaning of that rule of law which holds that the master is not responsible for an injury received by an employee caused by the negligence of a co-employee or fellow-workman. That rule rests upon the sound principle that each one who enters upon the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow-workmen in the general course of his employment are within the ordinary risks. *Coal Co. v. Jones*, 86 Penn. St. 432. To constitute fellow-servants, the employees need not be at the same time engaged in the same particular work. It is sufficient if they are in the em-

ployment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. The rule is the same, although the one injured may be inferior in grade, and is subject to the direction and control of the superior whose act caused the injury, provided they are both co-operating to effect the same common object. *Bridge Co. v. Newberry*, 96 Penn. St. 246. Thus we have repeatedly held that a "mining boss," under the act of March 3, 1870, is a fellow-workman with the miners, and that the mine-owners are not responsible for his negligence. *Canal Co. v. Carroll*, 89 Penn. St. 374. This however is in part owing to the fact that the duty of appointing a mining boss is imposed upon the mine-owners by the act of Assembly, hence the responsibility of the latter would seem to cease when they had exercised due care in the selection of that person. Be that as it may, it is well stated that mere difference in rank or grade does not change the rule. But there are some duties which the master owes to the servant, and from which he cannot relieve himself, except by performance. Thus the master owes to every employee the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools and machinery with which to work. This is a direct, personal and absolute obligation, and the master may delegate these duties to an agent, and such agent stands in the place of his principal, and the latter is responsible for the acts of such agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate. *Mullan v. Steamship Co.*, 78 Penn. St. 25; *Railroad Co. v. Bell*, 112 id. 400. It is very plain that it was the duty of the defendant company, as between said company and its employees, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives and machinery, for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty, which the company owed its employees and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty, and while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of and represent the principal. In other words, they are vice-principals. If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically, that when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents, the result of obeying such orders. At the time of the collision referred to, Wellington Bertolotte was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or any one else. For the purpose of sending out the trains he wielded all the power of the company. He could send a train out on schedule

time or he could hold it back. He could change the schedule time, or make new schedules, as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order, the train was bound to move as he directed. The engineer and conductor had but one duty, and that was obedience. In *Slater v. Jewett*, 85 N. Y. 61, the late Chief Justice Folger thus clearly stated the duties of railways in this particular: "It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it, and that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants, who are to square their action to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and therefore whomever he uses to bring those time-tables to the notice of his servants, he puts that person to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done, and done effectually; and that if instead of doing it in person, he chooses to do it through an agent, that agent *pro hac vice* is the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow-servant of theirs is harmed. This rule has been laid down in repeated cases in this court." The distinction between a general dispatcher—one who has the absolute control of all the trains upon the road—and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the dispatcher, and if an employee is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end, under orders from superior authority. The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees, from the president down, as they may all be said to be, in one sense, in the same common employment, and paid by the same corporation. While the cases are not uniform upon this subject, the weight of authority is with the foregoing views. In addition to the authorities cited we may refer to *Flike v. Railroad Co.*, 53 N. Y. 549; *Railway Co. v. Henderson*, 5 Am. & Eng. R. Cas. 529; *McKinne v. Railroad Co.*, 21 id. 539; *McKune v. Railroad Co.*, 17 id. 539; *Phillips v. Railroad Co.*, 23 id. 453; *Phillips v. Railway Co.*, 64 Wis. 475; and *Washburn v. Railroad Co.*, 3 Head, 638. Against these authorities we have only *Robertson v. Railroad Co.*, 8 Am. & Eng. R. Cas. 175, and *Blessing v. Railroad Co.*, 77 Mo. 410; 15 Am. & Eng. R. Cas. 298. These cases however do not sustain the broad principle contended for them; and if they did, we would not be disposed to adopt them in the face of so much respectable authority the other way. Aside from authority, I am of opinion that the doctrine we have announced is founded upon the better reason, and is a rule both valuable and necessary for the preservation of the lives, not only of railroad employees, but of the travelling public as well. Penn. Sup. Ct., Oct. 3, 1887. *Lewis v. Stefert*. Opinion by Paxson, J.

—NEGLIGENCE—EMPLOYERS, LIABILITY ACT—VICIOUS HORSE—RISK VOLUNTARILY INCURRED—"WORKMAN"—"PLANT," "DEFECT" IN CONDITION OF.—In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the

owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal, and his leg was broken. *Held*, by Lord Esher, M. R., Lindley, L. J., and Lopes, L. J., sitting as a Divisional Court, that the plaintiff was a "workman" within the definition of section 8 of the act. *Held*, by the majority of the court, Lord Esher, M. R., and Lindley, L. J. (Lopes, L. J., expressing no opinion), that the horse which injured the plaintiff was "plant" used in the business of the defendant, and that the vice in the horse was a "defect" in the condition of such plant, within the meaning of section 1 of the act. *Held*, by the majority of the court, Lord Esher, M. R., and Lindley, L. J. (Lopes, L. J., dissenting), that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff. *Thomas v. Quartermaine*, 18 Q. B. D. 686, distinguished. By Lopes, L. J., dissenting, that there was no evidence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment. 19 Q. B. D. 187. *Yarmouth v. France*.

#### CORRESPONDENCE.

#### NOLLE PROSEQUI AND SEC. 829, CODE OF CIVIL PROCEDURE.

*Editor of the Albany Law Journal:*

I have the misfortune to differ from your judgment upon two important points referred to in your number of February 4.

First. With regard to the duties of a district attorney, you have certainly made a mistake in saying that the "power and responsibility of entering *nolle prosequi* is in and upon the district attorney." The statute explicitly requires the approval of the court before any *nolle prosequi* can be entered by a district attorney. The fact that the rule is different with regard to the attorney-general proves, I submit, that your learned correspondent is in error in saying that the "duties of the district attorney are in all cases those of the attorney-general under similar circumstances." I differ from you and your correspondent upon the main question involved, as to whether a district attorney should refuse to ask for a conviction, or argue an appeal against a conviction, simply because he cannot see that the law covers the case and authorizes such conviction. If the district attorney were thoroughly satisfied, not only that the law did not cover the case, but that the facts did not amount to proof of some guilt which ought to be punished by law, a somewhat different question might be involved, though even in that case my own clear opinion is that the duty of the district attorney would be to state for the guidance of the court the provisions of law, statutory and other, which in his judgment related to the case, and to set forth a calm and clear analysis of the facts, leaving the responsibility upon the court. To refuse altogether to take any part in the argument, or to help the court in any way, is to

my mind a very plain dereliction of duty. But when the district attorney, as in the case which you comment upon, is satisfied that the accused person is guilty of a great offense, but is only unable to construe the law as inflicting a punishment for that offense, the case is still more clear, and he ought to state his view of the law fully to the court, to aid the court in every way by collating the statutes and decisions, and then to leave the responsibility of decision upon the judges to whom it belongs. It is far too common an opinion, even among lawyers, that prosecutors and the people at large have no rights in criminal prosecutions, that all the rights to be protected are on the side of the defense, and that such defense should be given, not only the benefit of every reasonable doubt, but of every unreasonable doubt. There could not be a better illustration of the danger and unwisdom of the theory that a district attorney is to be the absolute judge whether the prosecution shall be continued or not than has been afforded in Mr. Semple's case, where four judges upon two successive arguments have unanimously held that the law was the very reverse of what Mr. Semple believed it to be. Need I point out the danger which would be involved in the precedent if Mr. Semple's action should be fully justified. Criminals already are far too apt to make themselves secure without regard to the courts, by simply fixing the district attorney. In more than one case however grand juries and courts have overruled district attorneys, and have forced to conviction against the wishes of a corrupt official. But if honest and sincere district attorneys, like Mr. Semple, are to give countenance to the theory of the absolute control of district attorneys over criminal prosecutions, quite irrespective of the opinions of the judges as to the law, and of juries as to the facts, it will in future be impossible to distinguish between honest and dishonest officials of this class.

Secondly. With regard to section 829 of the Code of Civil Procedure, excluding the evidence of an interested party on account of the death of the opposite party, I am also unable to agree with your views. I have always heartily agreed with the doctrine, that where both parties could be put upon the witness stand, the court and jury might safely be trusted to decide between their conflicting statements. But where one party is dead, it is almost impossible to provide any tests upon the examination of the adverse party, which will make it safe to trust his evidence to a jury. The temptation to perjury in such a case is obviously great, since it would be impossible to secure a conviction for the offense. But which is of more importance than even to protect the representatives of deceased parties from the effects of perjury, it is notorious that interested parties indulge their imaginations to such an extent when there is no one to contradict or correct them, that the most honest and sincere witnesses will, under the influence of strong self-interest, relate conversations which they fully believe to have taken place, but which in fact either did not take place at all, or are incorrectly stated upon vital points, so as to produce an entirely false impression. Indeed not one person in ten, however honest and conscientious, is able to give an account of a conversation to which he was a party and in which he had a strong pecuniary interest, which does not produce a strong impression. The supposed remedy by cross-examination is no remedy at all more than once in twenty times, and generally results in giving an opportunity to the witness to improve his original statement and make it much stronger than it was before. I could mention well-known instances in which interested parties have narrated a succession of statements absolutely false, known by them

to be false, and confidentially admitted by their own counsel to be utterly false, and even to have been invented after they had in private consultation with their counsel stated something entirely inconsistent therewith. And yet these witnesses, after being subjected to severe examination by the most famous members of the bar in this State, remained entirely unshaken, and indeed made their testimony more clear and consistent on their cross-examination than they did upon their original examination: so that if the adverse party had not been alive to testify in opposition to them, no human being, except those in the secret, could have seriously questioned the truth of their statements, and no jury which ever was impanelled would have hesitated to give a verdict accordingly. Yet the adverse party being alive and able to testify, not only in contradiction of these statements, but also in setting forth other and uncontradictable facts known only to him, which made these statements inconsistent, has been able to convince the jury that all this ingeniously-manufactured evidence was false. The abolition of section 829 would simply open the door to the unlimited plunder of widows and orphans. There may be other countries which are virtuous enough to endure such a strain upon justice, although I do not believe it; but of one thing I am quite certain, and that is that the State of New York has not yet reached that height of moral superiority which fits it for the submission to juries of the uncontradicted or uncontradictable evidence of interested witnesses against the estates of deceased persons.

Yours obediently,

THOMAS G. SHEARMAN.

NEW YORK, Feb. 14, 1888.

*Editor of the Albany Law Journal:*

If it is not too late to take a hand in the discussion, I would like to make a suggestion regarding the "Case of Mr. Semple," as it has been called in the discussion in your columns.

The suggestion is this: It is not infrequently the case that good lawyers think they have a good case when the courts decide otherwise, and at times they think they have no case, when the courts decide that they have.

Inasmuch therefore as the courts declare the law, and the opinions of the attorneys are of little consequence as against actual decisions of the courts, it would seem to be the duty of the prosecuting officers to endeavor to sustain the decisions of the courts, because if the law upon the facts found says a person is guilty, that person is guilty notwithstanding the opinion of the prosecuting officer that the law ought not to say so.

The province of the district attorney is to say before the trial or at the trial if the facts do not seem to warrant a verdict, that he will, by leave of the court, enter a *nolle*. But when the court holds the facts proved sufficient to warrant a verdict, and a verdict is found, the duty of the prosecutor is to endeavor to sustain the court.

As I understand Mr. Semple's position, he differed with the court below (and as it appears, with the appellate court) as to the law of the case, and therefore wished to submit to a reversal. The result proved his ignorance of the law, and that he would have been wiser to have done as one of our former judges advised me when I was, as it is said Mr. Semple now is, "rather young." His advice was this: "When the court stands by you, you stand by the court."

Yours truly,

SUBSCRIBER.

PORT RICHMOND, N. Y., Feb. 17, 1888.

# The Albany Law Journal.

ALBANY, MARCH 3, 1888.

## CURRENT TOPICS.

THAT is a very interesting, and so far as we know, a novel question put by a correspondent in another column, concerning the payment of a bank check upon a false indorsement. The exact question is: whether the payment by a bank of a check drawn upon it, made payable by the drawer's mistake to a wrong order, but presented by a person of the exact name of the designated payee, will protect the bank. The *Journal of Commerce* answers this in the negative, upon the ground that it has been decided that a payment by a bank to a wrong person of the same name—"the wrong John Brown"—will not protect the bank. This was held in *Graves v. American Exchange Bank*, 17 N. Y. 207. One judge dissented in that case, and it has been severely criticised by Mr. Morse in his work on Banking. We do not know that such a holding is wrong. The drawer or the drawee must lose; the drawer was not at fault, and so, although it is hard on the drawee, he should lose. But that is not this case. This is not the case of a payment to "the wrong John Brown." The payment was to a person exactly answering the drawer's written direction, although not answering his intention. If the right man had indorsed the check in his proper name and presented it, he could not have got the money. How can the drawee dive into the mind of the drawer and ascertain his intention, especially when there is nothing to put him on his guard? Is not the drawer estopped by his mistake? We are inclined to think so, provided, of course, that there was no circumstance of suspicion nor any thing calling for extraordinary inquiry. What more had the drawee a right to demand of the indorser than identification as a man of the designated name? Suppose we mean to draw our check in favor of William B. Astor, but instead of that we draw it in favor of Chauncey M. Depew; will any one say that the bank would not be justified in paying it to Depew, and that the bank rather than ourselves must get back the money from Depew? We are inclined to believe that it is a fair question of fact whether the bank made sufficient and reasonable inquiry, and if it did, that the drawer and not the bank must suffer the consequences of the drawer's mistake. The *Graves* case was put on the ground that title could not pass without indorsement according to the drawer's intention, but it seems to us that where the drawer has made a mistake he is estopped to deny the validity of a payment in exact accordance with his apparent intention. The nearest analogy we have found is *Lennon v. Brainard*, 86 Minn. 380, of which the syllabus is as follows: "Where a draft which was intended for 'C. A. R.' was erroneously indorsed payable to

'C. R.,' and was shown to have been inclosed in a letter duly addressed and mailed to 'C. A. R.' at his place of business in a distant city, but miscarried and was never received by him, and was fraudulently indorsed and collected by a stranger, held, in a subsequent action to recover the amount of the draft by the true owner, that in the absence of any identification of the fraudulent indorser, or that any person bearing the name 'C. R.,' so indorsed, lived in or received his mail at the time in the city to which the letter was sent, the mistake in the original indorsement was not sufficient to raise an issue for the jury upon the question of plaintiff's negligence, and a verdict was properly directed." The court said that there was no evidence of "mistake or carelessness of the plaintiff," thus implying that if there had been, the result might have been different.

Mr. Edwin F. Palmer, of Vermont, writes to us criticising some points of Mr. Justice Bowen's translation of the passage in Virgil about Fame. Being a reporter he may be deemed an authority on the great author of reports. He says "slumbering eye" is exactly contrary to the sense of the original, which is "*Tot vigiles oculi*," and that "slumbering eye" does not accord with "all-vigilant ears" and with "she never in sweet sleep closes her eyes." He is undoubtedly right. Therefore read, "sleepless" or "watchful" eye. Mr. Palmer continues: "Lord Coke quoted one of these celebrated lines of Virgil on Fame, in describing an estate in abeyance. In 4 Kent Com. 259, is the following note: 'And Lord Coke, in Co. Litt. 843b, said that an estate placed in such a nondescript situation had the quality of fame—*inter nubila caput*.' The original is, *et caput inter nubila condit*. John Locke in his treatise on the Conduct of the Understanding, section 39, quotes line 175 as follows: 'To these latter one may for answer apply the proverb, 'use legs and have legs.' Nobody knows what strength of parts he has till he has tried them. And of the understanding one may most truly say that its force is greater, generally, than it thinks, till it is put to it. *Vires que acquirit eundo*.' The line quoted by Coke is rendered by Lord Justice Bowen: 'With her forehead touches the Heaven;' and the line quoted by Locke, thus: 'And she gathers speed as she flies.' These two lines in their English dress hardly have any application to the subjects treated by Coke and Locke. It is true that this might not be a complete test, but I submit that the exact meaning of the original is not given by the translation." So we think, and we would suggest for the former, "she hides her head in the clouds," and for the latter, "and she gathers strength as she flies," or perhaps better, "and her stature grows as she flies"—the meaning being that rumors grow as they are circulated.

"It is the Law, a Story of Marriage and Divorce," is the title of a yellow paper-covered book which

we have been particularly requested to read and "notice." We have read it, and we may as well state at once all there is good in it, and have it off our mind. As an explanation of the way in which a man may have several lawful wives at once it is ingenious, and we are inclined to think its law is sound. It is fortified by foot-notes of statutes and decisions. But this explanation is confused by the plot; it might much better have been made in the form of a plain, legal treatise. There is nothing new in it. As to the book as a whole, we regard it as perfectly absurd and detestable. The heroine was married at twelve years of age to her uncle, and at the age of eighteen she discourses of love and marriage like a metaphysician and a physiologist, and she knows pretty much all knowledge. She acquired more knowledge of the law of marriage and divorce at boarding school than most lawyers have ever dreamed of. There is another woman who marries her nephew, much younger than herself. The first woman was on the point of falling in love with this last man, spite of her marriage, and because she had a secret Illinois divorce in her pocket, but she overcame her passion, and stuck to her uncle when she discovered that the fellow was flirting with his elderly aunt, whom he marries. This uncle of hers has another wife living, but the heroine euches her by her wonderful knowledge of the law. He is a political "boss," and knows Greek and quotes Plato. There is another bigamous couple in the book. The plot is extremely complicated, and it is not worth explaining. The author has some precious notions of his own, which he lugs in by the ears—and he has plenty of room for his hold. He believes that "temperance fanatics" cause drunkenness. He believes that President Garfield was a liar and that the Morey letter was genuine. He believes that it is very common for men in New York State to have several wives. He believes also that only the denizens of large cities are good, and foully abuses the inhabitants of the "rural districts." He does not believe in a "personal God." The chapters of this strange far-rago are headed with goodly morals from Proverbs, but the text smacks more of Solomon's Song. On the whole we advise our readers not to buy it, and our copy is at the publisher's service. But if any of our readers have an unholy longing for such a book they can get it from Belford, Clarke & Co., Chicago (of course), also New York.

We feel bound to chronicle every attempt at wit by the judiciary, especially by those dignified personages, the English judges. The unwonted appearance of an article of feminine apparel as the subject of a lawsuit seems to inspire them with wanton quips. A recent "bustle" case gave their lordships an excellent opportunity. Counsel argued that although braided wire had been used for cushions, its use for "dress improvers" was a novelty capable of being protected by a patent. Thereupon Lord Justice Bowen, at the very moment, per-

haps, when we were writing a tremendous puff of his lordship's exquisite and refined translation of Virgil, remarked: "Then you say that there is a difference between a pillow on which you put your head and a 'dress improver' on which you put another part of your body." And then the lord chief justice shyly suggested: "Surely a dress improver is in the nature of a cushion. If one may say so, it is in the nature of padding." This is too dreadful. We hope the English are not so irreverent as to name an article of this sort after their gracious and revered sovereign, as has been done in this country—"the Frankie C." But we democrats are extremely impudent. There is a pug in this town, belonging to a lawyer, we regret to say, which his owner has named "Grover Cleveland." But the master of the rolls is just as naughty as these other judicial triflers. In *Whitby v. Brock*, an action for an injury by being struck by fireworks, it was contended that the plaintiff took on herself the risk by going to the exhibition. Then the master of the rolls said: "You say that the lady's legs got among the fireworks, their case is that the fireworks got among the lady's legs." All this we derive from *Gibson's Law Notes*. The master of the rolls seems to be "as merry as a grig"—whatever that may be—probably "a Greek," for that people were fond of fun. At a recent banquet to Sir Henry James by the Coopers Company (they ought to have sung a stave, but they didn't) the lord chancellor, Lord Bramwell, Mr. Justice Smith and Mr. Justice Charles being present, the master of the rolls, in replying to a toast to the bench, said: "At a particular period of to-day, and at a particular function which I am told a learned judge has said is not luncheon, but which looks extremely like it, it came upon me that I might have to respond for this toast to-night. But I looked up and saw the mournful, imploring eyes of my brother, Mr. Justice Charles, and the threatening athletic arm of my brother Justice Smith, which seemed to say to me, 'master, to-night be not light or frivolous; you are about to represent us, be dignified.' I thought to myself, twenty years hence, when you are as old as I am, you will know that a person who is always dignified is never light but always dull. Dignity is dull. Notwithstanding certain things that you may have seen in certain papers, let me assure you that throughout the day her majesty's judges are dignified. Let me also tell you that their courts are always dull. However, I resolved upon this occasion to be dignified, and with the consequences I have just told you. You have drunk the health of her majesty's judges, and all kinds of beautiful things have been said to you of them, and you seem to have accepted them. All I can say is that with those beautiful things I entirely agree with you, but considering that I am one of the judges my natural modesty makes it difficult for me to go on and say that I agree with them. I have said it before, and I say it again in the presence of my young colleagues, that I believe we are all you say." This learned

gentleman is not only a good joker, but as a judge is a fit successor to Jessel, which is the highest praise that could be bestowed.

*Gibson's* also tells us of a case where "an old lady in North Wales, finding the walls of the town in which she was living placarded over with bills representing one of her own sex in a condition of extreme undress, tore the placards down with her parasol. The theatrical agent sued her for damages. She paid 1*l*. into court, and the jury found that this was adequate compensation. The agent appealed to the Queen's Bench for a new trial. Baron Huddleston inspected the bills and refused the application. The jury, he said, were quite right. The placard 'would very readily convey the idea that it was indecent. Some of the figures called Nautch girls had scarcely any drapery at all.'" The good St. Anthony Comstock should take courage from this.

#### NOTES OF CASES.

**I**N *O'Bannon's Adm'r v. Louisville & N. R. Co.*, Kentucky Court of Appeals, Jan. 12, 1888, it was held that in an action against a railroad company for the willful, negligent killing of a brakeman in the employ of the defendant, it was shown that the immediate cause of the accident was the formation, during the trip, of sleet or ice on the edge of the car, where deceased was compelled to stand while handling the brake, and that no salt or sand with which to remove it had been furnished by the company. Held, plaintiff could not recover. The court said: "No question as to defective machinery is presented. It appears from the petition that the night was 'cold and sleeting,' and we must therefore presume that the ice had formed during that night, or at least upon that trip. Conceding that at that season of the year (December), and in that locality where the accident happened, that it was the duty of the appellee to provide its trains with a proper supply of salt or sand to be used in times of snow or ice, yet this action presents no complaint upon this score, and we do not therefore decide that any such duty rested upon the company. The failure complained of is that the ice was not removed, or sand or salt put upon it. Certainly, in the absence of averment, we will not presume that in this latitude it was the duty of the company to provide other servants than the brakemen themselves to accompany the train in anticipation of unusual weather, and remove the ice or sleet from their pathway or strew it with salt or sand. One entering an employment assumes all the risks ordinarily incident to it. The increased dangers of railroading arising from rain, snow and ice, or the weather, are a part of the ordinary risk incident to the business. To hold railroad companies liable to their employees on account of dangers

arising from the elements would lead to the running of trains in good weather only, thus seriously interfering with the travel and business of the country. We are inclined to think that it was the duty of the deceased to provide for his own safety by removing the ice, or putting the salt or sand upon the spot where he had to stand to operate his brake; but whether this be so or not, the danger was one ordinarily incident to the business; snow or sleet was likely to fall at any time during its prosecution, thus adding more or less to the risk. The train might start upon its trip when the day was pleasant, and before reaching its destination, and during the following night, ice and snow come, thus increasing the ever-existing danger to those operating it. Thus it seems to have been in this instance, and the deceased when he entered upon the employment knew all this, and must be held to have assumed the risk as one ordinarily incident to it." We recollect a case where the plaintiff claimed that the railroad ought to prevent the ice at the side of the track, but without success. See 28 ALB. LAW JOUR. 403; *Piquegno v. Chic., etc., Ry. Co.*, 52 Mich. 40; S. C., 50 Am. Rep. 248.

In *Dwenger v. Geary*, Indiana Supreme Court, Jan. 20, 1888, it was held that where land is conveyed to the bishop of the Roman Catholic church to be used as a cemetery for the interment of Catholics of a city within his diocese, and the land is laid off into lots immediately after the conveyance, and is consecrated as a Catholic cemetery under the laws, and by the rites and ceremonies of the church, and is used as a Catholic cemetery for a period of years, it passes under the dominion of the church functionaries, and no one has a right of burial in such cemetery unless, under the laws or polity of the church, he is a Catholic in good standing at the time of his death, and of this the ecclesiastical authorities are the exclusive judges. Elliott, J., said: "The sepulture of the dead has in all ages of the world been regarded as a religious rite. The place where the dead are deposited all civilized nations and many barbarous ones regard, in some measure at least, as consecrated ground. In the old Saxon tongue the burial ground of the dead was 'God's Acre.' One who buys the privilege of burying his dead kinsmen or friends in a cemetery acquires no general right of property; he acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as is connected with the right of sepulture. Beyond this his title does not extend. He does not acquire, in the strict sense, an ownership of the ground. All that he does acquire is the right to use the ground as a burial place. In discussing this subject it was said by the court in *Page v. Symonds*, 63 N. H. 17; S. C., 56 Am. Rep. 481: 'Such right of burial is not an absolute right of property, but a privilege or license to be enjoyed so long as the place continues to be used as a burial



ground, subject to municipal control, and legally revocable whenever the public necessity requires. It is a right of limited use, for purposes of interment, which gives no title to the land. *Craig v. Church*, 88 Penn. St. 42; S. C., 32 Am. Rep. 417; *Windt v. Church*, 4 Sandf. Ch. 471. A grant of a lot in a public cemetery is said to be analogous to the renting of a pew in a meeting-house, and the right of burial in a public burial ground in some respects resembles the right of a pew tenancy. *Jones v. Towne*, 58 N. H. 462; S. C., 42 Am. Rep. 602; *Shier v. Church*, 109 Mass. 1-21; *Kincaid's Appeal*, 66 Penn. St. 411; 5 Am. Rep. 377. To the cases cited by the opinion from which we have quoted may be added *Richards v. Church*, 32 Barb. 42, and *In re Church*, 3 Edw. Ch. 155. It may therefore be safely affirmed that John Geary secured nothing more than the privilege of using the lot set apart to him as a burial place, for so far there is neither doubt nor difficulty. The privilege of burial which John Geary secured was not a general one, since by the express words of the deed by which the ground was set apart for a cemetery its use for a burial place was restricted to Catholics. There was in the deed itself a clear and positive limitation to a class, and the courts cannot be in doubt as to the class intended by the parties to the deed. It cannot be unknown to any court that the term 'Catholics,' when employed by Catholic grantors, as it was here, in a deed to a high officer of a great and powerful church that has existed for many centuries, means members of the Catholic church whose ecclesiastical head is the pope. We cannot therefore doubt that only Catholics had the right of interment in the cemetery of St. Mary's, even if we should confine our view to the words of the deed."

In *Appeal of Detrick*, Pennsylvania Supreme Court, Jan. 3, 1888, a husband and wife had been bred to farm life, and she had sometimes done outdoor work. He was a tenant farmer of limited means, and compelled her to help care for two large gardens, to milk five cows, and to churn by hand, and tried to compel her to do field work. He provided but a frugal table, though as good as the average in their condition in life, but occasionally scolded, and she suffered some hardships. *Held*, that his conduct did not afford her ground for divorce as for "cruel and barbarous treatment, endangering her life." The court said: "She says in her testimony that she took care of two large gardens; had to milk five cows and churn by hand, besides all the work of a farmer's wife, including the care of a young child. That she did some work in the garden is not denied, but there was proof that she did not do it all. It may be conceded that her life was not an easy one; that of a farmer's wife seldom is. There are many women who could do it with ease; there are many others who could not. We must look at the situation of the parties; at the manner in which they have been brought up, and

the amount of labor they have been accustomed to from childhood. Both libellant and respondent had been brought up to farm life, and trained in a school of hard work and economy. The respondent had not only been accustomed to the indoors or household work of a farm, but sometimes to the outdoor work where hands were scarce. There is no evidence that she ever complained to her husband that her work was too heavy; on the contrary, she says that she did not. She did say she asked for a little girl to help during the 'berry season,' but in this she was contradicted by her husband. This branch of the case amounts to but little, and may be dismissed. It is plain to my mind that the principal grievance with the respondent was that her husband did not supply the table with sufficient liberality. This allegation rests almost entirely upon her own testimony, and she is not only contradicted by her husband but by several witnesses, work people and others, who had more or less means of knowledge. That the libellant provided a plain table, not overloaded in any respect, may be conceded; but that it was about as good as the average farmer's table of persons of their condition in life is fully proved. Philip Smith, a witness called for the respondent, said: 'The most I did was to help get wood, chop wood—summer wood. The living sometimes was better than others while I was there. Sometimes we had mush and milk for supper, and I call that poor; we had mush and milk for supper; we had potatoes, meat, etc., for dinner, usually. I think the meat was pickled pork, boiled with potatoes. For breakfast I cannot just tell what we generally had; have forgotten. The living was satisfactory to me; I never made any complaints. I call that poor living when they have mush and milk for supper, and pickled pork boiled with potatoes for dinner, because I don't like them. I think we had tea and coffee sometimes.' This is not a luxurious diet, but we must remember that the libellant was a young tenant farmer of limited means; was probably living in the manner to which he had been accustomed in his father's house; was a hard-working, industrious and thrifty man, and more than usually economical in his habits. The foregoing, with some evidence of occasional scolding and fault-finding, was the substance of the libellant's case, if we except an allegation that the libellant would not allow her to go to church, and treated her family coolly. But as they lived together but three months, and during that time libellant took her to church at least once, these matters are of little importance in the case. While the evidence discloses some disagreements and annoyances, and perhaps some hardships on the part of the respondent, there is not enough to justify her precipitate abandonment of her husband. The marital contract is one of a binding and solemn character, and it is no light reason—no slight faults or incompatibility of temper—which will justify one of the parties thereto in rescinding it."

**MASTER AND SERVANT—NEGLIGENCE—  
ASSUMPTION OF RISK—PROMISE TO  
REMEDY DEFECT.**

SUPREME COURT OF INDIANA, DEC. 27, 1887.

INDIANAPOLIS & ST. L. RY. CO. v. WATSON.

The night-watchman of a freight-yard where there were many tracks and switches, whose duty it was to go over the yard at all hours of the night, after twice applying for a lantern as necessary for his safety and receiving promises of one, made a third complaint, and was told that he would be lucky if he got one in a month. He testified that he resumed work not expecting to get one within a month. *Held*, that the promises were not definite enough to relieve him from the consequences of his assumption of the risk.

**A**CTION by Watson, plaintiff, to recover for personal injuries against the defendant railroad company. Defendant appealed.

*J. T. Dye*, for appellant.

*Shepard, Elane & Martindale*, for appellee.

**ELLIOTT, J.** Stated in a condensed form, the material allegations of the complaint are these: The appellant maintained a freight-yard near the city of Indianapolis, in which there were many tracks and switches, used for handling locomotives and cars. On the 15th day of October, 1885, the appellee was in the service of the appellant as a night-watchman. His duties, as such watchman, were to go about and over the yard at all hours of the night, and look after the property of his employer, and to wake up, at the proper times, its employees. The appellant knew that it was necessary that the watchman should be provided with a light, in order that he might properly discharge his duties, and at the same time protect himself from danger, yet the appellant refused to provide a light. A day or two after the appellee had been so employed, he notified his employer that it was necessary for him to have a light in order to discharge his duties and to protect himself. His employer promised to procure a light for him in a short time, and requested him to continue in the performance of his duties. Relying on this promise, he did continue in the appellant's service, but the light was not provided as promised. On the night of November 1, 1882, he was injured, without any fault on his part, while in the discharge of his duties, and his injury was caused by the wrong and negligence of the appellant in failing to provide him with a lantern.

The fourth instruction given by the court read thus: "The general rule is that a servant who before he enters the service knows it to be hazardous, or voluntarily continues his service, without objection or complaint, when he has such knowledge, is presumed to contract with reference to the state of things as they are known to him; and if he knows that the continuance of such service exposes him to constant and certain danger, the servant in such cases takes the risks upon himself, and in case he suffers injury thereby, he waives all claims for damages against his master for such injury. As has been said in argument, 'the master is not required to take better care of his servant than he takes of himself.'" Appellant's counsel dissect this instruction, and seizing on the words, "without objection or complaint," assailed it as erroneous. This course cannot be successfully pursued. The instructions must be taken in connection with the others of the series, and cannot be considered as standing alone. An instruction is not to be judged by taking mere fragments, dislocated from their proper connections, nor is one instruction to be taken as complete in itself. This instruction must, as is well

settled, be taken as an entirety, and in connection with the others referring to the same subject, and immediately connected with it. *City v. Gaston*, 58 Ind. 224; *Deig v. Morehead*, 110 id. 451.

We must therefore take the fourth instruction in connection with that bearing upon the same subject, which is as follows: "(6) To the general rule I have announced in relation to a servant who with a knowledge of the dangers of the service continues in it, there is at least this exception, that if a servant knows that his service is dangerous, and that he has not been provided with proper means or implements for the reasonably safe performance of the duties of his employment, and makes complaint to his master, who promises that suitable and proper implements shall be provided him to render his service less dangerous, then such servant may continue in the service a reasonable time, and may recover for an injury sustained by him within such time, if on account of the master's negligence in failing to supply the means of avoiding danger, the injury results; provided such servant, at the time of the injury, was not guilty of any negligence which contributed to produce the injury. His care must be also proportioned to the danger; when the one is increased, the other must be also. Yet all that is required is ordinary care under the circumstances of the case. And you must determine from the evidence in the case what would be a reasonable time within which he might continue in the master's service under said promise, if any was made, and also what would be ordinary care; that is, such care as an ordinarily prudent and cautious person would exercise under the circumstances of the case. The want of such care is what the law terms negligence."

If these instructions, taken together, express the law, then the appellant has no just cause of complaint, even though the isolated clause which counsel detach and assail should in itself be regarded as an inaccurate statement of the law. Our conclusion is, that when the instructions are so taken, they express the law as favorable to the appellant as it had a right to ask. The first of these instructions does not assert that those employees who continue in the master's service, "without objection or complaint," do not assume the usual risks of the service. It simply asserts that all who do continue, "without objection or complaint," do assume the risks incident to the service; but it by no means asserts that those who do complain and object do not also assume those risks. Possibly the instructions standing alone may be incomplete; but it cannot be justly said to be erroneous, since it may be true that all who continue in a service without objection do assume the risks, as well as those who do make the objections. But however this may be, it is sufficiently evident that the fourth instruction is made complete by the sixth, and there is therefore no available error.

The next step takes us into a field of stubborn conflict. There are authorities holding, that where the employee objects to the safety of the appliances furnished him, the employer is liable if the employee is injured while in the employer's service, and within a reasonable time after urging the objection. *Manufacturing Co. v. Morrissey*, 22 Am. Law Reg. 574; *Thorpe v. Railroad Co.*, 89 Mo. 650; 58 Am. Rep. 120; 2 Thomp. Neg. 1009. A careful examination of the other authorities relied on by appellee's counsel has satisfied us that they do not decide all that it is asserted that they do. In *Holmes v. Clarke*, 6 Hurl. & N. 349, the master neglected to fence a dangerous place, as an act of parliament required him to do, and a servant was awarded a recovery for injuries caused by this negligence. Leaving out of consideration the element introduced by the positive legislation, although it is by no means clear that the act of parliament did not

exert an important influence, we yet conclude that the case does not sustain appellee's position. *Railway Co. v. Locke* (this term.) This conclusion we rest upon the words of the opinion in that case, cited by counsel: "Where machinery is required by an act of parliament to be protected, so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, after it has become dangerous, in consequence of the protection being delayed or withdrawn, and complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant, he is responsible." The promise of the master formed, it is obvious, an important factor in the case, and exerted a controlling influence on the judgment of the court. There are some expressions in *Greene v. Railway Co.*, 31 Minn. 248; S. C., 47 Am. Rep. 785, that seems to support the appellee's contention, but the ultimate decision is against him. It was there said: "If the emergencies of the master's business require him temporarily to use defective machinery, we fail to see what right he has, in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when notwithstanding the servant's objection to the machinery, he has requested or induced him to continue in its use under a promise thereafter to repair it." At another place the court, in speaking of the general rule, asserts that the master is liable, where the servant gives notice of the defects, and the "master thereupon promises, that they shall be remedied." The utmost that can be deduced from the case under immediate mention is that the servant may continue in the service a reasonable time after the promise to make the machinery or appliances safe, and that if he is injured within that time he may maintain an action. The cases of *Kroy v. Railroad Co.*, 32 Iowa, 357; *Greenleaf v. Railroad Co.*, 33 id. 52; *Muldrow v. Railway Co.*, 39 id. 615; *Lumley v. Caswell*, 47 id. 159, and *Way v. Railroad Co.*, 40 id. 341, do not, as we understand them, go further than to hold that the master is not liable where the servant continues in his service with notice of its danger, unless he has induced the servant to do so by an express or implied promise. In *Way v. Railroad Co.*, *supra*, it was held error to refuse an instruction containing this clause: "If a brakeman on a railroad knows that the materials with which he works are defective, and he continues his work, without objection, and without being induced by the master to believe that a change will be made, he is deemed to have assumed the risks of such defects." This we think implies that there must be a promise, either in express words or arising, by fair implication, from the conduct of the master. Going back to the case of *Kroy v. Railroad Co.*, we find the principle upon which the subsequent decisions rest, for they are all built upon that case. It was there said: "Another important modification of the liability of a master for an injury to an employee, which is sustained by an almost unbroken current of authority in this country and in England, is that if a servant knows that a fellow-servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risks of such defects." This ruling certainly does not sustain the appellee's contention that if an objection and protest are made the master becomes liable. The case of *Snow v. Railroad Co.*, 8 Allen, 441, cannot be regarded as in point on this question, nor can the case of *Car Co. v. Parker*, 100 Ind. 181, for both of these cases simply affirm the general rule, that it is the duty of the master to provide his servants with a safe working place, and with

safe machinery and appliances. In *Patterson v. Railroad Co.*, 76 Penn. St. 389, there was an express promise on the part of the master, and that fact gives a controlling force to the decision there made. We are referring to Dr. Wharton's statement that: "In this country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant upon the use of such machinery, if he has notified the employer of such defects, or protested against them in such a way as to induce a confidence that they will be remedied." Whart. Neg. (1st ed.), § 221. If it were conceded that this is a correct statement of the law, still it would not supply a premise for the conclusion that an objection or protest exempts the servant from the general rule that he assumed the risk; for it is implied that something must be done by the master to induce the belief that the defect will be remedied, and it is difficult to conceive what other thing than a promise, express or implied, can be regarded as sufficient to induce such a belief. We find on examining the later edition of Dr. Wharton's book that he adds, to what is copied from the earlier edition by counsel, these words: "Such confidence being based on the master's engagements, either express or implied," and that he modifies the statement in other respects. Whart. Neg. (2d ed.), § 220. This author is indeed inclined to condemn the exceptions to the general rule, even as he states it, for he says: "The only ground on which the exception before us can be justified is, that in the ordinary course of events, the employee supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employee sees that the defect has not been remedied, and yet, deliberately and intelligently, exposes himself to it." Whart. Neg. (2d ed.), § 220.

The rule which we regard as sound in principle, and supported by authority, may be thus expressed: The employee who continues in the service of his employer, after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent, the exception cannot exist. In support of our conclusion we refer to these authorities. *Russell v. Tillotson*, 140 Mass. 201; *Lynch v. Manufacturing Co.*, 9 N. E. Rep. 728; *Halt v. Nay*, 10 id. 807; *Bussell v. Manufacturing Co.*, 48 Me. 113; 77 Am. Dec. 212, 218, and authorities, note; *Railway Co. v. Drew*, 59 Tex. 10; 48 Am. Rep. 261; *Webber v. Pifer*, 38 Hun, 353; 83 Alb. Law J. 64; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Wood Mast. & Serv.* 21; *Beach Neg.* 372. The rule absolving the servant from the assumption of risks is an exception to the general rule; for the general rule is that the servant assumes all the ordinary risks of the service he enters. There must therefore be some ground for the exception, and the only solid ground that can be found is the inducement held out by the agreement of the master. If this be not so, then an employee at his first entrance into the service might object and protest, and successfully claim that he was exempt from the perils of the service. Or if our theory be not sound, a mere complaint or objection might in effect overthrow the general rule, and this would result in confusion and uncertainty. We can see no way to hold that the servant is exempt from the known risks of his service, where there is no express or implied contract on the part of the master, without completely nullifying the general rule. The servant is at liberty to quit the service, and if he remains after knowledge of its danger, he assumes the risks, even though he

may object or complain, unless he is induced to continue by a promise of the master to remove the cause that augments the danger; since if this be not true, it must be true that any objection or complaint, made at any time, will absolve him from the risk, and this conclusion cannot be sustained. As the exception concedes and tries the general rule, it cannot be allowed to destroy it; for if it were allowed to do this, it would cease to be an exception. *Sweeney v. Envelope Co.*, 101 N. Y. 520; S. C., 54 Am. Rep. 722.

The evidence in this case, as counsel concede, shows that a lantern was essential to the service the appellee undertook to perform; that as the appellee knew, without the lantern, the act which he was engaged in performing subjected him to great danger, and he was injured while attempting to perform it. Nor does the counsel for the appellant, as we understand his argument, contend that it was not the duty of the company to provide the lantern, nor does he question the authority of the person to whom the appellee made application for one to act for the company in such cases. The central position assumed is that the evidence does not show any promise. This is the question presented to us, and the question to which we at this point limit our decision. We are therefore required to determine whether there is evidence fairly supporting the verdict on this subject, and in doing so we must take that which the jury deemed credible and trustworthy.

[Omitting this question.]

We must affirm that an employee who continues in the employer's service after he has acquired knowledge of its great and immediate dangers, assumes the risk, unless he is induced to continue in the service by a promise, express or implied. We do not depart from the rule that an employer is bound to use ordinary care to provide a safe working place, and safe appliances for his employees; but we do hold that the rule cannot apply to such a case as this. The rule itself we regard as firmly settled. *Car Co. v. Parker*, *supra*; *Krieger v. Railway Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, id. 212. It is the application of the rule, as made by the appellee, and not the principle it asserts, that we deny. The rule asserts that the machinery and appliances must be kept safe, as against those who do not know of their unsafe condition, but does not apply to those who know of its unsafe condition, and still continue in the service without being induced to do so by the employer's promise. The employee has a right until he acquires knowledge of danger, or by reasonable care might acquire such knowledge, to act upon the assumption that his employer will use ordinary care to provide safe appliances; but when he becomes fully informed of the danger, he can no longer act upon this assumption. Knowledge on his part puts an end to his right to assume that the master has done his duty. It is manifest that one who knows that a duty has not been performed, cannot reasonably assert that he acted upon the assumption that it had been performed. The case therefore falls within the rule that the employee assumes the risk of all the dangers of which he has knowledge. *Pennsylvania Co. v. Whitcomb*, *supra*; *Railway Co. v. Datley*, 110 Ind. 75; *Railway Co. v. Stupak*, 108 id. 1; *Unback v. Railway Co.*, 88 id. 191.

Where there is a promise to repair which induces the employee to continue in the service, then doubtless he may, for a reasonable length of time, rely on the promise, and continue in the service, unless the danger of continuance, without a removal of the cause of it, is so great that a reasonably prudent man would not assume it. *Hough v. Railway Co.*, 100 U. S. 215; *Looman v. Brockway Co.*, 3 Robt. 74; *Railroad Co. v. Jewell*, 46 Ill. 99; *Crichton v. Keir*, 1 Macph. 407. Some of the cases go further, and assert that the promise of

the employer exonerates the employee entirely, even though the continuance in the service is known to him to be constantly and immediately dangerous. *Railroad Co. v. Gildersleeve*, 33 Mich. 133. We are not inclined to adopt this view. Our opinion is that if the service cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employee, he assumes the risk if he continues in the service. It is a fundamental principle in this branch of jurisprudence that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employee must not subject himself to a great and evident danger, since this he cannot do without participating in the employer's fault. The community have an interest in such questions, and that interest requires that all persons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death, or serious bodily injury, sins against the public weal. All must use ordinary care to avoid known and immediate danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop; and he cannot pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur. Proceeding upon a somewhat different line of reasoning, other courts have reached the same conclusion as to that which we are led. *Ford v. Fitchburg R. Co.*, 110 Mass. 240; S. C., 14 Am. Rep. 398; *Crichton v. Keir*, *supra*; *Couch v. Steel*, 3 El. & Bl. 402. The general principle which rules here is strongly illustrated by the cases which hold that a passenger cannot recover for an injury received while acting in obedience to the directions of the conductor in whose charge he is, where obedience leads to a known danger which a prudent man would not voluntarily incur. *Railway Co. v. Pinchin*, 13 N. E. Rep. 677; *Railroad Co. v. Carper*, id. 122. If the rule prevails in such cases, much stronger is the reason why it should prevail in a case like this, where ordinary care is required of employer and employee alike, while in the class of cases referred to, the highest degree of practicable care is required of the carrier, and only ordinary care exacted of the passenger. It is probably true that the promise of the employer, when relied on by the employee, will rebut a presumption of contributory negligence, in cases where the danger is not great and immediate; but this presumption yields whenever it appears that the employee voluntarily incurs a known and immediate danger of so grave a character that it would deter a reasonably prudent man from incurring it.

In the case before us, the testimony convincingly shows that the appellee knew the danger he encountered, and it shows also that it was so great and immediate that a prudent man would not have assumed the risk it created. It results, that even if it were conceded that there was a promise, and a reliance on it, there could be no recovery.

Reluctant as we are to set aside a verdict which has passed the scrutiny of a learned trial court, we cannot do otherwise in this instance.

Judgment reversed.

[See *Thorpe v. Mo. Pac. Ry. Co.*, 89 Mo. 650; S. C., 59 Am. Rep. 120, and note, 125; *Eureka Co. v. Bass*, 81 Ala. 200; S. C., 60 Am. Rep. 152, and note, 157.—ED.]

**CONSTITUTIONAL LAW—INTER-STATE COMMERCE—REQUIRING LOCOMOTIVE ENGINEERS TO BE LICENSED.**

SUPREME COURT OF THE UNITED STATES, JAN. 30, 1888.

**SMITH V. STATE.**

The statute of Alabama requiring locomotive engineers in that State to be examined and licensed, by a board appointed by the governor for that purpose, is constitutional.

**I**N error to the Supreme Court of the State of Alabama.

*E. L. Russell, B. B. Boone and E. M. Watson*, for plaintiff in error.

*T. N. McClellan*, Attorney-General, for defendant in error.

This is a writ of error bringing into review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of the City Court of Mobile. The proceeding in the latter court was upon a writ of *habeas corpus* sued out by the plaintiff in error, seeking his discharge from the custody of the sheriff of Mobile county, in that State, under a commitment by a justice of the peace upon the charge of handling, engineering, driving and operating an engine pulling a passenger train upon the Mobile and Ohio Railroad used in transporting passengers within the county of Mobile, and State of Alabama, without having obtained a license from the board of examiners appointed by the governor of said State, in accordance with the provisions of an act, entitled "An act to require locomotive engineers in this State to be examined and licensed by a board to be appointed by the governor for that purpose," approved February 28, 1887, and after more than three months had elapsed from the date of appointment and qualification of said board. The plaintiff in error, upon complaint, was committed by the examining magistrate to the custody of the sheriff to answer an indictment for that alleged offense. The ground of the application for discharge upon the writ of *habeas corpus* in the City Court of Mobile was, that the act of the General Assembly of the State of Alabama, for the violation of which he was held, was in contravention of that clause of the Constitution of the United States which confers upon Congress power to regulate commerce among the States.

**MATTHEWS, J.** The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States.

There are many cases however where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or inter-State commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which perhaps is not to be found in any single and exact rule of decision. Some general lines of discrimination however have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. "But upon an examination of the cases in which they were rendered," as was said in *Sherlock v. Alling*, 93 U. S. 99, 102, "it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuits in particular channels, or conditions for carrying it on." In that case it was held that a statute of Indiana, giving a right of action to the personal representatives of the deceased where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio river, engaged in inter-State commerce, and did not amount to a regulation of commerce in violation of the Constitution of the United States. On this point the court said (p. 103): "General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-State commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. \* \* \* And it may be said generally that the legislation of a State, not directly against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit." In that case it was admitted, in the opinion of the court, that Congress might legislate, under the power to regulate commerce, touching the liability of parties for marine torts resulting in the death of the person injured, but that in the absence of such legis-

lation by Congress, the statute of the State giving such right of action constituted no encroachment upon the commercial power of Congress, although, as was also said (p. 103): "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-State commerce, the persons engaged in it, and the instruments by which it is carried on."

The statute of Indiana held to be valid in that case was an addition to and an amendment of the general body of the law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of inter-State commerce. This general system of law, subject to be modified by State legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the National Government nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several States in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the Legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication.

It is among these laws of the States therefore that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in the business of inter-State commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This indeed was the very point decided in *Sherlock v. Alling*, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of inter-State or foreign commerce notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same juris-

dition, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?

It is that law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged; which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible.

But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or inter-State commerce, then in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and inter-State commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced covers the subject.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the States in which they sit, or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co. v. Lockwood*, 17 Wall. 457, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State.

In cases also arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the State courts than in other cases. *Swift v.*

*Tyson*, 16 Pet. 1; *Carpenter v. Providence Washington Insurance Co.*, id. 495; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 id. 14.

There is however one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction, which therefore is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore v. United States*, 91 U. S. 270.

The statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would indeed be competent for Congress to legislate upon its subject-matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or inter-State commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States, (Rev. Stat. tit. 52, §§ 4399-4500), and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate inter-State commerce. In *Sinnot v. Davenport*, 23 How. 227, this court adjudged a law of the State of Alabama to be unconstitutional, so far as it applied to vessels engaged in inter-State commerce, which prohibited any steamboat from navigating any of the waters of the State without complying with certain prescribed conditions, inconsistent with the Act of Congress of February 17, 1793, in reference to the enrolment and licensing of vessels engaged in the coasting trade. In that case it was said (p. 243): "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When therefore an act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way, and this without regard to the source of power whence the State Legislature derived its enactment."

The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority.

But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of inter-State commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States.

No objection to the statute, as an impediment to the free transaction of commerce among the States, can be

found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of \$5 to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required before obtaining his license to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer, and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.

Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the State or in inter-State commerce, to provide and furnish itself with locomotive engineers of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss are caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of congressional legislation.

The statute in question further provides that any engineer licensed under the act shall forfeit his license if at any time found guilty by the board of examiners of an act of recklessness, carelessness or negligence while running an engine, by which damage to person or property is done, or who shall immediately preceding or during the time he is engaged in running an engine be in a state of intoxication; and the board are authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequently to it. The eighth section of the act declares that any engineer violating its provisions shall be guilty of a misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than \$50 nor more than \$500, and also that he may be sentenced to hard labor for the county for not more than six months.

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other States, should, while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State, if they declare the offense in such a case to be manslaughter. The power to punish for the offense after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which if performed would prevent the commission of the larger offense.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards



and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

In conclusion, we find therefore first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of inter-State commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and thirdly, that so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally and remotely, and not so as to burden or impede them, and in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged to contravene the Constitution of the United States, to be a valid law. The judgment of the Supreme Court of Alabama is therefore affirmed.

Mr. Justice Bradley dissented.

#### SPECIFIC PERFORMANCE OF CONTRACTS FOR SALE OF STOCK—WHEN DECREED.

PENNSYLVANIA SUPREME COURT, JAN. 3, 1888.

##### APPEAL OF GOODWIN GAS-STOVE AND METER CO.

The specific performance of a contract for the purchase and sale of stock of a private corporation will be decreed in a case where it is plain that the remedy at law is inadequate or the computation of proper damages impracticable.

**B**ILL in equity, wherein H. Dumont Wagner was complainant, and the Goodwin Gas-Stove and Meter Co. and William Wallace Goodwin, defendants.

Answers having been filed, the case was referred to John Scott, Jr., Esq., as examiner and master, who reported the facts to be as follows:

In the year 1879 Goodwin, the defendant, who had bought out his former business partner, was desirous of forming a corporation for the purpose of carrying on the business in which he had been engaged, viz., the manufacture of meters and gas machines. He associated with him Wagner, the plaintiff, who agreed to put in a certain amount of capital, and to endeavor to induce others to take stock in the concern. Wagner was a gas engineer, and the relations between him and Goodwin had been very friendly. Their negotiations resulted in a written agreement, under date of

July 1, 1879, whose provisions may be summarized as follows:

1. It was agreed to organize a corporation under the general law, to be called the "W. W. Goodwin Meter Company," with a capital stock of \$200,000—2,000 shares at \$100 par value.

2. Goodwin was to put in the meter works, No. 1016 Filbert street, machinery, etc., for which he was to receive 1,050 shares of the stock of the corporation. Wagner agreed to pay into the corporation \$7,000 in cash, for which he was to receive 100 shares of stock, full paid.

3. The sum of \$7,000 to be paid by Wagner, to be secured to him, and ten per cent at least per annum profit thereon guaranteed to him, either by the issue to him of preferred stock to that amount or by the bond of the company, with warrant of attorney attached, or in some other manner to be mutually agreed upon between the parties thereto.

4. Goodwin shall be president of the said corporation, at a salary for the first year of \$6,000; and Wagner shall be appointed the superintendent of the said corporation, under a written contract for five (5) years, at an annual compensation or salary of at least \$1,800.

Wagner, the plaintiff, went abroad on company business at once, but returned before the incorporation. In his absence, in pursuance of this agreement, Samuel Wagner, as attorney, paid to Goodwin the \$7,000, and received his receipts therefor; Goodwin giving, as the security required under the agreement, his judgment note for \$7,000.

The corporation was formed in December, 1879, under the title of "The Goodwin Gas-Stove and Meter Company," in which both Messrs. Goodwin and Wagner were named as incorporators. It was soon found impracticable to issue preferred stock to secure Wagner in his investment of \$7,000, and after consultation and negotiation the second agreement was entered into, of date January 27, 1880. Samuel Wagner, Esq., acted as the attorney for both parties; their agreement was communicated to him, and he prepared a draft. The parties met again and the draft was submitted to them. Some additions were made, at the suggestion of Goodwin, who was really the active party in making the agreement; and the agreement was then engrossed and executed as follows:

"MEMORANDUM OF AGREEMENT, made this twenty-seventh day of January, A. D. eighteen hundred and eighty (1880), between William W. Goodwin, of the one part, and H. Dumont Wagner, of the other part. Whereas, by agreement in writing dated the first day of July, A. D. 1879, the said H. Dumont Wagner did agree to contribute the sum of seven thousand dollars to the capital of a corporation, to be formed for the purpose of purchasing and succeeding to the business of the firm of W. W. Goodwin & Company, and the said W. W. Goodwin did agree to secure the payment of the said sum of seven thousand dollars, and ten per cent annual profit thereon, by preferred stock or by the bond of the said corporation, or in some other manner to be mutually agreed upon. And whereas, the said H. Dumont Wagner has agreed to release his claim for security of the said sum of seven thousand dollars in consideration of the transfer and sale to him, upon the terms hereinafter mentioned, of seventy shares of the the capital stock of the Goodwin Gas-Stove and Meter Company, a corporation erected under the laws of the Commonwealth of Pennsylvania, and succeeding to the business of the said W. W. Goodwin & Company. Now this agreement witnesseth that the said William W. Goodwin, for and in consideration of the premises, and of the sum of one dollar to him in hand paid by the said H. Dumont Wagner, does covenant, promise and agree that he will forthwith transfer and assign to the said H. Dumont Wagner seventy

shares of the capital stock of the said Goodwin Gas-Stove and Meter Company held by him, the said William W. Goodwin, it being distinctly understood that the object of this transfer and agreement is to appoint the said H. Dumont Wagner trustee of the said amount of stock, and that he shall have the option of purchasing the said seventy shares of stock, or any part thereof, and of paying for the same at its par value of one hundred dollars a share, in installments of not less than such amounts as the said stock shall from time to time earn in dividends exceeding six per centum per annum. And the said H. Dumont Wagner does covenant, promise and agree to paid the said William W. Goodwin all dividends on the said stock not exceeding six per centum until the stock is paid for, and to pay him all dividends on the said stock in excess of six per centum per annum, on account of the purchase of the stock at its par value, provided that one share of the said stock shall become absolutely the property of him, the said H. Dumont Wagner, for each one hundred dollars so paid on account of the purchase. Provided however that the said H. Dumont Wagner shall not be in any way liable for the price of the said stock unless the dividends thereon shall exceed six per centum, and then only to the extent of such excess, and that he shall not be liable for interest on the price of the stock in case the dividends thereon shall not amount to six per centum per annum in excess of the amount said stock shall earn. And provided also that the said H. Dumont Wagner shall have the right to terminate this agreement at any time, in which case he shall reassign the said stock to the said William W. Goodwin, excepting so much thereof as shall have been paid for in the manner hereinbefore set forth. And it is hereby further agreed that the said William W. Goodwin shall have the right to vote at all meetings of the said corporation upon so much of said stock as shall not have been paid for under the terms of this agreement. And further, that the provisions of this agreement shall be binding upon and available in favor of the executors and administrators of both the parties hereto."

Goodwin was the president of the company, and by successive elections he has continued in the office. Wagner was elected president of the company, and was duly re-elected in 1881 and 1882.

At the time of the execution of the agreement of January 27, 1880, Wagner cancelled and delivered up to Goodwin his (Wagner's) copy of the original agreement, and at the same time cancelled and surrendered up the judgment note for \$7,000 which Goodwin had given as the security Wagner was to get under said original agreement. These instruments are still in Goodwin's possession, and having been produced upon call, were in evidence. Goodwin retained his copy uncanceled.

In July, 1882, Wagner presented a request for an indefinite leave of absence. This was refused, and he presented his resignation on the ground of ill health. This was accepted by the board of directors with expressions of regret. At this meeting Goodwin was present, favored the action of the board, and personally dictated the letter accepting Wagner's resignation.

Wagner never signed any written contract to act as superintendent of the company for five years; no such contract was ever presented to him for signature; nor was he ever asked to sign such an agreement; nor does it appear that at any time subsequent to the first agreement he ever expressed any intention of so doing.

After the dividend was declared in 1881, Wagner called upon Goodwin to transfer to him such shares as had been earned under the agreement. Goodwin promised to attend to it, but appears never to have

done so. Subsequently demands were made each year that the company should transfer to Wagner personally such shares of stock as he was entitled to under the agreement, and to Wagner, as trustee, the balance of said seventy shares.

All these demands were refused, until September 24, 1884, when Goodwin, upon the demand of Wagner by his attorney, for a compliance with the agreement of January 27, 1880, and a transfer of such shares of stock as he was entitled to thereunder, delivered to Wagner the certificate for nine shares of stock and his check as president for \$45; the statement of the secretary of the company being sent showing that up to July 1, 1882, seventy shares of the capital stock of the company had earned the sum of \$945 in excess of six per cent.

Wagner accepted these nine shares on account, but declined to receive the check. The nine shares were never transferred to Wagner on the books of the company. The company having declined to honor Wagner's demands further, the present suit was brought. Wagner alleged in his bill that Goodwin intended by the above agreement to sell to him the said seventy shares of stock, and that he, Wagner, had immediately exercised his option, mentioned in said agreement, and had thereby purchased the whole of the said seventy shares of stock, to be paid for as provided in the agreement, and that it was at all times understood between the parties that all dividends paid to the said Goodwin upon the said stock were to be considered as having been paid him by Wagner, in accordance with the terms of the above agreement.

The bill prayed on account of the dividends of the seventy shares, payment of what might be found due Wagner, that the company be decreed to permit the transfer on their books, and to pay Wagner the dividends in future.

The answer of the company admitted some of the facts in the bill, denied knowledge or information as to others, admitted the refusal to permit transfers to be made of the seventy shares, except said nine, and averred willingness, when the controversy between the plaintiff and defendant Goodwin should be settled by the court, to do, or refrain from doing, as to said seventy shares and the dividends thereon, as the court may decree.

The answer of Goodwin admitted the incorporation of the company and the issue of the seventy shares of stock as alleged, and the agreement of January 27, 1880; but averred that the full consideration therefor was not set forth therein, but that by the agreement of July 1, 1879, plaintiff was to be superintendent of the corporation, under a written contract, for five years, at an annual salary of \$1,800, and was to serve for that full term, which was part of the consideration of both the agreements.

The plaintiff was appointed superintendent January 1, 1880, but declined to serve after June 30, 1882. That his, Goodwin's, object and special consideration in making the arrangement, and agreeing to sell his stock to plaintiff on such easy terms, was a desire to be relieved of the care of looking after the factory and its details, and to secure plaintiff's services as superintendent, and to make him feel a greater interest in the business, apart from his salary.

That it was not his, Goodwin's, purpose to sell the whole of the said seventy shares to plaintiff otherwise than as above stated; and that had he, Wagner, remained and discharged his duties as superintendent, according to agreement, and made any effort to pay for said shares, they would have been transferred to him; but that he was not to continue to have the option, for an indefinite period, of paying for said stock. Goodwin also averred that plaintiff had an adequate remedy at law.

It was admitted that Goodwin received all the dividends declared upon said stock, and that they were as follows: "In 1881, twelve per cent; in 1882, twelve per cent; in 1883, nine per cent; in 1884, ten per cent; and in 1885, eight per cent.

It was also admitted that the stock of said company is not now and never has been placed upon the list of stocks purchasable in the Stock Exchange of the city of Philadelphia or elsewhere, and that the same cannot be purchased in the market.

Upon the bill and answers and admitted facts as above set forth, the master reported that the points of issue are resolved into the following: (1) Whether Samuel Wagner, Esq., is a competent witness to prove the understanding of the parties at the time of the agreement of January 27, 1880, was made. (2) Whether the agreement that the plaintiff should act as superintendent of the company for five years was a part of the consideration of the second agreement, to-wit, January 27, 1880. (3) Is the cause one calling for relief in equity, or will equity decree specific performance of such a contract?

Upon these points the master reported the following as his conclusions:

1. That the said Samuel Wagner, Esq., did not act as attorney in this matter, but as a legal scrivener; that he did not therefore become the repository of confidence within the rule of the law, and was therefore a competent witness.

2. That the plaintiff's contract to act as superintendent for five years was not an express consideration in the second contract; that no evidence was produced to induce a reformation of that contract; that that agreement was made on the conditions and consideration therein expressed, and that Wagner had exercised his option to purchase the stock.

3. That the nature of the stock was such that no just and exact ascertainment of damages could be made in an action at law.

The master then calculated that the excess of dividends over the six per cent required to be paid Goodwin under the agreement, was sufficient to purchase in all thirteen shares of stock. He accordingly recommended a decree that Wagner should deliver to Goodwin the certificate for the nine shares which he admitted receiving, and that the company should transfer upon the books of the said company thirteen of the said seventy shares to Wagner in his own right, and fifty-seven of the seventy shares to him as trustee, and shall issue and deliver to the said Wagner certificates of ownership of the said shares of stock in accordance with the said two several transfers. And further, that the said company should be enjoined at all times hereafter from paying to said Goodwin any and all dividends which shall have been or shall hereafter be declared from and after March, 1885, upon the said seventy shares of stock, or any part or parcel thereof. And that the said company shall pay over all dividends which shall hereafter be declared upon the said seventy shares of stock to the legal holder or holders thereof at the time such dividend shall be declared. And that the said Goodwin shall pay over to the said Wagner in cash the sum of \$316 lawful money of the United States of America, together with the lawful interest thereon for the dividends received by him on the said thirteen shares of stock and not paid over.

Samuel C. Perkins, for appellants.

Henry J. McCarthy and William Nelson West, for appellee.

CLARK, J. It is a well-settled doctrine that equity will not, in general, decree the specific performance of contracts concerning chattels; the reason assigned for

this is that their money value, recovered as damages, will enable the party to purchase others in the market of like kind and quality. In the United States, as well as in England, contracts for public securities, government stocks, bonds, etc., will not be specifically enforced; no especial value attaches to one share of stock, or one bond, over another; the money which will pay for one will as readily purchase another. To this rule there are doubtless exceptions, but the rule is so general in its application that the exceptions are but few. *Stayton v. Riddle*, 34 Pitts. Leg. Jour. 176. Although a different doctrine may perhaps exist elsewhere as to contracts concerning the stocks and bonds of merely private or business corporations, in the United States the principle seems to be well established by the weight of authority, that they will not be carried into effect in equity except under very special circumstances, such as render the remedy at law wholly inadequate, or damages impracticable. *Pom. Eq. 1402*. The same general principles govern in contracts for the sale of stocks of this character, as in the sale of other personal property; if the breach can be fully compensated, equity will not interfere, but when, notwithstanding the payment of the money value of the stock, the plaintiff will still necessarily lose a substantial benefit, and thereby remain uncompensated, specific performance may be decreed. *Waterman Spec. Perf.*, § 19.

In *Dungan v. Doheart*, an unreported case, decided *at nisi prius*, and referred to in a note to *Railroad Co. v. Stitche*, 11 Week. Notes, 325, Mr. Justice Agnew, after referring to the case, said: "In an ordinary contract for the sale or transfer of stock, where there is no fiduciary relation between the parties, no peculiar circumstances attending the stock, and no trust declared or arising by operation of law, or other fact in the contract, which would make a verdict for damages inadequate relief, there is no reason for specific performance other than in every case of a sale of a chattel. The non-delivery or refusal to transfer can be easily compensated in damages."

The doctrine has in some cases been carried to this extent—that if a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed. *Abb. Pr. (N. S.) 300*; 81 *How. Pr. 38*; *Treasurer v. Commercial Co.*, 23 *Cal. 390*. This would appear to have been the view entertained by Mr. Justice Thompson in *Sank v. Union Street Ship Co.*, a case tried *at nisi prius*, and reported in 5 *Phila. 499*. "I incline much," says the learned justice, "toward the distinction made by Vice-Chancellor Shadwell in *Duncuft v. Albrecht*, 12 *Sim. 189*, between public stocks of a known market value and stocks of a particular company, with none in market, and recognized by the lord chancellor in *DeGex & Jones, 27*. The former resembles ordinary property with known values, while the latter resembles more the case of specific or peculiar property, with a value contingent or uncertain, which it has been held, the only adequate remedy is to give the thing itself. 1 *Lead. Cas. in Eq. 757*, and 1 *Eq. Juris. 724*." Whether the distinction taken in the case cited may ultimately be recognized to the full extent stated, we cannot say, but the general underlying principle seems to be established, that in a sale of stocks in a merely private or business corporation, where from any proper cause it is plain that the remedy at law is inadequate or damages impracticable, specific relief may be awarded. As to the case now under consideration, it is fair to assume that the security for the principal investment for \$7,000, and for the dividends upon it at the rate of ten per cent per annum, was the inducement for Wagner to enter into the contract of July, 1879, and when on 27th January, 1880, he agreed to waive his right to

that security, it was under the special inducement that he was to have, in addition to the shares he then had, seventy other shares on the terms of the latter contract; shares that would ultimately be paid for, if paid at all, out of their earnings, in installments equal to the excess of the dividends thereon over six per cent in each year. The contract of 1880 disclosed the special terms upon which the investment was actually made. Wagner was to receive, not only the dividends upon the shares he purchased with his original investment, but was entitled also from time to time to such of the seventy shares in dispute as would be paid for by the excess stated; and the title to the seventy shares was actually transferred to him, in trust, under the contract. He held the shares as a trustee; if transferred on the books the shares must necessarily have been transferred to him on the footing of that trust; as they were earned however they were to become Wagner's own shares, freed from the trust, the dividends thereon payable to him, and he was entitled to have such further assurance from Goodwin as would liberate them from the trust, and authorize the transfer to him absolutely on the books of the company.

The case is in some respects a peculiar one. Wagner already has the title to these seventy shares; he holds the certificate transferred in writing, and delivered to him by Goodwin; but the transfer being subject to a trust imposed upon them by the parties, he cannot avail himself of them as his own until they are relieved of that trust. The transaction is not therefore a simple sale and purchase of stocks. The question presented is, whether or not the terms of the trust have been satisfied as to the whole or any part of the seventy shares to which Wagner already has title; if they have, he is entitled to a transfer to his own use; if they have not, he must still hold the title subject thereto. It cannot be doubted, we think, that equity has jurisdiction in such a case, not only against Goodwin, but against the company, especially as the shares have no recognized market value, and their value, even if ascertained, would not necessarily be against either be the proper measure of damages. The seventy shares, having been transferred to Wagner in trust under the agreement, he was entitled as the trustee to a transfer on the books, and as dividends were declared from time to time, he was entitled at his option to an absolute transfer discharge of the trust for as many shares as were paid by the excess of the dividends over six per cent annually.

We are of opinion however that the agreement of 27th January, 1880, was only a modification of a particular part of the previous contract of 1st July, 1879; the preamble which precedes the paper of 1880 clearly shows that the special provision in the first contract, for security to Wagner, was the special subject-matter of modification in the second. But the clause which provides that Wagner "shall be appointed the superintendent of the said corporation under a written contract for five years, at an annual compensation or salary of at least eighteen hundred dollars," would seem to be a provision made in the interest and favor of Wagner. Wagner does not agree in express terms to serve as superintendent for five years, unless perhaps under a written agreement to that effect, and no such agreement was ever made; on the contrary, he was elected from year to year, and had no assurance whatever of his continuance in office for five years. The company was put under no obligation to retain him as superintendent, and he was under no obligation to continue in the company's service. The parties, we think, did not intend their contract to be a guarantee in this respect; if the condition and ownership in the stock had been such that Goodwin was not elected president of the company at a salary of \$6,000, did the

parties contemplate that Wagner should be held responsible to Goodwin for that result? We think not; yet this feature of the contract was as certainly obligatory upon one party as upon the other. Moreover when Wagner tendered his resignation it was, without complaint of any one, accepted; Goodwin himself was present, favored this action of the board, and personally dictated the very complimentary response which was given to Wagner's request. He cannot now complain of that which at the time he approved, and which was consummated by the company, not only without any objection whatever, but with his full consent.

In the view which we have taken of this case, the testimony of Samuel Wagner becomes unimportant, and the question of his competency of little consequence in the case. Samuel Wagner was however without doubt a competent witness. If he was the legal adviser of any of these parties, he was the adviser of both of them, for the advice he gave was given to both, and the papers he prepared were prepared at the instance of both; the matters communicated to him by either one of the parties were communicated in the presence of the other; they were not in their nature private, and therefore could not have been the subject of any confidential disclosure. Wagner seems to have acted merely as a scrivener, and although of the legal profession, his testimony would not thereby be rendered incompetent.

Upon an investigation of the whole case, we are of opinion that the decree of the learned court is right.

The decree is therefore affirmed, and the appeal dismissed at the cost of the appellants.

Sterrett, J., absent.

[See *Johnson v. Brooks*, 93 N. Y. 337.—Ed.]

## NEW YORK COURT OF APPEALS ABSTRACT.

ACCOUNT STATED — ACTION ON — PLEADING AND PROOF.— Plaintiff sued on account stated. Defendant pleaded general denial, and testified that at request of plaintiff's husband he had opened accounts in the names of her two sons and herself, but all were really one account with her husband. *Held*, that under the pleadings he could introduce any testimony tending to establish these facts, and that he had no stated account with her. Jan. 17, 1888. *Feld v. Knapp*. Opinion by Earl, J.

CONSTITUTIONAL LAW—VESTED CORPORATE RIGHTS — ELECTRICAL SUBWAYS — MUNICIPAL REGULATION—TITLE OF ACT — AMENDMENT—TAXATION.—(1) Laws N. Y., 1885, chap. 490, providing for the appointment of a board of commissioners of electrical subways in cities exceeding 500,000 inhabitants, and declaring that no company shall construct any conduits without the approval by such board of the plans submitted to it, is a police regulation, and is not unconstitutional as impairing the rights of a corporation which had previously received permission from the city council. (2) It is not in violation of Const. art. 3, § 16, which provides that local or private laws shall not embrace more than one subject. (3) It does not re-enact the law of 1884, chap. 534, relating to the same subject, but is simply an amendment thereto, and is not therefore, in violation of Const. art. 3, § 17, providing that no act shall be passed which shall provide or enact that any existing law shall be made a part of or applicable to said act, except by inserting it in such act. (4) Nor is that part of the act which provides that the cost and expenses of the board of commissioners shall be assessed by the comptroller of the State, when paid by him, upon the company desiring to put its wires underground, unconstitutional as levying a tax. Jan. 17, 1888. *People v. Squire*. Opinion by Ruger, C. J.

**CONTRACT—PARTIES—WHO LIABLE.**—Plaintiffs were subcontractors for the building of a portion of the defendant's railroad, and had performed work under instructions from the engineer in the employ of the contractor in charge of the work, and under agreement with the engineer that such work should be taken outside of the contract, but no written order was given as required by the contract in such a case. *Held*, that defendant was not responsible for such work; and the fact that it took possession of the road when completed, and had the benefit of the work, did not amount to a ratification. For these conclusions, the cases of *Homersham v. Water-Works Co.*, 6 Exch. 137; *Thayer v. Railroad Co.*, 24 Vt. 440; *Vanderwerker v. Railroad Co.*, 27 id. 125, 130; *Herrick v. Belknap's Estate*, id. 673; 1 Redf. R. (5th ed.), 431, 433. Jan. 17, 1888. *Woodruff v. Rochester & P. R. Co.* Opinion by Earl, J.

**EMINENT DOMAIN — RIGHT TO COMPENSATION — FAILURE OF ASSESSOR TO REPORT.**—The effect of the statute "to widen and improve North Second street in the city of Brooklyn" (Laws N. Y., 1871, chap. 559), was to deprive the owner of lands taken for such purpose of his estate therein, and such owner could bring action for the value of the lands, notwithstanding the board of assessors, whose duty it was to assess the benefits before the condemnation would be complete, had never performed that duty, or made any report thereon. Jan. 17, 1888. *McCormack v. City of Brooklyn*. Opinion by Danforth, J.; Ruger, C. J., and Earl, J., dissenting.

**EVIDENCE — EXPERTS — FOUNDATION FOR TESTIMONY—INSURANCE—BURDEN OF PROOF—EVIDENCE—"PORT RISK."**—(1) In an action on a marine policy a witness was called as an expert to testify as to the value of a ship at the time of her loss. He testified that he had been a ship broker and owner for fifteen years, in which time he had bought and sold over 200 ships and steamers; that he had seen the ship in question once, and knew her from the published reports in the *American Lloyds*, the *Green Book*, and the *Record Book*, which were used by underwriters and merchants to guide them in the valuation of vessels; that he had never made a personal examination of her. *Held*, a competent witness. It is true that the witness had no knowledge of this vessel, based upon any personal examination, and that substantially all his knowledge was derived from the reports, books, and records to which he referred. But there was evidence showing her age, tonnage, condition and character. There was evidence also tending to show that those books and records contained a full and accurate description of her character, condition, age, tonnage, and the material of which she was made; and that they were commonly referred to by underwriters, merchants and persons buying and selling ships, for the purpose of ascertaining the condition and description of the ships; and it is to be inferred that their standing in the market and among business men depends somewhat, if not largely, upon those records. They were regarded as sufficiently reliable for the guidance of underwriters, merchants, and buyers and sellers of ships; and they have been so frequently before the courts that we may take judicial notice of the fact that they are referred to by business men for the purpose of ascertaining the condition, capacity, age, and value of ships. It was not a sufficient objection to the competency of this witness that he had no personal knowledge of the ship. An expert is qualified to give evidence as to things which he has never seen. He may base an opinion upon facts proved by other witnesses, or upon facts assumed and embraced within the case. Questions may be put to him assuming the facts upon which he is asked to base his judgment and express an

opinion. In this case, the question put to the witness might have assumed the age, tonnage, character, condition, and quality of the vessel, and he could have been asked to give an opinion as to her value based upon such facts; or the facts relating to the vessel appearing in the books and records which he referred to, and which were also proved upon the trial, might have been assumed in the question put to the witness, and he asked to give an opinion as to her value based upon them. The plaintiff was not asked to pursue this course in putting his question, and there was no objection that the witness did not have sufficient facts before him upon which to base his opinion as to the value of the ship. The sole objection was that he did not have personal knowledge of the vessel. It seems to have been assumed that the character, condition, and quality of the vessel were sufficiently proved, and that all the conditions existed which would qualify the witness to give an opinion as to value, except that of personal knowledge, and that as we have seen, was not necessary. (2) The exclusion of evidence defining "port risk," in the absence of any explanation of the purpose of the question, is not error. The attention of the court was called to *Nelson v. Ins. Co.*, 71 N. Y. 453, where it is stated in the opinion that "port risk in a marine insurance policy means a risk upon a vessel while lying in port, and before she had taken her departure upon another voyage." That decision having been made several years before this policy was issued, we think it just to hold that the term must have been used in the policy with the meaning thus given to it by this court. If it was the purpose of the question to show that it did have such meaning, then it was wholly unnecessary. If it was intended to show that it had any other or different meaning, or if there was any other purpose, the intent and purpose should have been disclosed to the court, so that the proper ruling could have been intelligently made. It is impossible to perceive what the object of the question was, as at the time of her destruction, the vessel was in the port of New York, and had not yet started upon her voyage. She was not rigged for the voyage, and her crew had not yet been shipped. It is impossible to perceive why the destruction of the vessel under such circumstances was not a "port risk in the port of New York;" and the trial judge did not err, in the absence of any further information than was given him, in so holding. But we think that in all policies issued in this State since the opinion in the case referred to was pronounced and published, these words should have the meaning given them therein, as it is most probable that such would be the meaning attached to them by the parties using them. (3) The defendant's counsel requested the court to charge the jury as follows: "The burden of proof is on the plaintiffs to establish to your satisfaction that the loss of this vessel took place without any agency or instrumentality to the plaintiffs, direct or indirect," and that "the plaintiffs must establish this fact, that the loss was without any agency or instrumentality of theirs, by a clear preponderance of credible testimony." The court refused to charge either of these requests, and to the refusals the defendant excepted; and it is now claimed that in this the court erred. The rule contended for by the defendant would be quite unfair and impracticable in the trial of insurance cases. Where there is an insurance against a loss by fire, and it is proved or admitted that the property insured has been destroyed by fire, the loss is brought literally and exactly within the terms of the policy. If in such a case, the insurance company claims to be exempt from paying the sum insured, because there has been a breach of some condition contained in the policy, or the violation of some obligation or duty imposed upon the insured by the law or contract, the burden rests upon it to estab-

lish the facts which it thus relies upon as a defense to the claim under the policy. Every presumption of law is against the commission of a crime, and in all forms of action, civil and criminal, every person is presumed to be innocent until his guilt has been established by at least a preponderance of evidence. These humane rules of law would be violated if a person suing upon a policy insuring his property against fire was bound to assume the burden of showing that he was not guilty of the crime of burning his own property. The defendant making that allegation against him must bear the burden of establishing it. *Tidmarsh v. Insurance Co.*, 4 Mason, 439; *Fiske v. Ins. Co.*, 15 Pick. 810; *Murray v. Ins. Co.*, 85 N. Y. 236; *Hellman v. Lazarus*, 90 id. 672; 1 Greenl. Ev., § 35; *Roscoe Ev.*, 52. The burden in such a case to prove the crime of incendiarism should rest upon him who alleges it, just as the burden of proving insanity rests upon him who assails a will, deed, or other instrument upon that ground. 1 *Williams Ex'rs* (6th Am. ed.), 24; 1 Redf. Wills, chap. 3, § 4; *Schouler Wills*, §§ 147, 173; 1 Greenl. Ev. (Redf. ed.), § 80. Here the burning and destruction of the vessel are admitted in the answer, and the defendant makes the allegation and tenders the issue that the fire was caused by the insured; and in such a case it is a just rule to hold that the defendant, by the issue it has thus made, has assumed the burden of maintaining its allegations. (4) The conclusion of the testimony of a witness, called as an expert to testify as to the value of a ship at the time of her loss, and who had not been on board of her for more than five years—the testimony showing that within that time a large amount of repairs had been made upon her—is not reversible error. If the evidence had been received it certainly would not have been entitled to very much weight with the jury. While it would not, we think, have been erroneous to receive and submit the evidence to the jury for what it was worth, we cannot say, as matter of law, that the judge exceeded the bounds of a reasonable discretion in holding that the witness was not qualified as an expert to give an opinion as to the value of the ship at the time she was burned. The rules determining the subjects upon which experts may testify, and prescribing the qualifications of experts, are matters of law; but whether a witness offered as an expert has those qualifications is generally a question of fact to be decided by the trial judge; and it has been held that his decision in reference thereto is not reviewable in an appellate court. *Sarle v. Arnold*, 7 R. I. 582; *Dole v. Johnson*, 50 N. H. 455; *Jones v. Tucker*, 41 id. 546; *Wright v. Williams*, 47 Vt. 222. Without going the full length of these cases, it is sufficient to hold here that the decision of the trial judge in such a matter should not be held to present an error of law, and on that account be reversed, unless it is against the evidence, or wholly or mainly without support in the facts which appear. Here, we think, it was a fair matter for the judgment of the trial judge whether this witness had the requisite knowledge and qualifications to give an opinion as an expert as to the value of this ship. Jan. 17, 1888. *Slocovitch v. Orient Mut. Ins. Co.* Opinion by Earl, J.; Andrews and Peckham, J.J., dissenting.

**INSURANCE — BENEFICIARY OF LIFE POLICY — "GUARDIAN" — NOTICE OF DEATH — COMITY — WILL — SEAL.**—(1) A provision in a policy of life insurance provided that under certain circumstances, payment of the amount upon the death of the insured should be made to the guardian of his children for their use if they were under age. *Held*, that this meant to the legally qualified guardian, and none other was capable of receiving the amount so as to relieve the obligation of the insurance company. (2) A guardian *ad litem* is

a proper person to receive payment of such policy. (3) One who is not legally and duly appointed guardian but who is nominally acting as such guardian, has sufficient authority to give a valid notice of the death of the insured, and the claims of the beneficiaries. (4) A debtor in New York cannot invoke the statute of that State defining the powers of domestic guardians, to justify a payment to a supposed guardian appointed under the New Jersey Laws. (5) The addition of a seal to an instrument intended for a will does not change the character of the instrument so as to make it a deed. Jan. 17, 1888. *Wuesthoff v. Germania Life Ins. Co.* Opinion by Andrews, J.

**JUSTICES OF THE PEACE—JURISDICTION—LIMITATION OF ELECTION—DE FACTO—CONVICTION BEFORE.**—(1) The act of the Legislature incorporating the village of Canton (Laws N. Y. 1845, chap. 192; as amended, Laws 1859, chap. 70; as further amended by Laws 1870, chap. 263), and providing for the election of a justice of the peace for that village, is intended to prescribe a limited jurisdiction for such justice co-extensive with the boundaries of the village, and is therefore constitutional. (2) The Constitution of New York permits the election in villages of a judicial officer of inferior and local jurisdiction, and it is immaterial that such officer is called "a justice of the peace." (3) Where it did not appear affirmatively that no ballots were cast for a certain person for an office, and there was evidence to indicate that probably some were so cast, and where many were cast for the person for an office designated in nearly the same way as the office in question, and it further appeared that the person had entered upon the duties of the office, and in pursuance thereof convicted one who was accused of a crime, *held*, that the office was held by an officer *de facto*, and the prisoner should not be discharged. Jan. 11, 1888. *People v. Terry.* Opinion by Peckham, J.

**LANDLORD AND TENANT — COVENANT TO BUILD — ASSIGNMENT OF LEASE — RELEASE — AGREEMENT — PROVISION AGAINST SUBLETTING — BREACH — KNOWLEDGE OF LESSOR — COVENANT TO RENEW LEASE — ENFORCEMENT — COSTS — ACTION ON "INSTRUMENT IN WRITING" — SPECIFIC PERFORMANCE OF COVENANT.**—(1) Plaintiff's assignor leased certain property from defendants for a term of years with an agreement to build within six years. After the lease had been assigned, with defendants' consent, to plaintiff, defendants executed a release to the original lessor and his assigns "from the covenant and agreement to build in said lease contained." *Held*, that it wholly discharged plaintiff from any obligation to build. (2) On expiration of the lease the lessor was to buy the building or renew the lease. *Held*, that the lessee still had the right to build, and having done so, became entitled to the exercise of the option by the lessor. (3) The lease was conditioned against assigning or subletting. He erected an apartment house, lived on one floor himself, and for several years paid thereat which was received without objection. *Held*, that by such a subletting, with the knowledge of the lessor, he had not forfeited his rights under the lease. The construction of the house indicated that it was designed for permanent use as an apartment house. It is consistent with the circumstances and with fair dealing to construe the acts and silence of the defendant as an assent that the somewhat peculiar interest created by the letting of apartments from time to time for brief periods was not an underletting or parting with any interest in the demised premises, within the meaning of the covenant. The interest of an occupier of an apartment is peculiar. He has simply the right to occupy designated rooms during the time specified; but a destruction of the building ends the right (*Kerr v. Bank*, 3 Edw. Ch. 315; *Graves v. Bordan*, 29 Barb

100), and thereafter he would retain no interest in the lot. Letting rooms to lodgers is held not to be a breach of a covenant against underletting. *Doe v. Laming*, 4 Camp. 73; see also *Wilson v. Martin*, 1 Denio, 602; *White v. Maynard*, 111 Mass. 250. The plaintiff at all times occupied a part of the premises, and the defendant had the protection which his personal oversight would afford. It would be inequitable to permit the defendant to insist upon a forfeiture, when by its conduct it had sanctioned the construction which the plaintiff had placed upon the covenant. (4) In an action to compel a lessor to execute a renewal of a lease, a judgment providing for the appointment of appraisers, according to the terms of the original lease, and that upon their report the lessor shall pay for the improvements or execute the new lease, as provided in the old lease, is proper. (5) An action to compel specific performance of the covenants of a lease is not such an action to procure an adjudication upon "an instrument in writing" as to entitle plaintiff to statutory costs under Code N. Y., § 3252. Jan. 17, 1888. *Smith v. Rector of St. Philip's Church*. Opinion by Andrews, J.

— COVENANT TO REPAIR—NOTICE—[APPEAL—ESTOPPEL BY CONDUCT BELOW.—(1) A covenant in a lease by the landlord to "put and keep" a roof in repair, when the circumstances indicate no probability of its being out of repair when the lease was made, does not imply a confession that it was so, and does not impose the duty of repairing without notice to the landlord of a necessity for it. (2) Where a party, by his requests for instructions, concedes the necessity of a notice to repair on the part of a tenant to a landlord, he cannot upon appeal take a different and inconsistent position. Jan. 17, 1888. *Thomas v. Kingsland*. Opinion by Finch, J.

NEGOTIABLE INSTRUMENT—DEFENSE OF GAMBLING CONSIDERATION.—Plaintiff won \$500 at cards from defendant. Defendant, on August 7, 1883, offered, if plaintiff would give him accommodation note to defendant's firm, to procure its discount, and pay plaintiff in cash. This was done. The note was renewed from time to time until October 27, 1884. On March 1, 1884, defendant gave plaintiff a note payable on demand, to protect plaintiff against the note then outstanding, made by the latter. Plaintiff's last note went into the hands of an innocent holder, and plaintiff paid it. *Held*, that the note of March 1, 1884, was valid. We do not perceive how this note is affected with any illegality. The gambling debt was absolutely paid on the 7th of August, 1883, and thereafter had no existence whatever. The Revised Statutes—3 Rev. Stat. (7th ed.), p. 1963, § 14—provide that every person who shall, by playing at any game, \* \* \* lose at any time or sitting the sum of \$25 or upward, and shall pay or deliver the same or any part thereof, may within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost and paid or delivered from the winner thereof." Under this statute the defendant could have sued the plaintiff at any time within three months to recover the money thus paid. It is true that the money was procured upon the credit of the plaintiff and the firm of Goodwin, Cross & Co.; but it was nevertheless the money of the defendant at the time it was paid to the plaintiff, and the plaintiff thereafter simply bore the relation of accommodation maker of the note which he delivered to the defendant. The note in suit was given to him, not for the gambling debt, but to indemnify him against his liability upon his accommodation note. The note given by the plaintiff on the 7th of August, 1883, to the defendant was discounted, not for the plaintiff's accommodation, but for the accommodation of the defendant or his firm.

Suppose there had been no law which rendered the gambling debt illegal, and the plaintiff, at any time after he had received the payment made to him on the 7th of August, had sued the defendant for the debt, could not the defendant have successfully maintained that it had been paid? Or suppose, that instead of owing the plaintiff \$500 for a gaming debt, he had owed him \$500 for borrowed money, and had paid the \$500 under precisely the same circumstances which exist in this case, would not the debt have been discharged? And could the plaintiff afterward have maintained an action against the defendant for the \$500? Clearly not. The consideration upholding this note is not the gambling debt, but the money paid by the plaintiff upon the accommodation note. After the defendant gave this note, his sole obligation to the plaintiff was to pay the accommodation note, or in default of such payment, to pay this note. It may be said that if the plaintiff can maintain this action he has successfully evaded the statute which declares that "all things in action \* \* \* given or executed by any person, when the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatever, \* \* \* shall be utterly void," etc. 3 Rev. Stat. (7th ed.), p. 1963, § 14. But it is frequently true that statutes enacted for the public welfare may be successfully evaded without any violation of them. Jan. 17, 1888. *Hoyt v. Cross*. Opinion by Earl J.; Danforth, J., not voting, and Peckham, J., dissenting.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

CRIMINAL LAW—RES GESTE—DECLARATIONS.—On the trial of an indictment for murder, evidence was received of a declaration made within a few moments of the firing of the pistol shot which caused the injuries of which deceased died. The declaration tended to identify the defendant as the perpetrator of the crime, and was made when there was danger of the occupants of the house being burned, and in reference thereto, a fire having been started in one of the rooms. *Held*, the declaration was part of the *res gestæ*. What length of time had elapsed after Mrs. Peek was shot before the door was opened and the declaration made does not certainly appear, but it could have been but a few moments. Several pistol shots had been fired, and all of the persons in the house declared they were shot. A fire had been lighted in the adjoining room, and the danger of being burned existed when the door was opened and the declaration made. It seems to us quite clear that the declaration constitutes a part of the transaction, and was clearly admissible in evidence. It is true the pistol shots had been fired a short time before, but the fire was then burning. The danger of being burned actually existed at that time, and the declaration was made in reference to the fact. In *Com. v. McPike*, 3 Cush. 181, the deceased ran from a room where her husband, the defendant, was, to a room in the same house, a story above the one occupied by herself and her husband, and knocked at a door, crying "Murder." A witness saw the deceased was wounded, and started for a physician. She met the defendant and another witness on the stairs, and the latter went for a watchman, and upon returning, went immediately to the room where the deceased was, and there found her bleeding profusely. She said John (meaning defendant) had stabbed her. The defendant objected to such declaration. The objection was overruled, and it was held the ruling was right, on the ground that it was so recent after the receiving of the injury as to jus-



tify the admission of the evidence as a part of the *res gesta*. See also *Driscoll v. People*, 47 Mich. 419; *People v. Vernon*, 35 Cal. 49; *Harriman v. Stowe*, 57 Mo. 93; *Insurance Co. v. Mosley*, 8 Wall. 397; *State v. Driscoll*, 34 N. W. Rep. 423. The declaration was admissible in evidence. Iowa Sup. Ct., Dec. 15, 1887. *State v. Schmidt*. Opinion by Seever, J.

**DAMAGES—TRESPASS—CUTTING AND CARRYING AWAY TIMBER—GOOD FAITH.**—In an action for the value of timber cut and carried away from the land of another, if the defendant was an unintentional or mistaken trespasser, or honestly and reasonably believed that his conduct was rightful, the measure of damages is the value of the timber at the time it was taken; that is, standing on the ground. By the case of *Whitney v. Huntington*, 33 N. W. Rep. 561, and *Nesbitt v. Lumber Co.*, 21 Minn. 491, as the latter is limited or qualified by the former, this court has adopted the following rules upon this subject as applicable to cases of this kind: First, where the defendant is a willful trespasser, the full value of the property at the time and place of demand; second, where he is an unintentional or mistaken trespasser, or as expressed in *Whitney v. Huntington*, where he honestly and reasonably believed that his conduct was rightful, the value of the property at the time it was taken; that is, the value of the timber standing; third, if the defendant is an innocent purchaser from a willful trespasser, the value of the property at the time of such purchase. These rules may not be logically consistent with each other, but in practice they perhaps work as equitably as any that could be adopted, and seem to be in accord with the prevailing doctrine both in this country and in England. See *Wooden-Ware Co. v. U. S.*, 106 U. S. 432. It was also decided in *Whitney v. Huntington*, *supra*, that actual notice of the adverse claim of the true owner is not inconsistent with good faith on the part of the trespasser, using the term in the sense in which it is often used, of the absence of willful or intentional wrong or bad motive. Such honesty of purpose is not inconsistent with knowledge of all the facts out of which the claim of the true owner arises, but where a party acts under an honest and reasonable mistake as to the legal rights which grow out of these facts. Such was the case of *Whitney v. Huntington*, *supra*; also in *Jegou v. Vivian*, 6 Ch. App. 742. In the exclusion of evidence the court below proceeded upon the idea that notice of plaintiff's claim was inconsistent with good faith in the sense referred to, or what amounts to the same thing in this case, that such notice necessarily rendered defendants willful trespassers. The evidence as to the honesty of purpose and intent on part of defendants ought to have been admitted, and the question at least submitted to the jury, under proper instructions. Minn. Sup. Ct., Dec. 23, 1887. *King v. Merri-man*. Opinion by Mitchell, J.

**PARTNERSHIP—PAYMENT OF PRIVATE DEBT WITH FIRM ASSETS—NOTICE TO CREDITOR.**—Plaintiff, trustee of a savings bank, took from one of the defendants, in payment of his individual note, a check of the firm of which he was a partner, knowing that the signature and writing in the check was in the handwriting of the maker of the note. Held, that these facts were notice to the plaintiff that defendant was applying the firm assets to his private use, and they took the risk of the assent of the other partner. Penn. Sup. Ct., Nov. 11, 1887. *Graham v. Taggart*. Opinion per Curiam.

#### OBITUARY.

Sir Henry James Sumner Maine, K. C. S. I., who died at Cannes, of apoplexy, on February 3, was born

in 1822, and was the eldest son of James Maine, M. D. He was educated at Christ's Hospital, and at Pembroke College, Cambridge, where he was Brown's medalist for the Greek ode, Camden's medalist, and chancellor's medalist for English verse, Craven scholar and Brown's medalist for the Latin ode and epigrams. He took his degree in 1844 as senior classic, senior chancellor's classic medalist, and senior optime in mathematics. He obtained a tutorship of Trinity Hall, the college of which he was afterward elected master. He held his tutorship for two years, and in 1847, at the unusually early age of twenty-five, he was appointed regius professor of civil law. He held this office until 1854, when he relinquished it in order to undertake the post of reader of jurisprudence at the Middle Temple, having been called to the bar in 1850, being a member both of Lincoln's Inn and of the Middle Temple. He was elected a bencher of the latter inn in 1873. In 1856 he contributed to the "Cambridge Essays" an essay on "Roman Law and Legal Education," but the work which made his name was the "Ancient Law, its Connection with the Early History of Society, and its Relation to Modern Ideas," published in 1861. In 1882 he was appointed legal member of the council of the governor-general of India. His other works included the "Lectures on Village Communities," and the "Early History of Institutions." He was married in 1849 to his cousin, the daughter of Mr. George Maine, of Kelsie, in Roxburghshire. Lady Maine, not being herself in good health, was hastily summoned to Cannes on Friday in last week, when the seizure occurred. They had three children, a daughter who died young, and two sons who survive. After a special service held in the College Chapel at Trinity Hall, Cambridge, on February 9, the Rev. H. Latham, the vice-master, delivered an address, in the course of which he said: "Sir Henry Maine never thrust himself forward; there was no dogmatism about him, neither was there the least trace of intellectual coxembry or of looking down on tastes and pursuits which differed from his own. He never said a caustic or an unkindly thing. Even in those days he was remarkable for a mental quality for which I have no English word. He would lay his mind so close against the matter that was presented to him that he seemed to take off from it an impression accurate even to the faintest lines. His reputation," he concluded, "will grow with years, because he has enriched the world with new ideas and pointed out sound methods of carrying on investigation. He helped men to understand their institutions, and started them on right tracks of thought. Many names which now are as well known as his will pass out of mind while his will be left to fame.—*London Law Journal*."

#### CORRESPONDENCE.

##### PREGNANCY FROM RAPE.

*Editor of the Albany Law Journal:*

The case of *Young v. Johnson*, 46 Hun, 164, cited by you in the LAW JOURNAL of Saturday last, and commented upon with your usual sagacity, and as I believe, in this instance at least, with accuracy, recalls to my mind a similar case that fell under my own observation.

Seventeen years ago a very worthy woman from an adjoining town, and in humble life, applied to me for counsel. I knew her well, and was sure that she would state nothing but the truth. The poor woman, with many tears and sobs, made the following statement: She said that her daughter—a pleasant, fresh-looking

country girl of sixteen years of age, and present with the mother—was of feeble intellect (a fact well known), and that she had been complaining of ill health for the past four or five months; that two or three physicians in the country had prescribed various remedies for her, which had no effect, and that the physicians could not tell what her malady was; that she had just come from Dr. —'s office (one of our most prominent physicians), and to her astonishment and horror had learned from him that her daughter was *enecinte*, and that she had just drawn from her this explanation: That in the summer, as she was picking berries in a wood, about a quarter of a mile from her house, a great, strong fellow who worked as a farm hand for their neighbor, came suddenly upon her, and flourishing a knife, threatened her with instant death if she made the least outcry. He then threw her on the ground amid the bushes and ravished her, the poor girl making all the resistance in her power, but not daring to cry out. After threatening her again with death, as she lay helpless and nearly unconscious, in case she informed against him, the brute left her, and it was some hours before the poor, half-witted girl reached her mother's house. She had never mentioned the outrage to any one until it was drawn from her on this occasion.

I at once procured a warrant for the ravisher placed it in the hands of an officer, who forthwith repaired to the house of the farmer for whom the villain worked, but he had left that very morning, and has never been seen in the neighborhood or heard from since. He must have obtained some information as to what was going on, or become suspicious, or possibly made satisfactory terms with the officer; at all events he never could be found afterward, though I procured an indictment, and kept it hanging over his head for years, and it was recently dismissed. The poor girl became a mother, and died. The grandmother assured me that the little one, from the day of her birth until she was at least five years of age, would tremble in every limb and her eyes show the strongest indication of fear whenever any one—grandmother, familiar friend or stranger, approached her. Now whatever opinion a medical expert might express, I believe he should be allowed to express it on the witness stand in such a case. Here are undeniable facts that show *pregnancy MAY follow ravishment of a female who never before had had sexual intercourse*; for this poor girl, on account of her weak mind, had always been kept under the eye of her prudent, cautious mother, and she was not allowed to be in company with any man. And that she informed her mother truly is proven by many circumstances, not thought necessary to state here, aside from the flight of the villain who committed the crime.

Now, both to adorn the tale and to point a moral, observe the inscrutable ways of God, who permits this atrocious crime to be committed, suffers it to go unpunished, at least so far as human tribunals are concerned, and at length almost sanctifies it by the goodness and virtue that He causes to flow from such an impure fountain-head!

I recently saw and conversed with the fruit of this brutal crime, now a young lady of sixteen, handsome, refined, intelligent, and thanks to the kind grandmother, with more accomplishments than one could expect from her surroundings. This noble girl is today the sole support and nurse of the dear old grandmother, now fallen into poverty and helplessness. I have seen them quite often in these relations, and never could angel administer to a saint with more gentleness and love. I have, purposely of course, omitted their names, but I will add that the young girl has no idea that she was not born in lawful

wedlock, that both parents are dead, and that for family reasons she retains the name of her mother.

Yours truly,

TROY, Feb. 20, 1888. FRANK J. PARMENTER.

#### PAYMENT OF CHECK ON FALSE INDORSEMENT.

*Editor of the Albany Law Journal:*

Can we beg that you will review, and if necessary revise this decision of the *New York Journal of Commerce* of February 9. There is much interest in the decision among our bankers and lawyers over the country.

Very respectfully,

J. S. & W. F. DAVIDSON.

AUGUSTA, GA., Feb. 18, 1888.

"ST. LOUIS, Mo., Feb. 1, 1888.

*"Editor of the Journal of Commerce:*

"One of our customers drew a check on us which he intended to draw to the order of J. E. Jones, but he erroneously drew it to E. J. Jones, and sent it to a town in the country where J. E. Jones was staying, and also a man named E. J. Jones, who got the check and had it cashed by a party in the town, who deposited it in his bank, and it came here and was paid by us to the country bank's correspondent here. Our customer now wants us to refund the money. Should we do so? If so, can we recover of the bank here of whom we received it, and so back to the original party who cashed the check for the wrong Jones, although it was made to his order? The party cashing the check for Jones took fifteen per cent off the face for cashing it—although about one-eighth per cent would cover a straight transaction. P."

"Reply: It has been decided in a case heretofore fully reported by us that a bank on which a check is drawn in favor of John Brown must pay it to the right John Brown, or be liable for the error. In this case, although the error of the drawer contributed to the mistake, we are sure that the court will not hold it to be a good payment when made to a man for whom it was not intended, and who was not a *bona fide* holder for value. The customer can refuse to have the check charged to his account, claiming with good reason that it is not properly indorsed. The drawee bank then returns it to the correspondent as not properly payable for want of the right signature; the correspondent must refund or prove that it was properly or rightfully indorsed, which he cannot do; he therefore refunds the money, and sends the check to the country bank, which makes him the proper credit. That country bank can compel the 'party' who cashed it to make it good. And the party aforesaid, who thought he had made fifteen per cent, must get his pay back from E. J. Jones, to whom he gave the money, or lose it. This is the legal course for all concerned. The customer can then draw his check to the right order and get it cashed."

[See Current Topics.—Ed.]

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, Feb. 23, 1888:

Judgment affirmed with costs—In re Petition of John Pennie to vacate assessment. This affirms the decision of Justice Parker at Special Term, which was sustained at General Term, that the assessment for the paving of Second street, in this city, is void for informalities in the action taken to secure assent of property-owners.—Order affirmed with costs—In re Application of Niagara Falls and Canadian Rapids Railroad Company to acquire lands of De Vaux College.—Judgment affirmed with costs—Andrew Brown, appellant, v. Charles Foster and another, re-

spondents.—Order of General Term reversed, and judgment of trial court affirmed with costs—Samuel Thayer, appellant, v. George W. Flinton.—Judgment of the General Term affirmed, and judgment absolute rendered for the defendant in the stipulation with costs—Jason Bloodgood, appellant, v. Ann Ayers and others, respondents.—Awards in each case reversed and rehearing ordered—Isaac K. Reed, Mary Costello and others and Mary A. Poland, appellants, v. State, respondent.—Judgment affirmed with costs—Wm. Gibson Jones, appellant, v. Lulu V. Jones, respondent. This affirms with the validity of Mrs. Jones' divorce obtained in Texas as a bar to his suit.—Judgment affirmed with costs—Samuel Brice, respondent, v. Paul Bauer, appellant.—Judgment affirmed with costs—James Park and others, respondents, v. Harvey R. Preston and others, appellants.—Judgment reversed, new trial granted, costs to abide event—Charles W. Romeyn, respondent, v. Daniel E. Sickles, appellant. This was an action by an architect to recover for plans drawn for a provisional building that was never erected. Defendant asserts that plaintiff's pay was to depend on the acceptance of plans and erection of building.—Judgment reversed, new trial granted, costs to abide event—Commercial National Bank of Philadelphia, respondent, v. Isaac Heilbrunner, appellant.—Judgment of General Term affirmed except and so far as it relates to the third count, and as to that reversed, and that of Special Term affirmed without costs to either party of this appeal—George E. Dodge, appellant, v. John L. Colby, respondent.—Judgment affirmed with costs—Wm. D. Lindsay, respondent, v. Brooklyn City and Newtown Railroad Company, appellant.—Judgment affirmed with costs—Alfred A. Cobb and others, respondents, v. Dolphin Manufacturing Company, appellant.—Judgments reversed, new trial granted, costs to abide event—Francis Nellis, respondent, v. John G. Munson and others, heirs, etc., appellants.—Judgment affirmed with costs—Wm. C. Allison and another, appellants, v. Wm. P. Abendroth, impleaded, etc., respondent.—Order affirmed with costs—Max Hoffman and others, appellants, v. Isaac Steinan and others, respondents.—Order affirmed with costs—Louis Strauss and others, appellants, v. Chicago Glycerine Company, respondent.—Orders of General and Special Term reversed, and motion for mandamus was granted, without costs against the defendants—Reuben N. Waldorf, appellant, v. Police Commissioners of the City of Albany, respondents.—Order affirmed with costs—New York Life Insurance Company v. Ferdinand Mayer and others.—Order of General and Special Term reversed and proceedings dismissed with costs—Poughkeepsie Bridge Company, respondent, v. Robert Sanford, appellant.—Orders of General and Special Terms reversed, and motion granted with costs in all courts—People, respondents, v. Patrick McDonald, appellant. McDonald, the steward of Reed & Spencer's club house, in Saratoga Springs, was indicted for receiving brook trout out of season. Held, that the district attorney and grand jury of Fulton county had no jurisdiction, for McDonald's offense was committed in Saratoga county.—Judgment affirmed with costs—Wm. B. Smyth, appellant, v. George W. M. Sturges, respondent.—Judgment and conviction of murder in the first degree affirmed—The People, respondents, v. Robert Brunt, alias "Happy Bob," the Salvation army murderer.—Judgment affirmed with costs—Ell Tinklepaugh, respondent, v. Chester Miller, appellant.—Judgment affirmed with costs—John Demarest, respondent, v. Henry Heide, appellant.—Judgment affirmed with costs—Frederick Beck and others, respondents, v. J. Lester Wallack, appellant.—Judgment of General Term reversed and that of Special Term affirmed with

costs—Town of Mentz, appellants, v. Roswell Cook, respondent.—Judgment affirmed with costs—James Dolan, respondent, v. Brooklyn, Flatbush and Coney Island Railroad Company, appellant.—Appeal dismissed with costs—Rowley H. Knapp, respondent, v. Ira N. Deyo, appellant.—Judgment affirmed—The People, respondent, v. Amareath H. Brodner, appellant.—Judgment affirmed, and judgment absolute ordered for the plaintiff on the stipulation with costs in all the courts—Rowland Brill, respondent, v. John Brill, appellant.—Judgment affirmed with costs—Walter S. Church, respondent, v. Newton Ketcham, appellant.—Judgment affirmed with costs—Wm. B. Ludlow and others, appellants, v. Sigmund Warshing and others, respondents.—Judgment affirmed with costs—The N. Y. National Exchange Bank, respondent, v. The Metropolitan Elevated and the Manhattan Railroad Companies, appellants.—Judgment affirmed with costs. Holds that dentists are liable in damages for professional malpractice, and the defendant for the malpractice of its professor and students in work on plaintiff's teeth—Jane M. Sims, respondent, v. N. Y. College of Dentistry, appellant.—Judgment affirmed with costs. This holds that a mere squatter gains no standing in court to real estate against a plaintiff with a color of title—Dr. Francis Delafield and others, respondents, v. James Brady and others, appellants.—Judgment affirmed with costs. Plaintiff is a nun and the court holds that she is still entitled to property devised to her by her grandfather's will despite the fact that it eventually goes to the religious order to which she belongs—Lillie L. White, respondent, v. Milton S. Price and others, appellants.—Judgment affirmed with costs—Catherine Jeunling, respondent, v. Henry Van Schoick, appellant.—Judgment affirmed with costs—John Hommerberg, respondent, v. The Ocean Steam Navigation Company, appellant.—Judgment affirmed with costs—Harriet Burhans, respondent, v. Oliver T. Comfort, appellant.—Judgment affirmed with costs—Catherine Harold, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment affirmed with costs—Richard Oakley, appellant, v. Abram Healey respondent.—Award affirmed without costs to either party. Both parties appealed from the award—J Smith McMaster v. The State.—Judgment reversed, new trial granted, costs to abide event—Peter A. Tillyou, appellant, v. Patrick Reynolds, respondent.—Judgment affirmed with costs—Martin J. Hackett, respondent, Hackett Hatch Door Manufacturing Company, appellant.—Ordered affirmed with costs—People ex rel. Henry Edwards, appellant, v. Charles O. Potter, Commissioner, etc., and others, respondents.

#### NOTES.

The following is a copy of the body of an indictment found by the grand jury of Lawrence county, Ky., at its October Term of the Criminal Court: "The grand jury of Lawrence county, in the name and by the authority of the Commonwealth of Kentucky, accuse — of the offense of malicious mischief, committed as follows: The said —, on the 10th day of September, A. D. 18—, in the county and circuit aforesaid, did unlawfully, willfully and maliciously kill and destroy one pig, the personal property of George Pigg, without the consent of said Pigg, the said pig being of value to the aforesaid George Pigg. The pig thus killed weighed about twenty-five pounds, and was a mate to some other pigs that were owned by said George Pigg, which left George Pigg a pig less than he (said Pigg) had of pigs, and thus ruthlessly tore said pig from the society of George Pigg's other pigs, against the peace and dignity of the Commonwealth of Kentucky."

# The Albany Law Journal.

ALBANY, MARCH 10, 1888.

## CURRENT TOPICS.

WE seldom read the ALBANY LAW JOURNAL — after reading the proofs. But casually taking up the last number and glancing over its contents, it struck us as a remarkably interesting number — no vanity, now, for it is not our fault — but it seemed to us to chronicle and comment on an unusually large number of novel and striking cases, to say nothing of the current topics, for which we are too modest to take any credit.

Now having happened upon a personal vein we may as well publish the following letter which we have just received: "I have been a subscriber from the beginning of your first issue, and have never had occasion to find any fault with you or your work till now. Indeed, your publication is a welcome messenger of peace and good-will, united with a heavy amount of sense and erudition, and it has become to me, next to the words of holy writ, the man of my counsel and guide of my heart. But what on earth do you mean by those two pictures? They are good looking fellows enough — but who are they? Those on title page — are they the next candidates for president? Neither looks like the plumed knight, and I thought he was the man. Nor do they look like Williamson and Higbie, whose 'ad.' they seem to stand on, or rather sit on. Are they Strouse and Darwin? Pray say who they are, and if you print any more pictures please put the names on." Confidentially we will inform our inquirer that those are *not* the likenesses of the next Democratic candidates for the presidency — Cleveland and Hill — nor of the Republican — Blaine and Conklin — but of Messrs. Benjamin Vaughan Abbott and Horace G. Wood. We know, not by reason of any likeness to the originals, but from special information from the advertisers. But as newspaper portraits go they are not positively bad; they are better than some in the *World*, for example.

The editor has been indulging in an unwonted luxury — his first jury trial in eight years. This occurred in the city of New York. It gave rise to sundry reflections on the administration of justice and the conduct of trials. *First*, and most indelibly imprinted on our memory, is the foul air of the court-room. Is it not possible to ventilate the court-room as well as the merits of the cause? This defect shortens the lives of lawyers as well as their tempers. *Second*. It reminds us of Mr. Coudert's remarkable assertion that any case could be reached for trial in the city, if both parties were willing, in

three or four months. Now here was a case in the Supreme Court, a year and a half old, standing number eleven hundred and something, in which both parties were ready and anxious, and which had been on *the day calendar*, when any was made up, *for two months*, and to try which the editor made three journeys to the city and wasted a week of his (not too) precious time. *Third*. The wretched quality of the juries. We saw one other case partly tried, and therefore saw two juries. In quality they are very inferior to those in the much abused rural districts. The best men will not serve. Many are excused by statute. Others manage to be left "off the lists." Others get excused through friendship with the judges. And so the most important interests of citizens — of the best as well as the worst — are left to the mercy of unintelligent and sometimes corruptible men. But what can be done about it? One thing certainly — repeal the silly statutes excusing men of certain extensive business responsibilities. They are the very men who ought to be compelled to serve. They owe the community something for the protection of their vast interests, and they can the most easily supply their own places. In spite of what we have said above, we must admit that the two verdicts which we heard were quite right — especially the last, which was in favor of our client! We do think that juries are generally right, but the more intelligent the surer and quicker the result. *Fourth*. A verdict should be pronounced by eight or nine jurors. In one case which we witnessed four were in favor of five thousand dollars damages and two of six cents. The six cent men hung the jury for three hours, and the result was a compromise at one thousand dollars. *Fifth*. Trials consume too much time. A trial which we witnessed occupied four days, and it ought not to have taken more than two and a half or three. Too much cumulative evidence; too much "running empties" on the part of counsel; too much "acting." The judges are too patient. We recall the late Henry E. Davies as a model circuit judge; also Amasa J. Parker. These men would not allow cumulative evidence unless it was clearly essential and material. What is the use of proving by a dozen expert witnesses a theory about which everybody agrees? Bunsby said: "If the ship has gone down, why then the ship has gone down." One Bunsby opinion in a case is enough. We have an impression that these things are done much better in England, and one of these days we are going over there to follow a circuit, observe, and report.

Our north-pole friend, Mr. R. Vashon Rogers, asks us: "Did your microscopic eye ever notice the funny mistake on page 522 of volume 32, where my 'Elegant Extracts from Brownlow' is indexed as 'Elegant Extracts from Browning?'" Oh, yes, but we thought we wouldn't say any thing about it unless he mentioned it. It is a good rule not to apologize until one is found out. We hope our friend did not suspect us of being a member of a

"Browning Club." Frequently we should like to take a club to him, but that is the nearest. Now to soothe our friend we will tell him a story—a true one, and never before printed. In a town of Ohio the girls formed a "Browning Club," and took up easy things at first, something which they could make head or tail of, such as "Our Last Ride." This was read aloud, and at the close the only query suggested was whether the parties rode on horseback or in a "buggy," and the general opinion was that it must have been in a buggy, because they did not see how otherwise "he could have put his arm around her." This is one of the most sensible "notes" on Browning that we have ever heard.

At a banquet of the Union League Club of Chicago on Washington's birthday, Mr. Justice Harlan made some interesting remarks on the Federal Supreme Court. He showed what a keen interest Washington took in it, and how he desired to draw "the first characters of the Union into the judiciary," and how he believed that "the judicial department is the keystone of our political fabric." The speaker also urged the adoption of measures to enable the court to keep up with its business. He deprecated the enlargement of its numbers, and advised the establishment of intermediate courts of appeal. He spoke some glowing and eloquent words on the equality of rights among our citizens, and in closing said: "Is it not something to be a citizen of a country which, by its fundamental law, grants such privileges and secures such protection? Who but a dreamer or a madman could wish to see a government of law displaced by anarchy? Outside of the law whose rights of life, liberty or property are safe? I know what is your response to these questions, for in the breast of every genuine lover of our institutions there is an abiding conviction that obedience to law is the surest guaranty of the rights of all."

Mr. William W. Cook, the author of the treatise on the "Law of Stock and Stockholders," has issued a pamphlet on "Trusts, the recent combinations in Trade, their character, legality and mode of organization, and the rights, duties and liabilities of their managers and certificate-holders," which we should think would be interesting to the people at the capitol just now. Mr. Cook is decidedly opposed to these monstrous monopolies, and predicts their speedy downfall. His essay is well and vigorously written, and it is to be commended to all who are interested in this present absorbing conflict.

The report of the fifth annual meeting of the Kansas Bar Association is at hand. It contains an address on "Milestones of the Law," by Solon O. Thacher, full of humane and noble sentiment. Mr. Thacher denounces the detestable argument of Charles O'Connor in the Lemmon slave case (20 N. Y. 562) in a manner which does credit to his intel-

lect and his conscience. It is astounding that an advocate should have been found to utter such sentiments in a court of justice. We wish we had space for some extracts from Mr. Nathaniel M. Hubbard's address on the "Dramatic Art in the Jury Trial," a novel and entertaining topic well handled. Mr. Rossington contributes a paper on "Federal and State Jurisdiction," in which emphasis is laid on the respect due and rendered to the State authority by the Federal tribunals. There is a paper on "Punishment—Degree and Measure," by Mr. Scott Hopkins, which advocates the "indeterminate sentence" plan, and leans toward the abolition of capital punishment—"put him under permanent bonds to appear at the judgment bar of his creator," says Mr. Scott very felicitously. This is well if he is *kept* under bonds. "Taking the Case from the Jury" is discussed by Messrs. J. W. Ady and W. W. Guthrie. On the whole this is a report of unusual ability and interest.

#### NOTES OF CASES.

**I**N *Wilmer v. Gaither*, Maryland Court of Appeals, Jan. 6, 1888, it was held that where, in an action against husband and wife on joint promissory notes, part payment was made by the husband within the statutory period of limitation, without the knowledge or consent of the wife, the wife is not bound by the new promise of the husband. The court said: "The common-law disability of the wife still exists in this State except in the special cases, and to the extent that the Legislature by statute have thought proper to remove or qualify such disability. It is the act of 1872, chapter 270, that is relied on by the plaintiff in this case as having removed the disability of coverture, and fixed upon the wife all the liabilities of a *feme sole* in respect to the notes in question. That act provides that 'any married woman may be sued jointly with her husband in any of the courts of the State on any note, bill of exchange, single bill, bond, contract or agreement, which she may have executed jointly with her husband, and may employ counsel and defend such action or suit separately or jointly with her husband, and judgments recovered in such cases shall be liens on the property of the defendant,' etc. In regard to the power to execute the notes, though as mere surety for the husband, there is no question; but the question is whether the husband, by any separate, independent act of his own, can extend the liability of the wife, and deprive her of a lawful defense given her by statute, which she may plead separately from her husband. Suit may be brought jointly against husband and wife, but what avails the right of the wife, secured to her by the statute, to make a separate defense, if she is to be bound and concluded by every separate and independent act of the husband that may have the effect to bind him? Can it be supposed that the Legislature contemplated the right and power of the husband by any separate,

independent act of his own, after the execution of the note or obligation, to continue in force as against the wife those instruments for an indefinite time, without the concurrence, and even against the will and consent of the wife? We think clearly not. The only binding effect of the instruments authorized by the act to be made as against the wife is that derived from the joint act of husband and wife in executing them, and every note, bill or other contract mentioned, must be taken to have been executed subject to the bar created by the statute of limitations. Therefore to allow the husband, by any separate act of his own, to impart new or extended life and vitality to the instrument to rescue or preserve it from the operation of the statute, is simply imposing upon the wife an obligation not undertaken by her, nor authorized by the terms of the statute conferring upon her the power to make the instrument. In this State, as in England, there must be shown to exist one of three things to take a case out of the operation of the statute of limitations: First, an admission or acknowledgment by the debtor of a subsisting debt, from which a promise to pay may be implied; secondly, an unconditional promise to pay the debt; or thirdly, a conditional promise to pay the debt, and evidence which shows that the condition has been performed or gratified. As a general rule, the acknowledgment of the debt, as by the payment of part of the principal or interest due by one of several joint debtors, made before the statute has become a bar, will arrest the statute and prevent its becoming a bar to the debt until after the lapse of the statutory period from the date of the new promise or acknowledgment. But it is otherwise if such acknowledgment or promise be made after the statute has run, and become a bar to the debt. In such last-mentioned case the acknowledgment or promise will only be effectual as against the party making it, and not against the joint debtor. *Ellicott v. Nichols*, 7 Gill. 86; *Newman v. McComas*, 43 Md. 82; *Schindel v. Gates*, 46 id. 615; S. C., 24 Am. Rep. 526. And as to the force of an acknowledgment or admission of a subsisting debt, by partial payment or otherwise, it was said by this court in *Mitchell v. Sellman*, 5 Md. 376, 387: 'The decisions in Maryland upon this question are reviewed in *Ellicott v. Nichols*, 7 Gill, 96, the result of which is that there must be a promise, express or implied. It is not the mere acknowledgment of a subsisting debt which removes the bar. Where a debt is admitted to be due the law raises a promise to pay it; and it is this new promise, either made in express terms or deduced from an acknowledgment, as a legal implication, which is to be regarded as reanimating the old promise, or as imparting vitality to the remedy.' And the first case which states the principle upon which one joint debtor becomes bound by the acknowledgment or promise of another joint debtor, if made within the statutory period and before the debt has become actually barred, is the leading case of *Whitcomb v. Whiting*, 2 Doug. 652; 1 Smith Lead. Cas. (4th Am.

ed.) 606. In that case Lord Mansfield, in speaking of the effect of partial payments made by one of several joint debtors, said: 'Payment by one is payment for all; the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due.' The principle and the authority of the case of *Whitcomb v. Whiting* have been fully recognized by this court in *Ellicott v. Nichols*, 7 Gill, 86. Now upon the principle thus fully recognized and adopted, can it be successfully contended that there was any implied power of agency vested in the husband by the wife, by the joint act of making the notes, under the special power conferred by the statute, whereby he was authorized, either by making partial payments or other acknowledgments or promises, to bind the wife and to preclude her from taking the benefit of a legal defense given her by law? We think not. For if he can extend her liability on the notes beyond the period of limitations by partial payments, he can do so just as effectually by a simple acknowledgment, or by an express promise or a conditional promise, as he can by partial payments, as the promise may be either express or implied."

In *Serrana v. Jefferson*, Circuit Court, Southern District of New York, Jan. 3, 1888, it was held that a mechanical contrivance consisting of a real tank, into which real water is made to fall, and running thence off underneath the stage, representing a river into which in the course of a theatrical play the villain is made to fall from a bridge above, not being a link in the chain of incidents, which together with the speech and action of the performance constitute a series of events concededly novel, is not such a mechanical contrivance as will be protected by copyright of the play in which it is introduced. Lacombe, J., said: "The plaintiffs have elaborated Mr. Vincent Crummeles' dramatic conception of a real pump and wash-tubs. In the fourth act of their play, entitled 'Donna Bianca, or Brought to Light,' they set in the stage a real tank, three feet square and seven feet deep, filled with natural water. This water flows through a trough from behind a battlement wall at the rear of the stage, falling into the tank and running off underneath the stage. The water in this tank and trough represents a river. It is crossed by a bridge, upon which, after an angry dialogue between the hero and the villain of the play, there ensues a struggle in which the villain falls through the bridge into the water below. Plaintiffs allege that their play is copyrighted, and by virtue of that circumstance pray for an injunction against the defendants. These latter are now managing and producing at the Academy of Music in this city a play entitled 'A Dark Secret.' Here too there is placed upon or set into the stage a tank considerably larger than the plaintiffs' tank and trough, also filled with natural water, and intended to represent the

river Thames. Into this tank the heroine of the play is thrown, after appropriate dialogue. It is alleged that these immersion scenes in the two plays are prominent features, and add greatly to their attractiveness. There is nothing original in the incident thus represented on the stage. Heroes and heroines, as well as villains, of both sexes, have for a time whereof the memory of the theatre-goer runneth not to the contrary, been precipitated into conventional ponds, lakes, rivers and seas. So frequent a catastrophe may fairly be regarded as the common property of all playrights. The plaintiffs' contention is founded solely upon the circumstance that in their play the river into which the fall takes place is mimicked by a tank filled with real water, instead of by an apparatus constructed of cloth, canvas or painted pasteboard. Such a mechanical contrivance however is not protected by a copyright of the play in which it is introduced. The decisions which extend the definition of 'dramatic composition' so as to include situations and 'scenic' effects, do not cover the mere mechanical instrumentalities by which such effects or situations are produced. The plaintiffs upon the argument referred to *Daly v. Palmer*, 6 Blatchf. 264, as sustaining their contention. That case does not go to such extent. The practicable railroad tracks and the counterfeit locomotives which ran upon them, in the two plays analyzed by Judge Blatchford in *Daly v. Palmer*, suggested the name 'railroad scene' as generally descriptive of the portions of those plays in which they were introduced. The tracks and locomotives however were mere links in an extended chain of incident, speech and action, which together represented a series of events concededly novel, and which in the opinion of the court constituted a dramatic composition. Because in both plays there was found the same series of events in the same order, represented in a manner to convey the same sensations and impressions to the spectators, it was held that the representations of the latter was a piracy of a meritorious part of the invention incorporated in the former."

In *Bendelow v. Guardians of Wortley Union*, 57 L. T. Rep. (N. S.) 849, Chan. Div., an interim injunction was granted restraining a sanitary authority from continuing a small-pox hospital, on the ground that there was an "appreciable injury to the plaintiffs' property." Stirling, J., said: "This case certainly comes close to the line. The first question is, what is the law applicable, and that, after the discussion which it has undergone in recent cases, is tolerably clear. The plaintiffs complain of a building at no great distance from their property as a nuisance, being used as a small-pox hospital. The burden of proof is upon them. They must make out not merely that patients suffering from infectious disease are gathered together there, but that there is also some injury to the rights of the plaintiffs as owners of the property where they live. Then comes the question, what is the amount

of injury which will induce the court to treat this as a nuisance? That is well illustrated by *Fleet v. Metropolitan Asylums Board*, 2 L. T. Rep. 361. The expression there used is that there must be provable injury to the plaintiffs' property. The plaintiffs must make that out. Has that been made out here? The plaintiffs' property is between 132 feet and 147 feet from the place in question. The house abuts on a road made by the plaintiffs going to and from their houses. There is between the building occupied as a hospital and the plaintiffs' house a wall thirteen feet high. Upon the evidence adduced by the plaintiffs I felt considerable doubt, and I suggested that some medical man should go down and report accordingly. Dr. Murphy, nominated by Dr. Buchanan of the local government board, was sent down accordingly, and reported. \* \* \* What meaning am I to attach to that report? I think it shows that there is a real appreciable danger to persons susceptible to small-pox, though not very great. On the other hand, the nature of the disease is such that if once a person suffers from it, it is irreparable in the sense in which that word is used in reference to an injunction. I think the plaintiffs have made out a case of real appreciable injury, though not a great one, and are entitled to an interlocutory injunction to restrain the user of the place so as to be a nuisance to the plaintiffs."

#### SURETY'S LIABILITY ON BOND CONDITIONALLY SIGNED.

##### I

OFFICIAL and other bonds are frequently signed by sureties with the understanding that the bond is not to be used unless the signatures of one or more additional sureties are first secured. Is the bond valid as against those who have signed it, if the person intrusted with the instrument, who is usually the principal in the bond, betrays the confidence reposed in him, and delivers the obligation without procuring the signature of the other sureties? The answer is overwhelmingly in the affirmative. Were it not for the doctrine of estoppel the answer on principle must inevitably be in the negative, for the instrument is in escrow, and cannot be delivered so as to bind the sureties unless the condition upon which the delivery is to be made is performed. This is elementary. Courts which have held the delivery of no efficacy against the sureties have utterly ignored the existence of that great doctrine which makes the law almost synonymous with justice—equitable estoppel. As well might an astronomer ignore the centripetal force of the solar system, and argue that the centrifugal force must mentally plunge us into the "void profound."

Let us put on record where the bar may find them, and the bench too wherever the bar fails to marshal them for the court—let us put on record this host of honest witnesses. They hold without qualification that the surety who places such confidence in the principal's integrity, must abide the consequences of his rascality. *Jordan v. Jordan*, 10 Lea, 124; S. C., 43 Am. Rep. 294; *Dair v. United States*, 16 Wall. 1; *State v. Peck*, 53 Me. 224; *Nash v. Fugate*, 32 Gratt. 596; S. C., 34 Am. Rep. 780; *Cutler v. Roberts*, 7 Neb. 4; S. C., 29 Am. Rep. 371; *State v. Potter*, 63 Mo. 212; S. C., 21 Am. Rep. 440; *Russell v. Freer*, 56 N. Y. 67; *McCormick v.*



*Bay City*, 23 Mich. 457; *Brown v. Probate Judge*, 42 id. 503; S. C., 4 N. W. Rep. 495; *City of Chicago v. Gage*, 95 Ill. 593-613; *Buller v. United States*, 21 Wall. 272; *State v. Pepper*, 31 Ind. 76; *County of Taylor v. King* (Iowa), 34 N. W. Rep. 774; *Carroll County v. Ruggles* (Iowa), 23 id. 590; S. C., 69 Iowa, 590; *State v. Churchill* (Ark.), 3 S. W. Rep. 352; *Deardorff v. Forestman*, 24 Ind. 481; *Nash v. Fugate* 24 Grat. 202; S. C., 18 Am. Rep. 640; *Trustees, etc., v. Scheick* (Ill.), 8 N. E. Rep. 189; *Smith v. Peoria Co.*, 59 Ill. 414; *Lytle v. Cosad*, 21 W. Va. 183; *Abbey Hom. Ass'n v. Willard*, 48 Cal. 613; *Gibbs v. Johnson* (Mich.), 30 N. W. Rep. 343; *Millett v. Parker*, 2 Metc. (Ky.) 608; *Hall v. Smith*, 14 Bush. 604; *Buller v. United States*, 21 Wall. 272. See also *Green v. United States*, 9 Wall. 658; *Smith v. United States*, 2 id. 519; *Passumpsic Bank v. Goss*, 31 Vt. 318.

A few cases hold the other way. *Pepper v. State*, 22 Ind. 399, overruled in *State v. Pepper*, 31 id. 76; *People v. Bostwick*, 32 N. Y. 445, practically overruled in *Russell v. Freer*, 56 id. 67. It is true that the court in the last case attempt to distinguish the two cases. In the earlier case there was an express condition that the bond should not be delivered until signed by another surety, while in the later case there was simply an expectation on the part of the surety that another surety would sign it. But the court cites with apparent approval a number of the decisions which are hostile to the rule laid down in *People v. Bostwick*; and what effectually destroys the force of this case as an authority for the proposition it seems to support, is the fact that the obligee, through its officer, knew that the other person was to sign the bond as surety, and this was certainly sufficient to put the obligor upon inquiry as to the existence of a condition that the bond was to be delivered only in case such other person also executed it. See reference to this fact in *Richardson v. Rogers*, 50 How. Pr. 403, at page 407. This last case assumes that the doctrine enunciated in *People v. Bostwick* is not the law in New York.

Next comes *Guild v. Thomas*, 54 Ala. 414; S. C., 25 Am. Rep. 703, and *Smith v. Kirkland*, 1 South. Rep. 276. They are lonely authorities. This court thinks the doctrine of estoppel is inapplicable for the reason that the obligee is himself careless in not inquiring whether an instrument perfect on its face and purporting to bind the surety, is what it appears to be, or only an escrow. Such logic would abrogate this salutary doctrine as to a multitude of cases in which it has been repeatedly applied. But in the later case the same court decided that the surety would be bound when having knowledge of the delivery of the bond, he suffers the obligee to rely upon it as a valid obligation to his prejudice. He cannot thereafter object to his liability on the ground that the condition was not complied with. *Smith v. Kirkland* (Ala.), 1 South. Rep. 276.

*Daniels v. Gowe*, 54 Iowa, 319; S. C., 3 N. W. Rep. 424, has been practically overruled by the later Iowa cases.

Several decisions seem, on a casual perusal, to hold in accordance with these few cases; but an analysis of the facts discloses an element which rendered the application of the doctrine of estoppel impossible. In each of these cases the obligee had notice of the condition that others were to sign, and that the bond was not to be delivered unless this condition was performed, or he had notice of facts sufficient to make it his duty to inquire whether such condition had not been imposed upon the delivery of the instrument. These authorities are *Pauling v. United States*, 4 Cranch, 219; *Duncan v. United States*, 7 Pet. 435; *Leaf v. Gibbs*, 4 C. & P. 466; *Perry v. Patterson*, 5 Humph. 133; *Fryson v. Hull*, 23 Grat. 600; S. C., 14 Am. Rep. 153; *Fletcher v. Austin*, 11 Vt. 447; *State Bank v. Evans*, 3 Greene (N. J.), 155; S. C., 28 Am. Dec. 400;

*Ward v. Churn*, 18 Grat. 801; *Smith v. Peoria Co.*, 60 Ill. 414; *State v. Churchill* (Ark.), 3 S. W. Rep. 352.

This distinction is recognized in *Hall v. Smith*, 14 Bush. 604; *Nash v. Fugate*, 24 Grat. 202; S. C., 18 Am. Rep. 640, where the court holds the surety bound if the obligee has no notice of the condition, and distinguishes *Ward v. Churn*, 18 Grat. 801, on the ground that the obligee in that case did have notice of the condition.

In *Dair v. United States*, 16 Wall. 1, the court holding the obligee protected where there was notice, actual or constructive, expressly declares that *Pauling v. United States* was correctly decided, for the reason that in that case the obligee had notice of the condition, because it appeared on the face of the bond that one of the sureties named in the bond had not signed. The court say: "The case of *Pauling v. United States*, 4 Cranch, 219, has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. If the name of Joseph P. Cloud appeared as a co-surety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the government, who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things."

That notice, actual or constructive, is sufficient to let in the defense that the surety signed on condition is recognized in *Trustees, etc., v. Scheick* (Ill.), 8 N. E. Rep. 189, and in fact in practically all the cases which hold the surety bound where there is no notice.

What is sufficient constructive notice is an important inquiry, as actual notice is very seldom given. The notice which the obligee ordinarily has is only that which the bond itself gives him. It seems settled that if the name of a surety who has not signed the obligation appears in the body of the instrument, this is sufficient to apprise the obligee that the other sureties signed on condition that such surety also should sign. This was held in *Pauling v. United States*, 4 Cranch, 219; *Fletcher v. Austin*, 11 Vt. 447; S. C., 34 Am. Dec. 698; *Allen v. Murray*, 65 Ind. 898; and this has been recognized as a sound doctrine in *Dair v. United States*, 16 Wall. 1; *Ordinary of New Jersey v. Thatcher*, 12 Vroom (N. J.), 403; S. C., 32 Am. Rep. 225.

In *Fletcher v. Austin* the court say: "If the bond contains the names of the other obligors, and is delivered without the signature of all, the obligee must inquire whether those who have signed consent to its being delivered without the signatures of the others."

In *Pauling v. United States* the court remarked: "Here the representative of the government had notice on the face of the instrument that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors."

In *Dair v. United States* the court reiterates this doctrine. "In any case, if the bond is so written that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defense the want of execution by the others if they agreed to become bound only on condition that the other co-sureties joined in the execution."

But this will not constitute notice when the surety himself delivers the bond to the obligee without notifying him of the condition. *State v. Levin*, 73 N. C. 138; S. C., 21 Am. Rep. 461.

But suppose that the name of the surety who was to

sign is in the bond when the surety who signs on condition executes the bond, and the principal subsequently erases the name of such surety and delivers the instrument, is the obligee charged with notice of the condition? A respectable authority decides that he is. *Allen v. Murray*, 65 Ind. 396; S. C., 32 Am. Rep. 73. In this case the erasure was apparent. One Cobb who was named as an obligor in a bond when two other sureties signed it, was also to sign the bond or it was not to be delivered. He did not sign it. His name was erased; and the bond in this condition was delivered. It was held that there was no liability on the part of the sureties who executed the bond, for the reason that the obligee was put upon his guard by the insertion and erasure of Cobb's name. The court, after holding that the sureties would have been liable had there not been something on the face of the bond to make it the duty of the obligor to inquire whether it was the understanding that Cobb was to sign, then squarely decides that the erasure of Cobb's name in the body of the bond was as suspicious a circumstance as the existence of his name in the body of the bond would have been had it not been erased. The reasoning is certainly convincing: "We regard as of no particular importance the fact that the name of Cobb had been erased from the bond at the time it was presented to the mayor for acceptance. For the purposes of the question involved, the case stands in substantially the same condition as if the name had not been erased. The fact that the name had been placed in the bond was sufficient to indicate to the mayor that it was expected at the time it was placed there that Cobb would sign the bond. The name having been placed there, and being erased, was quite enough to put a prudent man upon his guard, and induce inquiry as to the circumstances of the erasure, and whether the appellants had not signed the bond with the expectation and understanding that it was to be signed by Cobb also before delivery." Of course if the name of the surety who was to sign has been erased as signed by him and not merely from the body of the bond, that fact would be sufficient to apprise a prudent man that such surety was to sign the obligation, and he would take with notice of such an understanding if there was one. This was the decision in *State v. Churchill* (Ark.), 8 S. W. Rep. 352. In this case the court cites with seeming approval the decision of the New York Court of Appeals in *Russell v. Freer*, 56 N. Y. 67. The New York case is in conflict with the Indiana decision just referred to. The facts were similar to those in the Indiana case. The court said: "It is insisted by the counsel for the appellant that the bond upon its face showed that the name of James Dolson had been inserted in the bond as an obligor, and erased therefrom, and that this should have put the intestate upon inquiry to ascertain why it was not executed by him. The case shows that all the names in the body of the bond were written by the justice who took the acknowledgments of those who executed it, and by whom the oath to the justification was administered. Under these circumstances the erasure of a name of a person who did not execute, from the body of the bond, would not excite suspicion of wrong, if it would in the absence of these facts." If the erasure of a name is a suspicious circumstance generally (and this the court did not decide), then the circumstance referred to in the opinion in this case does not render the erasure any less suspicious. This decision is as unsound as the one it practically overrules. *People v. Bostwick*, 32 N. Y. 445. The application of the doctrine of estoppel to the facts of that case is a gross perversion of this beneficent principle. The obligee has notice that at one time the person whose name is stricken out was to have signed the bond. This appears as fully as if the name had not

been erased. What right has he to assume that the surety who signed has waived the condition that the other whose name has been erased was to sign also? He has as full notice in the one case as in the other that there was such a condition, for there is something on the face of the bond showing that there has been a departure from the original plan. Moreover the surety has not been negligent, for he has signed an obligation showing upon its face that there is to be another surety. Where is the estoppel? No negligence on the part of the person to be estopped. Notice of gross negligence on the part of the person claiming the benefit of the estoppel. This reasoning is based upon the assumption that the erasure appears, for if it is invisible another question might arise.

In *State v. Churchill* the New York decision was distinguished, and the court appears to have considered it as sound, saying: "The principle enunciated in that case is this: There being no erasure of the name of the surety as signed by him, the erasure of the name in the body of the bond is not such a material alteration as to create suspicion that the bond is not genuine, and therefore is not such as to put the obligee on notice and inquiry, and that in such case he can only be affected by actual notice." \* \* \* "The above rule is in nowise in conflict with the rule applicable to the case now under consideration, that is to say, that where the name of a surety both in the body of the instrument and as signed by him is erased, and so appears to the reader, the alteration is such as to put the obligee on notice."

There is a dictum in *Hall v. Smith*, 14 Bush, 604, in the line of the New York decisions, where the court says, that "if the principal had stricken out the names of the sureties named in the bond who did not sign it, and had inserted in place thereof the names of those who signed it in their place before the delivery, and without the knowledge of the obligee, the obligee would have had the right to presume that the substitution or change had been made with the knowledge or consent of all who signed the bond, and in such a case all who signed it would be bound by the bond."

The fact that the word "sureties" appears in the bond, and only one surety has signed it, is not sufficient to give the obligee notice of a condition that another surety was to execute the bond. *Brown v. Perkins* (Mich.), 5 N. W. Rep. 195; S. C., 42 Mich. 501.

All the cases agree, without exception, that notice of any kind will exonerate the surety from liability. In many of the cases cited it is expressly decided and in others it is stated to be the law. A grouping of the authorities on this point—a point so obvious—is unnecessary.

On the question of constructive notice one more decision deserves examination. It is *Nash v. Fugate*, 32 Grat. 595; S. C., 34 Am. Rep. 780. It was there held that the fact that there were additional scrolls for the signatures of parties other than those who had signed the bond when delivered, was not notice to the obligee of a condition that other sureties should be obtained, there being nothing else on the face of the instrument to create any suspicion, the court saying: "In the case before us the names of none of the contracting parties are inserted in the body of the bond. It is signed by the principal obligor and nine others, claiming to be sureties. It is the joint and several obligation of all executing it. As to them it is a complete and perfect instrument. There is nothing in its form or language to indicate that other persons were to sign it before it could take effect as to parties who have signed. Does the fact that there are scrolls, to which there are no names, render the instrument incomplete, or even tend to show an agreement that other parties were to sign in order to give effect to the

bond? It may be a circumstance to be considered in connection with other evidence, showing that the obligee had actual knowledge of the agreement, but of itself it is not sufficient to put him upon inquiry, or even to create a suspicion of the existence of such an agreement. The scrolls may indicate that at the time the instrument was prepared, the obligee required that number of securities, or that the principal obligor expected or intended to procure them. Sometimes the bond is prepared by the obligee himself, and sometimes by the principal obligor. Upon a contemplated loan of money or sale of property, quite as often as otherwise, the number of seals is purely accidental, attached to the writing simply with the view of procuring a sufficient number of obligors to make the security satisfactory to the obligee. That object is effected not infrequently with fewer signatures than there are scrolls, and the obligee being content with the security, accepts the bond without a suspicion that the principal obligor in delivering it is violating any agreement or transcending any authority. In the case of personal representatives and other fiduciaries as also commissioners for the sale of lands and the investments of funds under decrees of court, this sort of transactions is of frequent occurrence. Indeed throughout Virginia the practice is very common among business men of accepting such securities without a suspicion of any informality in them. It is impossible to foresee the inconvenience and mischief that will ensue if the courts should establish the doctrine, that the mere existence of one or more seals upon a bond, without names opens the door to proof of parol agreements or alleged agreements between the several obligors—principal and sureties—which will invalidate the bond as to such sureties in the hands of an innocent holder, and it is worthy of observation, that the researches of counsel have not produced a single case sustaining this doctrine. For the reason already stated, I think the bond in controversy is apparently a complete and perfect obligation, with nothing on its face to indicate that other persons were to sign it to make it effectual as to those who sign it."

Virginia has carried the doctrine that the surety is bound where he signs on condition to the farthest verge. In *Miller v. Fletcher*, 27 Gratt. 406, the court held that delivery to the obligee on condition that another person should sign the bond, rendered the surety liable. Here the obligee knew of the condition. Nay, he assented to it. There could of course under these circumstances be no estoppel. The court predicated its ruling on the doctrine, that the delivery of a deed to the grantee cannot be in escrow, and that all conditions attending the delivery are abrogated by the delivery. That this rule does not apply to bonds has been held in *Stuart v. Livesay*, 4 W. Va. 45-50; *Newlin v. Beard*, 6 id. 110; *People v. Bostwick*, 32 N. Y. 445; *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294.

But the burden of authority is the other way. In the New York case the opinion of the court was *obiter*; and in the Tennessee case the bond was negotiable. On the other hand it was held in *Ordinary of New Jersey v. Thatcher*, 12 Vroom, 408; 8 C. C. 82 Am. Rep. 226, that delivery to the obligee extinguished all conditions though he had notice of them. In this case the bond was delivered to the representative of the obligee, with instructions to have a third surety whose name appeared in the bond sign it. The signature not having been obtained, the other two sureties who had delivered the bond on condition sought to defend on that ground. The defense was overruled on the ground that the condition could not prevail against the delivery to the obligee. The court said: "Nor is it easy to understand why the grantee in a deed cannot receive such deed in escrow if he can

hold a bond under such circumstances, because granting the capacity to become a depository of an escrow it seems clear that by the conditional delivery of a conveyance to him the estate would not vest until the performance of the condition, any more than it would if such delivery were to a third person."

Sustaining the Virginia case is *Moss v. Riddle Co.*, 5 Cranch, 351. The defense in this case was that defendant did not deliver the bond to the obligees unconditionally, but that he delivered it to one of the obligees as an escrow, to be his act, and on condition that the same should afterward be signed, sealed and delivered by some other friend of Welsh, the principal in the bond, and that this was not done, and that therefore the bond was void as to defendant. The court, Marshall, C. J., writing the opinion, say: "It is admitted by the counsel in this case that a bond cannot be delivered to the obligee as an escrow. But it is contended that where there are several obligees constituting a copartnership, it may be delivered as an escrow to one of the firm. The court however is of opinion that a delivery to one is a delivery to all. It can never be necessary to the validity of a bond, that all the obligees should be convened together at the delivery." To same effect *Blume v. Burrows*, 2 Ired. N. C. 338.

The mere fact that another name was written in the bond at the time the surety signed, will not be sufficient to warrant the implication that he signed on condition that the other would sign also. *Towns v. Kellett*, 11 Ga. 286; *Elliot v. Mayfield*, 4 Ala. 417.

But the civil law makes the failure to sign evidence of a condition that such party was to execute the bond. *Wells v. Dill*, 1 Martin, 582, where the court says: "The law presumes that the other parties signing did so upon the condition that the other obligors named in the instrument should sign it, and their failure to comply with their agreement gives him a right to retract." To same effect, *Sharp v. U. S.*, 4 Watts, 21; 8 C. C. 28 Am. Dec. 676; *Russell v. Annable*, 109 Mass. 72; 8 C. C. 12 Am. Rep. 666; *City of Sacramento v. Dunlap*, 14 Cal. 424, and *Johnston v. Kimball Township*, 39 Mich. 187, and this seems to be the better doctrine. But the United States Supreme Court holds that the delivery of the bond unsigned by one of the sureties named in it is sufficient to rebut the presumption that there was any such condition arising from the existence of a name in the body and assigned at the end of the instrument. The court remarks: "The acknowledgment of the bond by Abner L. Duncan and afterward by John Carson unconditionally, and its delivery to the government, would seem to rebut the inference drawn by the plaintiffs against its validity from the simple fact of its not having been signed by Thomas Duncan. There is therefore nothing upon the face of the record which would go to destroy the validity of this bond." *Duncan v. U. S.*, 7 Pet. 435. There is nothing to show that the delivery was made by the surety. If that had been the fact, the surety would have been bound even if there had been an express condition, and the obligee had had notice of it, for the reason that there can be no delivery in escrow to the obligee, as we have already seen.

Suppose the signature of some one of the sureties is forged, is the surety who signs, assuming that the other signature is genuine, bound? There is conflict on this subject. Holding that the surety is not liable in such a case is *Seely v. People*, 27 Ill. 173; 81 Am. Dec. 224; *Chamberlain v. Brewer*, 3 Bush, 561. But see *Stone v. Millikin*, 85 Ill. 218, holding practically the contrary. And in *Hall v. Smith*, 14 Bush, 604, the court said that if the signature of one surety had been forged, the genuine signature of another surety is a guaranty to the obligee that the forged signature

is genuine. The obligee has a right to presume that the maker of the genuine signature would not sign the paper if the name of the other surety had been forged, and therefore the maker of the genuine signature is bound notwithstanding the forgery of the signature of his co-surety. To same effect is *Loew v. Stocker*, 68 Penn. St. 226, where the name of the principal was signed without authority.

In *Stern v. People*, 102 Ill. 540, the principal obligor forged the name of a surety after the other sureties had signed. They were held bound for the reason that they had intrusted the instrument to the principal to procure additional names. This decision might logically rest upon the principle that the name of the surety being signed, the bond on its face was complete, and there was therefore nothing to create suspicion in the mind of the obligee, that other signatures were to be obtained. Under similar circumstances the sureties were held exonerated in *Biglow v. Conegys*, 5 Ohio St. 256. In *Howe v. Peabody*, 2 Gray, 556, two sureties had signed, and the bond was then altered. Subsequently two other signatures were obtained. It was held that all the sureties were discharged, the two who signed last, being exonerated for the reason that they signed, assuming that the other two were bound.

Where the law requires two or more sureties, the obligee is bound to take notice of a condition that another surety is to sign, even though there is nothing on the face of the bond to apprise him of that fact. *Cutler v. Roberts*, 7 Neb. 4; S. C., 29 Am. Rep. 371, where the court say: "The law in such a case enters into and forms a part of the contract, and the surety may insist as a defense in an action on a bond signed by but one surety, that he is not liable thereon, the statute being notice to all parties concerned that two sureties were required, unless the surety waived the condition prescribed by statute." To same effect is *Sharp v. U. S.*, 4 Watts, 21; S. C., 28 Am. Dec. 676. Probably the signing of a bond in such a case by one surety with knowledge, that there was to be no other surety, would constitute a sufficient waiver; although the language of the court in the Nebraska case would seem to indicate that this would not suffice.

"A waiver is defined to be an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right, and an intention to relinquish it." According to this language the surety would not be bound unless he actually knew that the law required at least two sureties. Imputed knowledge of the law would not be sufficient. But what was said was *obiter*, for there was an express condition that another surety should be procured.

If the surety himself makes the delivery to the obligee and fails to make it conditional, he cannot insist upon the condition even though the bond contains in the body of it the name of another surety. *State v. Barnes*, 73 N. C. 138; S. C., 21 Am. Rep. 461. The decision in this case might have been founded upon the doctrine that there can be no conditional delivery by a party to the obligee; so that express notice of the condition and assent thereto by the obligee would not have altered the ruling of the court in this case. This was held in *Ordinary of N. J. v. Thatcher*, 12 Vroom, 403; S. C., 32 Am. Rep. 225, and other cases, as we have seen.

Is the surety bound if the obligation is not signed by the principal? The following cases hold that he is not. *Hall v. Parker*, 37 Mich. 590; S. C., 26 Am. Rep. 540; *Russell v. Annable*, 109 Mass. 72; S. C., 12 Am. Rep. 665; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Johnston v. Kimball Township*, 30 Mich. 187; *Ferry v. Burchard*, 21 Conn. 602; *Bunn v. Jetmore*, 70 Mo. 228; *City of Sacramento v. Dunlap*, 14 Cal. 421.

Holding the contrary are *Trustees, etc., v. Schetch*, (Ill.) 8 N. E. Rep. 189; *McIntosh v. Hurst* (Or.), 12 Pac. Rep. 647; *State v. Bowman*, 10 Ohio, 445; *Loew v. Stocker*, 68 Penn. St. 226.

Of course if there is an express or implied condition that the principal shall sign the bond and the fact is known to the obligee either actually or constructively, the surety would not be bound irrespective of the question whether it was necessary under the law to the validity of the bond, that the principal should sign it. There being no such condition attached to the delivery of the obligation by the surety to the principal, the question must then be one of the construction of particular statutes, for it is manifest that it is not necessary to the validity of a bond that the principal should sign it, unless some statutory enactment requires it expressly or by necessary implication, or unless the sureties sign on that condition.

In *Hall v. Parker*, there was an express understanding that the principal should sign, and in *Russell v. Annable*, the court inferred the condition from the fact that the principal's name was written in the body of the bond when the surety signed. In *Johnston v. Kimball Township*, the condition was presumed by the court in part from the fact that the statute contemplated that the principal was to sign the bond. But the court laid down the broad rule that the burden is on the obligee to show that it was not the understanding that the principal should sign; or that that condition was waived before the bond was delivered. The language of the court deserves attention: "Can statutes plainly contemplate that the treasurer shall himself be a party to his own official bond, and while we are not prepared to hold that bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of opinion that where he purports to be obligor and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature before they can be held responsible. \* \* \* Where several names are written as co-obligors and one of them is called upon to sign it, he does so upon an implied understanding that he can in case of being held responsible, not only have his right of contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract as he purports to be drawn up, and he has a right to insist that he will not be bound except upon his own terms, reasonable or unreasonable. It is for himself and not for others to determine those terms. And if it is claimed that he has waived them or become estopped from relying on them, the burden of proof ought not to be upon him to show that there has been no variance, but upon the plaintiff to show what is substantially a new contract. "Although we do not base our decision upon the ground that in this case there are substantial and legal reasons for requiring the treasurer to sign his own bond, yet such reasons are not without force."

But the case of *Trustees, etc., v. Schetch*, appears to hold exactly the reverse; but the court really decided the case upon the distinction between a promise on the part of the principal to sign the bond and an express condition to that effect. The principal's name appeared in the bond. He promised to sign it but did not. The sureties were held bound; but the court declared that if there had been an express condition that the bond should not be delivered the decision would have been different. The court say: "Upon an examination of the finding of the Circuit Court, it will be seen that the court found from the evidence that Reitz (the principal), promised the sureties that he would sign the bond before it was delivered. This however does not constitute the execution of a bond upon condition that it should not be delivered unless executed

by the principal." \* \* \* "If the bond had been signed by the sureties upon condition that it should not be delivered to the trustees until executed by the treasurer, and if the trustees had received notice of such condition or notice of such facts pointing to such a condition, as might put a prudent person on inquiry before the bond was approved, then they would not be regarded as innocent holders of the instrument, and entitled to maintain an action upon it. But the sureties, as appears, did not sign the bond on such a condition, but executed the instrument, and relied merely upon the promise of the treasurer, that he would before delivery of the bond sign it. This was no more than a secret promise made by Reitz the treasurer, to those who signed as sureties which could not be binding upon the trustees." This case, after all, cannot be considered as opposed to the Michigan case, as there was no room left for presumption, the court having expressly made a finding which the Appellate Court, construed as negating the fact of any condition. In support of the views of the court on this point, i. e., that there must be something more than an expectation or belief on the part of the surety, or a promise on the principal that the principal would sign, the case of *Russell v. Freer*, 58 N. Y. 67, may be referred to. It is on this proposition only that this decision can be sustained. The court in this case remarked, that the only inference for the facts found was that the sureties expected that before delivery the bond should be signed by others; and then declared that the bond was therefore binding upon those who signed it, and finally distinguished the case from *People v. Bostwick*, 32 N. Y. 445, on the sole ground that in *People v. Bostwick*, the sureties who signed directed the principal not to deliver it until another surety had signed it. Is this not the correct rule? Not a single case can be found where the court has held that a mere expectation is sufficient, unless we consider as holding such a doctrine, those cases in which the condition is implied from the fact, that a name is in the body of the bond, which is not signed at the end. In all the cases cited where the court has decided that the obligee was protected, or that he would have been protected, had he not known of the condition, there was an express condition that the bond should not be delivered unless others signed it. It has been held, where the bond contained the name of one who did not sign it, that the sureties were bound nevertheless, there being no condition attached to the delivery of the bond. *City of Los Angeles v. Mellus*, 59 Cal. 444; *Cutter v. Whittemore*, 10 Mass. 444. The California cases make a distinction between joint bonds and joint and several bonds. In the case of a joint bond the surety is not bound in that State, although there was no express condition to that effect, if the instrument is not signed by one whose name appears in the bond. *Sacramento v. Dunlap*, 14 Cal. 424. Otherwise where the bond is joint and several. *City of Los Angeles v. Mellus*, 59 Cal. 444; *People v. Stacy* (Cal.), 16 P. Rep. 196.

GRAND FORKS, DAKOTA.

GUY C. H. CORLISS.

#### USURY — DEFENSE OF, BY SECOND MORTGAGEE.

SUPREME COURT OF ILLINOIS, JAN. 19, 1888.

UNION NAT. BANK OF CHICAGO V. INTERNATIONAL BANK OF CHICAGO.

A second mortgagee, whose mortgage had not been foreclosed, and who has not been let into possession under his mortgage, cannot set up the defense of usury to a bill to foreclose a first mortgage.

*Melville W. Fuller, Williams & Thompson, Herrick & Martin, W. T. Burgess and Walter C. Larned, for appellants.*

*Rosenthal & Pence and Smith & Pence, for appellees.*

SCHOFIELD, J. The question is presented upon this record whether a second mortgagee, whose mortgage has not been foreclosed, and who has not been let into possession under his mortgage, may interpose the defense of usury in the indebtedness secured by a first mortgage to a bill in chancery for the foreclosure of that mortgage. It has been several times said in opinions of this court that it may; but the question has never before been before us for adjudication, and the remarks in that respect were unnecessary to a decision of the questions under consideration, and are therefore not conclusive upon us now. In *Valentine v. Fish*, 45 Ill., at page 468, the late Mr. Justice Breese, in delivering the opinion of the court, said: "The doctrine is well established that the owner of land who has given a usurious mortgage upon it, may sell or mortgage the land to another, generally, and give to such purchaser or mortgagee, by express agreement, the same right to contest the validity of the first mortgage as he has himself. But he may affirm the validity of the usurious mortgage by selling only the equity of redemption in the mortgaged premises, or by selling or mortgaging the land, subject in express terms to the previous mortgage; in which case the purchaser or subsequent mortgagee will be entitled to the equity of redemption merely, and cannot question the validity of the prior mortgage." And for authority he referred to *Shufelt v. Shufelt*, 9 Paige, 137; *Green v. Kemp*, 13 Mass. 515; *Spangler v. Snapp*, 5 Leigh, 478; *Ferris v. Crawford*, 2 Denio, 596, and *Henderson v. Bellew*, 45 Ill. 322. But the bill in that case was by the mortgagors and the owner, by subsequent purchase and grant of the equity of redemption, to redeem. In *Henderson v. Bellew*, the bill was also by the owner, by subsequent purchase and grant, of the equity of redemption and to redeem. In that case the only ruling pertinent here is thus stated: "We hold the better rule to be that in a sale of land subject to a mortgage tainted with usury, if the purchaser is informed of the fact of usury by the vendor, and authorized by him to set it up against the mortgage, the abatement to which the mortgage would be subject on account of usury thus constituting an element in the price of the land, the purchaser in such circumstances would be at liberty to raise the question." In *Pike v. Crist*, 62 Ill. 462, the owner, by purchase and grant, of the equity of redemption, sought to interpose usury as a defense to a bill to foreclose a mortgage, and it was held admissible because he accepted the title expressly subject to the prior mortgages, "except as to usurious interest in the same." In *Maher v. Lanfrom*, 86 Ill. 513, the purchaser and grantee of real estate incumbered by a prior mortgage was allowed to interpose the defense of usury to a bill to foreclose that mortgage, and in the opinion then filed the language we have quoted from the opinion in *Valentine v. Fish*, *supra*, is referred to in the argument, and assumed to be authoritative. There are also other cases, to which it is needless to make reference, in which there are rulings recognizing the right of the purchaser of the equity of redemption to set up the defense of usury to the foreclosure of a prior mortgage. But neither in the cases to which we have referred, nor in any others which we are able to call to mind, was it necessary to consider, nor was it in fact considered, whether a second and junior mortgagee occupies precisely the same position with reference to a prior and senior mortgage as that occupied by the subsequent purchaser and grantee, by an absolute deed of the title to the property or the equity of

redemption. It is therefore fairly to be assumed that the use of the word "remortgage," and other kindred expressions, in *Valentine v. Fish*, and their repetition in subsequent cases, were simply because of a too literal following of the language in some of the opinions in the cases cited and relied upon to support the decision then made, and not because it was found, after due consideration, indispensable to the argument that they should be used; and a slight investigation will demonstrate that it cannot follow, that because those words were accurate in the cases cited by Justice Breese, they must also be accurate under the materially different phraseology of our statute in relation to usury.

Under the statute controlling in those cases, it will be seen, by examination, that a mortgage securing a debt in which usurious interest was charged, was at the election of the mortgagor and his privies absolutely void. He and they were in such case authorized to treat the mortgage as a nullity, and wholly disregard it, and consequently might subsequently sell and convey or remortgage just as if it had never been executed. This is shown by the chancellor in his opinion in *Shufelt v. Shufelt*, 9 Paige, 145, where he says: "In the ordinary case of the giving of a usurious mortgage by the owner of the mortgaged premises, the statute having declared the usurious security void, the owner of the premises, of course, has the right to sell his property, or to mortgage the same, as though such void mortgage had never existed." Necessarily then in this view the second mortgage, at the election of the mortgagor, is to be treated as a first or original mortgage, and creating a privity of estate between the mortgagor and mortgagee. But this line of reasoning is not possible under our statute in relation to usury. It does not declare the mortgage securing indebtedness on which usurious interest is charged void; it merely declares the interest contracted to be received, void. Rev. Stat., 1874, chap. 74, § 6. The mortgage in such case therefore is valid, and must be enforced to secure the payment of the money actually loaned. The usury only affects the accounting. See *Snyder v. Griswold*, 37 Ill. 216. The second and junior mortgage conveys no interest vested by the first and prior mortgage; and so, even in cases of usury, under our statute, in the first and prior mortgage, the second and junior mortgage can only confer a lien upon the mortgagor's equity of redemption; that is, right to redeem from the prior mortgage if the mortgagor shall not pay the debt secured by the junior mortgage on or before maturity. See *Dodds v. Snyder*, 44 Ill. 53.

The right to set up usury as a defense is personal to the debtor. If any one is injured by the usury, it is he; and it is for him to say whether he has been injured or not. If he chooses to perform the contract, or to waive the defense of usury, no one else has a right to say that he shall not so do; it is for him to elect. *Safford v. Vail*, 22 Ill. 327; *Maher v. Lanfrom*, *supra*; *Tyler Usury*, chap. 21, and authorities cited. Those however who are in privity with the borrower, it is held, may also set up the defense. "The term 'privity,'" says Greenleaf in his work on Evidence, vol. 1, § 189, "denotes mutual or successive relationship to the same rights of property." There can be no ground for pretending that there is privity between the mortgagor of the usurious mortgage and the mortgagee of a subsequent and junior mortgage, other than by contract or in estate; and we think it quite clear that there is no privity in either of these respects. It is enough to say, on the question of privity by contract, that the junior mortgagee was neither directly nor indirectly a party to the usurious contract, and he derives and makes claim to no right through or resulting from it. With regard to the

question of privity in estate, it is to be observed that the equity of redemption of the mortgagor, under our statute, may be levied upon and sold by virtue of an execution, and the purchaser, obtaining a sheriff's deed, thereafter will take all the interest he had in the land. *Waller v. Defenbaugh*, 90 Ill. 241. And on the same principle, manifestly the mortgagor may at private sale sell the equity of redemption, and convey it by deed to the purchaser, and the purchaser will then be in privity of the estate with him in the mortgaged premises, that is, he will then occupy the same relation toward them that the mortgagor did; and necessarily thereafter the mortgagor will have no interest, in the absence of covenant or agreement affecting the question, in the usurious mortgage. Whether it shall be enforced or defeated will be to him alike immaterial.

But it would seem to be self-evident that the same right to elect to plead usury to a mortgage, or to waive the usury, and affirm the entire validity of the mortgage, cannot be in different and distinct parties in interest at the same time; for if this were not so, one party might elect to do one thing, and the other party might elect to do directly the opposite, and thus one election would nullify the other. The equity of redemption of the mortgagor is the right to redeem from the first and senior mortgage, either by paying the amount of the principal debt only, or by paying that amount and the amount of interest usuriously contracted to be paid, as he shall elect. The junior mortgage conveying a lien only on that right, does not cut it off, but leaves it still to be exercised by the mortgagor until he shall terminate it by grant or it shall be terminated by foreclosure. The junior mortgagee does not therefore occupy the same relation toward the property that the mortgagor did before he executed that mortgage; and since the mortgagor has not parted with his right of election to plead or to waive the defense of usury, it is impossible that the junior mortgagee can have acquired it.

We have expressly held that the mere fact that a creditor has a lien on land by virtue of a mortgage gives him no right to set up usury as against the claim of a co-creditor secured by the same mortgage. *Adams v. Robertson*, 37 Ill. 45. And this would seem to necessarily follow from the legal proposition that no one can demand the execution of a particular mortgage because alone of his being a creditor. Whether a debtor shall execute any or what mortgages to secure his creditors depends upon his sense of justice to his creditors; and although the creditor may decline to accept a given mortgage, if he shall elect to accept it, he must, in the absence of fraud, accept it as it is written. The effect of allowing usury in *Adams v. Robertson*, would have been to have increased the amount that might be resorted to in satisfaction of the one debt by decreasing the amount of the other debt secured by the mortgage. And this is precisely the effect of a junior mortgage pleading usury to a prior mortgage. The principle is the same, though the result would, in the amount of benefit to the pleader, be slightly different. It is not perceived that the circumstance that the party in *Adams v. Robertson* voluntarily took his mortgage is one to vary the principle from that applicable where usury in the prior mortgage is pleaded by the second and junior mortgagee. The junior mortgagee takes his mortgage quite as voluntarily as does the co-mortgagee. No principle of estoppel was applied in that case, and none is now believed to have been applicable. The decision rests alone on the ground that a creditor secured by a mortgage lien, as such only, has no right to diminish the amount of another mortgage lien by the defense of usury, for the enlargement of his own lien; and this was ruled in *Darst v. Bates*, 95 Ill. 493.

These views render an examination of the numerous questions discussed by counsel for the Union National Bank and the heirs of Coolbaugh, upon the pleadings and rulings in admitting and excluding evidence unnecessary. Under no state of pleading would it have been admissible for the Union National Bank and the heirs of Coolbaugh, as second mortgagees, to have introduced evidence proving usury in the mortgage securing the notes held by the International Bank, Lowenthal, Austrian, and others.

[Omitting a minor point.]

### TELEGRAPH — NEGLIGENCE — DAMAGES — SPECULATIVE PROFITS.

UNITED STATES SUPREME COURT, JAN. 30, 1888.

#### WESTERN UNION TELEGRAPH COMPANY V. HALL.

In an action brought against a telegraph company by the sender of an unrepeatd message to recover damages for negligence in the transmission and delivery of a telegram directing the purchase of petroleum, where the evidence fails to disclose any actual damage beyond the amount paid for transmitting the message, plaintiff is limited in his recovery to that amount.

As there was no order to sell, or evidence that the plaintiff would have sold next day, he is entitled to recover only nominal damages.

**E**RROR to the Circuit Court of the United States for the Southern District of Iowa.

This was an action at law brought in the Circuit Court of Polk county, Iowa, by George F. Hall against the Western Union Telegraph Company, and by the defendant removed, on the ground of citizenship, to the Circuit Court of the United States for the Southern District of Iowa. The action was for the recovery of damages for alleged negligence on the part of the defendant in delaying the delivery of a telegraphic message received by it from the plaintiff at Des Moines, in the State of Iowa, to be delivered to the party to whom it was addressed at Oil City, in the State of Pennsylvania. The cause was submitted to the court, a jury having been waived in writing. A judgment was rendered in favor of the plaintiff for \$1,800. The cause is brought here by a writ of error upon a certificate of a division of opinion between the judges upon certain questions which arose during the course of the trial, which questions, together with the facts necessary to their determination, are certified to us as follows:

"The court finds the following as the material facts in the case:

"The plaintiff, at 8 o'clock A. M., November 9, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraph dispatches at its office in Des Moines, Iowa, a message in the following form, and plainly written on one of the usual blank forms furnished by the company:

"Form No. 2.—The Western Union Telegraph Company.

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount

received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing stating agreed amount of risk and payment of premium thereon, at following rates, in addition to the usual charge for repeated messages, viz.: one per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing in sixty days after sending the message.

"NORVIN GREEN,

"President.

"THOS. T. ECKERT,

"General Manager.

"Receiver's No. —. Time filed, 8 A. M. — check.

"Send the following message, subject to the above terms, which are agreed to:

"11, 9, 1882.

"To Charles T. Hall, Exchange, Oil City, Penn.:

"Buy ten thousand if you think it safe. Wire me.

"GEORGE F. HALL."

"Read the notice and agreement at the top."

"The same being furnished and received by the defendant for immediate transmissal to Charles T. Hall, at Oil City, Penn., the usual and ordinary charge therefor being paid by plaintiff. Through the negligence and want of ordinary care on the part of defendant's employee at Des Moines, the message so received was forwarded to Oil City, Penn., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Penn., at 11 o'clock A. M., November 9.

"The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a board of trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 A. M. until 4 P. M. The officers of the exchange or board of trade refused to receive the dispatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the dispatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall at 6 o'clock P. M., Nov. 9, 1882. Had it not been for the error in sending the dispatch without including the name of Charles T. Hall it would have been delivered to him at Oil City at 11.30 A. M., November 9, 1882. The meaning of the dispatch was to direct Charles T. Hall to buy 10,000 barrels of petroleum if in his judgment it was best to do so. Had the dispatch upon its first receipt at Oil City, Penn., been promptly delivered to Charles T. Hall, he would by 12 M. of November 9 have purchased 10,000 barrels of petroleum at the then mar-



ket price of \$1.17 per barrel for the plaintiff. When the dispatch was delivered to Charles T. Hall the exchange had been closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff. At the opening of the board the next day the price had advanced to \$1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase, and hence did not do so.

"It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10, 1882. The operators acting for the defendant had no other knowledge of the meaning or purpose of the dispatch than is to be gathered from the message itself.

"The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the dispatch in question in the Circuit Court of Polk county, Iowa, the original notice being served upon the defendant on the 22d day of December, 1882. Under the statutes of Iowa actions in the courts of that State are commenced by serving upon the defendant an original notice, which is signed by the plaintiff or his attorney, and is addressed to the defendant. No summons or writ under the seal of the court is issued. The notice in this case was addressed to the defendant, and after entitling the cause, proceeded as follows: 'You are hereby notified that on or before the 22d of December, 1882, the petition of plaintiff in the above-entitled cause will be filed in the office of the clerk of the Circuit Court of the State of Iowa, in and for Polk county, Iowa, claiming of you the sum of fifteen hundred dollars, as money justly due from you as a loss and damage suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram, as set forth in said petition, on November 9, 1882, from plaintiff to Charles T. Hall, at Oil City, Penn., and that unless you appear thereto and defend before noon of the second day of the January Term, A. D. 1883, of the said court, which will commence on the second day of January, A. D. 1883, default will be entered against you and judgment rendered thereon.' Crom. Bowen and Whiting S. Clark, attorneys for plaintiff."

"No other presentation of the claim was made by plaintiff. Upon the foregoing facts it is the opinion of the presiding judge that the law is with the plaintiff, and that he is entitled to judgment in the sum of eighteen hundred dollars, and it is so ordered as the judgment of the court.

"The judges holding said Circuit Court, and before whom said cause was tried, hereby certify that on said trial of said cause they were divided in opinion, and were unable to agree upon the following questions of law arising on said trial, and necessary to be determined in order to finally determine said cause, to-wit:

"First. Can the defendant, having in the usual line of business accepted said message from plaintiff for transmissal to the party named therein, at Oil City, Penn., and having received its usual charge for such service, be heard to say that it was not bound to exercise ordinary care in transmitting the same, and that it is only liable to the plaintiff in damages in case of gross negligence on its part?

"Second. Under the contract legally existing between the plaintiff and defendant, whereby the latter assumed the duty of forwarding said message, the same being an unrepeatable message, was the defendant bound only to the exercise of slight care or to the exercise of ordinary care?

"Third. Under the contract legally existing between plaintiff and defendant, whereby the defendant assumed the duty of forwarding said message, the same being an unrepeatable message, can the defendant, in any event, be held to respond in damages be-

yond the amount paid to the company for forwarding the said dispatch?

"Fourth. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rule is to govern in ascertaining the same? Are the damages merely nominal, or is plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Charles T. Hall, at Oil City, Penn., it being admitted that he did not make the purchase for the reason, that in his judgment, the price on the morning of November 10, 1882, was too high to justify purchasing?

"Fifth. Was the message so obscure and uncertain on its face that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded?

"Sixth. Was the service of the original notice in this cause a sufficient compliance with the clause in the contract providing that 'the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message?' If not, is the right of recovery barred by the failure to present the claim in writing?"

*Wager Swayne and Rush Taggart, for plaintiff in error.*

*Crom. Bowen, Whiting S. Clark and Chas. A. Clark, for defendant in error.*

MATTHEWS, J. The view we take of this case requires us, in answer to the fourth question certified, to say that in the circumstances disclosed by the record, the plaintiff was entitled only to recover nominal damages, and not the difference in value of the oil if it had been purchased on the day when the message ought to have been delivered and the market price to which it had risen on the next day. As the judgment was rendered in his favor for the latter sum, it must be reversed on that account, and upon the facts found by the court, judgment rendered for nominal damages only, which finally disposes of the litigation. It therefore becomes unnecessary to consider or decide any of the other questions certified to us.

It is found as a fact that if the dispatch upon its first receipt at Oil City had been promptly delivered to Charles T. Hall, to whom it was addressed, he would, by 12 o'clock on that day, have purchased 10,000 barrels of oil at the market price of \$1.17 per barrel, on the plaintiff's account. He was unable to do so in consequence of the delay in the delivery of the message. On the next day the price had advanced to \$1.35 per barrel, and no purchase was made because Charles T. Hall, to whom the message was addressed, did not deem it advisable to do so, the order being conditional on his opinion as to the expediency of executing it. If the order had been executed on the day when the message should have been delivered there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not, or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show, whether up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory then on which the plaintiff could show actual damage or loss is on the supposition that if he had bought on

the 9th of November he might and would have sold on the 10th. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without any thing in the case to show that it was even probable or intended, much less that it would certainly have taken place.

It has been well settled since the decision in *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment.

In the language of the Supreme Judicial Court of Massachusetts, in *Fox v. Harding*, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." This rule was applied by this court in the case of *Philadelphia, Wilmington & Baltimore R. Co. v. Howard*, 22 How. 307. In *Griffin v. Colver*, 16 N. Y. 489, the rule was stated to be that "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of the contract, is a mere mode of expressing the first; and that they must not be the remote, but proximate, consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

In *Booth v. Spuyten Duyvil Rolling Mills Co.*, 60 N. Y. 487, the rule was stated to be that "the damages for which a party may recover for a breach of a contract are such as naturally and ordinarily flow from the non-performance; they must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent."

In *White v. Miller*, 71 N. Y. 133; S. C., 27 Am. Rep. 13, it was said: "Gains prevented, as well as losses sustained, may be recovered as profits, when they can be rendered reasonably certain by evidence, and have naturally resulted from the breach."

In cases of executory contracts for the purchase and sale of personal property ordinarily, the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract is broken. This rule may be varied according to the principles established in *Hadley v. Baxendale*, 9 Exch. 341; 23 L. J. Exch. 179, where the contract is made in view of special circumstances in contemplation of both parties. That well-known case, it will be remembered, was an action against a carrier to recover damages occasioned by delay in the

delivery of an article, by reason of which special injury was alleged. In the application of the rule to similar cases, where there has been delay in delivering by a carrier which amounts to a breach of contract, the plaintiff is not always entitled to recover the full amount of the damage actually sustained; *prima facie* the damages which he is entitled to recover would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered and their value at the time when they are in fact delivered. *Horn v. Midland Ry. Co.*, L. R., 8 C.P. 131; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen, 881. Any loss above this difference sustained by the plaintiff, not arising directly from the delay, but collaterally by reason of special circumstances, can be recovered only on the ground that these special circumstances, being in view of both parties to the contract, constituted its basis. *Simpson v. London, etc., Ry. Co.*, 1 Q. B. D. 274. So the loss of a market may be made an element of damages against a carrier for delay in delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the benefit of the market. *Pickford v. Grand Junction Ry. Co.*, 12 M. & W. 766. In *Wilson v. Lancashire, etc., Ry. Co.*, 9 C. B. (N. S.) 632, the plaintiff was held entitled to recover for the deterioration in the marketable value of the cloth by reason of delay in the delivery, whereby the season for manufacturing it into caps, for which it was intended, was lost.

The same rule, by analogy, has been applied in actions against telegraph companies for delay in the delivery of messages, whereby there has been a loss of a bargain or a market. Such was the case of *United States Telegraph Co. v. Wenger*, 55 Penn. St. 262. There the message ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time when it was purchased under another order, and the advance was held to be the measure of damages. There was an actual loss, because there was an actual purchase at a higher price than the party would have been compelled to pay if the message had been properly delivered, and the circumstances were such as to constitute notice to the company of the necessity for prompt delivery. The rule was similarly applied in *Squire v. Western Union Telegraph Co.*, 98 Mass. 232. There the defendant negligently delayed the delivery of a message accepting an offer to sell certain goods at a certain place for a certain price, whereby the plaintiff lost the bargain which would have been closed by a prompt delivery of the message. It was held that the plaintiff was entitled to recover as compensation for his loss the amount of the difference between the price which he agreed to pay for the merchandise by the message, which if it had been duly delivered would have closed the contract, and the sum which he would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased a like quality and quantity of the same species of merchandise. There the direct consequence and result of the delay in the transmission of the message was the loss of a contract, which if the message had been duly delivered, would by that act have been completed. The loss of the contract was therefore the direct result of the defendant's negligence, and the value of that contract consisted in the difference between the contract price and the market price of its subject-matter at the time and place when and where it would have been made. The case of *True v. International Telegraph Co.*, 60 Me. 1; S. C., 11 Am. Rep. 156, cannot be distinguished in its circumstances from the case in 98 Mass. 232, and was governed in its decision by the same rule. The cases of *Manville v. Telegraph Co.*, 37 Iowa, 220; S. C., 17 Am. Rep. 8, and of *Thompson v.*

*Telegraph Co.*, 64 Wis. 531; S. C., 54 Am. Rep. 644, were instances of the application of the same rule to similar circumstances, the difference being merely that in these the damage consisted in the loss of a sale instead of a purchase of property, which was prevented by the negligence of the defendant in the delivery of the messages. In these cases the plaintiffs were held to be entitled to recover the losses in the market value of the property occasioned which occurred during the delay.

Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value are clearly within the rule for estimating damages. Of this class examples are to be found in the cases of *Turner v. Hawkeye Telegraph Co.*, 41 Iowa, 458; S. C., 20 Am. Rep. 605, and *Rittenhouse v. Independent Line of Telegraph*, 44 N.Y. 263; S. C., 4 Am. Rep. 673; but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage therefore for which he is entitled to recover is the cost of transmitting the delayed message.

The judgment is accordingly reversed, and the cause remanded, with directions to enter a judgment for the plaintiff for that sum merely.

[See *Pennington v. Western Union Telegraph Co.*, 67 Iowa, 631; S. C., 56 Am. Rep. 367; also note, 60 Am. Rep. 488.—ED.]

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**MARRIAGE—PARTNERSHIP OF HUSBAND AND WIFE.**—A statute which provides that "a married woman shall have the right \* \* \* to contract and be contracted with, as to her separate property, in the same manner as if she were unmarried," confers no power to make a contract of partnership. The Legislature finding that the Constitution did not in express terms confer upon a married woman the power to contract and be contracted with, though such a power might be necessarily implied in the power to acquire and dispose of her property, and fearing that it might be doubtful whether the further power to make such contracts as would be necessary or desirable for the proper use, custody, preservation, and enjoyment of the wife's property, could also be implied from the general terms used in the Constitution, made this enactment for the purpose of removing such doubt, by declaring in express terms that a married woman might "contract and be contracted with as to her separate property in the same manner as if she were unmarried." This being the nature of the limited power of a married woman to make contracts, and the purpose of the limitation being to protect her, not only from the importunities of her husband, but also from her own improvidence and weakness in yielding

to her own generous and self-sacrificing impulses, we are now prepared to consider the first question presented in this particular case—whether the plaintiff had the power to make the contract of partnership set up in this case. It will be observed that the alleged contract is expressed in the most general terms. It contains no provision that either of the proposed parties shall put in as capital any specified amount of money, or any particular property. It is simply a bald agreement between husband and wife for the formation of a general partnership, in which no particular terms are specified, and no provision that either or both of the proposed partners are to furnish the whole or any part of the capital. Now we are told by Chancellor Kent (3 Com. 2), that a "partnership is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit, and bear the loss, in certain proportions." And in 1 Pars. Cont. 147, it is said: "A partnership exists when two or more persons combine their property, labor and skill, or one or more of them, in the transaction of business for their common profit." Now inasmuch as there is no mention made of any money, effects, or property in this agreement, if we should regard this as an agreement that each of the parties named should combine their labor and skill in the proposed enterprise, it is quite certain that no such partnership could be formed between husband and wife, for the simple reason that her labor and skill already belonged to her husband. As we have determined in the recent case of *Bridgers v. Howell*, 3 S.E. Rep. 790, neither the Constitution nor the statutes have made any change in the doctrine of the common law that the husband is entitled to the personal earnings of the wife, because her services belong to him, and not to her. But if on the other hand, the alleged contract of partnership could be regarded as an agreement on the part of the wife to put her separate property into the partnership as a part of its capital, the very moment it was so put in it would at once cease to be her separate property, and would become the property of the partnership; and hence any contract subsequently made by the alleged partnership could not be regarded as a contract made by the wife "as to her separate property"—the only kind of contract which she has the capacity to make—and she could not therefore be bound thereby. A married woman being thus denied the capacity to assume one of the liabilities necessarily incident to the partnership relation, it would seem to follow necessarily that she has no power to form such a relation. But even if it should be assumed that an agreement by a married woman to put her separate property into a partnership as a part of its capital, was a contract as to her separate property, it would be quite sufficient for the decision of this particular case to say that the contract here set up contains no such stipulation or provision. We are not however disposed to rest our decision upon that narrow ground. Even conceding that an agreement by a married woman, to contribute her separate property to the capital of a partnership, if that was all of the agreement, would be such a contract as she was competent to make, it would not conclude the inquiry, for that is not all that is involved in the contract of partnership. It most usually involves an obligation to contribute one's time and services, which a married woman has no right to control, and what is much more important, it involves a personal liability for the debts of the partnership, which a married woman has no power to incur, as such debts arise from contracts which can in no sense be regarded as contracts as to her separate property. It seems to us clear therefore that even looking to the property relations between husband and wife, a con-

tract of partnership is not such a contract as a married woman has been invested with the power to make; but when we look to the more important and sacred relations between man and wife, which lie at the very foundations of civilized society, which are liable to be at least disturbed, if not absolutely destroyed, by allowing the wife to enter into partnership with any one with whom she may see fit to form such a relation, we cannot suppose that the Legislature ever intended to invest her with such a power. They certainly have not said so in express terms, and we do not think that such a power can be implied from what they have said. S. C. Sup. Ct., Nov. 29, 1887. *Gwynn v. Gwynn*. Opinion by Melver, J.; McGowan, J., dissenting.

**MASTER AND SERVANT—LIABILITY OF LIVERY KEEPER FOR NEGLIGENCE OF DRIVER.**—In an action for damages for injuries resulting in the collision of a wagon driven by plaintiff and a carriage belonging to defendant, and driven by a servant in defendant's employ, the defendant asked the court to charge the jury to the effect that if the driver was at the time of the accident in the employ of the person to whom the carriage was hired, the defendant is not liable; and also that if the carriage and driver were at the time of the accident temporarily engaged in the service of the person hiring the same, and under his direction and control, the defendant is not liable for the negligence of the driver. *Held*, that the instructions were properly refused. Penn. Sup. Ct., Nov. 11, 1887. *Hersherberger v. Lynch*. Opinion per Curiam.

**MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE SEWER—NEGLIGENCE IN DEVISING PLAN—ERROR OF JUDGMENT.**—Where a sewer is of such a character as to require the preparation of a plan by a skilled person, it is negligence for councilmen to act on their own judgment, no matter how much they deliberate; but if the municipal officers exercise reasonable care in securing the preparation of plans by a skilled person, and use ordinary care in seeing to it that such person uses his skill, then in case the sewer proves insufficient, because of a defect in the plan, there is no negligence, although there may be an error of judgment, and the corporation is not liable. It has long been the law in this State that a municipal corporation is liable for negligence in devising the plan of a sewer constructed by it, as well as for negligence in the manner of doing the work. Of course as long as no work is done under the plan, no liability can arise, nor can a liability exist where there is nothing more than a failure to adopt a plan. But where a plan is adopted and carried into execution, then there is a liability if there was negligence in devising the plan. It is the duty of the municipal corporation to exercise reasonable care in providing a plan as well as in doing the work under it. In the case of *City of North Vernon v. Voegler*, 103 Ind. 314, the cases were collected; and it was said among other things, that "the doctrine is not only sustained by authority, but is sound in principle. Suppose that the common council of a city determine to build a sewer, and cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or to take such a case as *City of Indianapolis v. Huffer*, 30 Ind. 235, suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one-tenth of the water conducted to it by the drains constructed by the city, can responsibility be evaded on the ground of an error of judgment? Again, to take an illustration from a somewhat different class of cases, suppose the common council devise a plan for a bridge that will require timbers so slight as to give way beneath the tread of a child." From

the rule expressed in so many of our cases we cannot depart for it is not only well sustained by authority but is right in principle." Morrill Neg. 86. While our cases have always held that municipal corporations are liable for negligence in devising a plan, they have from first to last declared that there is no liability unless there is negligence. *Rice v. City*, 108 Ind. 7; S. C., 58 Am. Rep. 22; *City of North Vernon v. Voegler*, 103 Ind. 314; *City of Crawfordville v. Bond*, 96 id. 236; *City v. Decker*, 84 id. 325; S. C., 43 Am. Rep. 86; *Cummins v. City*, 79 Ind. 491; S. C., 41 Am. Rep. 618; *Weis v. City*, 75 Ind. 241; S. C., 39 Am. Rep. 135; *City v. Huffer*, 30 Ind. 235; *Stackhouse v. City*, 26 id. 17; *City v. Wright*, 25 id. 512. It is therefore a question of paramount importance whether the municipal authorities exercised due care in securing a plan, for if they did not exercise such care then their error is one of judgment, which cannot create a liability. It is however negligence for men unskilled in the business of preparing plans for sewers to act upon their own judgment in cases where skill is required. *Bradbury v. Goodwin*, 108 Ind. 236. It is their duty to use reasonable care to procure the services of men skilled in such affairs, and if they fail to exercise this care they are guilty of negligence for which the corporation must answer. Undertaking to exercise judgment without skill in a matter which requires skill is not a mere error of judgment, but it is negligence. This is a familiar principle pervading all branches of jurisprudence. A man who undertakes as a lawyer to conduct an action at law, without possessing skill, is negligent. So too one who undertakes to treat a sick or wounded man as a physician or surgeon without possessing a fair degree of personal knowledge is guilty of a breach of duty. A mechanic who undertakes to build a house is liable in damages if through ignorance he does his work unskillfully. Negligence, according to Judge Cooley's definition, is "the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand. Cooley Torts, 560; *Brown v. Railway Co.*, 49 Mich. 153. If a municipal corporation undertakes the work of constructing a system of sewers in a case where the assistance of men skilled in such matters is essential to secure sewers that shall carry off the water conducted into them, without using reasonable care to procure such assistance, there is an absence of the vigilance and precaution which the circumstances justly demand." If however the municipal authorities do exercise reasonable care in securing such assistance, and do exercise reasonable care in securing the employment of fair care and skill, they are not guilty of negligence. If after bringing into exercise reasonable care to select skilled persons, and in securing the exercise of their skill, there is still a defect in the system, it must be attributed, not to negligence, but to an error of judgment. The case is strictly analogous to that of a railroad company sought to be held liable by one of its employees. In such cases it is uniformly held that if ordinary care is used in the selection of the co-servants, the company is not liable, although it may turn out that the co-servant was not capable of performing the duties intrusted to him. So here if the municipal corporation uses reasonable care to secure and put into exercise the services of competent engineers, it ought not to be held liable, although it does turn out that a mistake was made. It would impose a burden upon municipal corporations that no principle of right or justice warrants, to hold them accountable where they have exercised reasonable care to secure a perfect and an adequate system of sewerage. The principle which we are endeavoring to bring out is thus declared in *Johnston v. District of Columbia*, 1 Lark. 327: "In the next place, a mere error of judg-

ment in the construction of such work does not seem, on the authorities, to be a ground of action, in the absence of carelessness in the selection of, or the employment of proper agents to devise or execute it." A similar line of reasoning is pursued in *Vau Pelt v. City*, 42 Iowa, 308, where it was said: "The city cannot be held liable unless for some neglect or omission of duty or negligence in its performance." At another place in the same opinion it was said: "As the city must act through the agency of others, it was its duty to select a competent engineer. When such selection is made, the city has in that regard discharged its duty, and no direct omission or negligence is attributable to it. If a competent engineer acts in good faith in drafting the plans of a culvert, and honestly believe that he is making it large enough to accomplish the desired purpose, then no negligence of the servant is attributable to the principals. If he is sufficiently competent, and makes a mistake after the exercise of his best judgment, it is such a mistake as is inseparable from human action. The making of such mistake cannot be attributable to negligence, for negligence is the failure to exercise ordinary care." It is possible for a common council to act negligently in devising a plan as well as in any other matter. If that body undertakes to prosecute a public work which requires a plan, and that plan can only be devised and prepared by skillful or experienced men, it would be negligence for it to undertake the work without exercising reasonable care to secure the assistance of such men. A prudent man certainly would not undertake a work of that character without the aid of competent men, and a city is held to substantially the same degree of care as individuals. *Lehn v. City*, 68 Cal. 76; *Barnes v. District of Columbia*, 91 U. S. 540. Deliberation on the part of the common council is futile, unless the members have a fair knowledge of the matter which forms the subject of their deliberation. Men may deliberate to the end of time without accomplishing any useful purpose, unless they possess knowledge of the thing they are considering. If councilmen are not skilled in devising plans for sewers, no length of time spent in deliberation can establish the fact that due care was exercised. Due care implies the employment of such means as will secure knowledge, not a deliberation without knowledge. Men who take no means to secure knowledge essential to intelligent deliberation, do not exercise that care which the law requires. If in a case like this councilmen proceed without knowledge, no matter how slowly, they do not exercise care; but if they use reasonable means to secure knowledge, and with deliberate care act upon it when secured, they are not negligent. If reasonable care is used to secure the preparation of plans by competent men, and ordinary care is used to see that the skill of the engineer or expert is brought into exercise, then there is no negligence, and can be no liability, although when the plan is carried into effect a defect may be developed which destroys or impairs its efficiency. *Ind. Sup. Ct.*, Nov. 1, 1887. *City of Terre Haute v. Hudnut*. Opinion by Elliott, J.

**NEGOTIABLE INSTRUMENTS—PURCHASE FROM BONA FIDE HOLDER—KNOWLEDGE OF EQUITIES.**—The purchaser of negotiable paper, with knowledge of the equities existing against it, can recover the full amount of the face value thereof, and is not limited to a recovery of the amount paid or advanced by him for the paper, when he purchases of one who acquired it before maturity, for value, and without notice of any infirmity or defense. The rule is familiar and elementary, that a purchaser of such paper acquires the title of his vendor, and all the right of his vendor, to enforce it for the full amount of the promise, against

the maker; and although the purchaser has knowledge of equities existing between the original parties to the paper, which his vendor did not have when he became the owner, the purchaser is not affected by such equities, but stands upon the title of the prior owner, and this title is intact. It is entirely clear that if any previous owner of the bonds and coupons in suit was a *bona fide* holder for value, the plaintiff, upon showing that he himself paid value, can avail himself of the position of such previous holder. There is a class of cases in which a purchaser of negotiable paper before maturity, who acquires knowledge that his vendor was not a *bona fide* holder of the paper, and that the paper was subject to a defense in his hands, is permitted to recover only what he has advanced upon purchasing the paper, before he acquired such knowledge. These are cases in which there was no *bona fide* holder previous to the plaintiff. The principle is that the plaintiff was only a *bona fide* purchaser *pro tanto*, and therefore entitled to recover to that extent only. These cases have no application to the present case. *U. S. Cir. Ct., N. D. N. Y.*, Nov. 16, 1887. *Butterfield v. Town of Ontario*. Opinion by Wallace, J.

**PATENTS—IMPROVEMENT IN CLOAKS—INVENTION.**—In letters-patent for an improvement in that class of ladies' cloaks known as "Russian Circulars," the improvement consists in extending the inner front parts to the back seams, making a close-fitting waist, and leaving the outer part loose and flowing. *Held*, that the improvement was not patentable, neither the tight-fitting garment nor the outside part being new, and the ordinary skill of those practicing the art of cloak-making being adequate to put the two together. *U. S. Cir. Ct., S. D. N. Y.*, Sept. 4, 1887. *Landesmann v. Jonasson*. Opinion by Wheeler, J.

**CANCELLATION—POWER OF GENERAL GOVERNMENT.**—In the absence of any specific statute, the United States cannot maintain a bill in equity to cancel a patent for an invention. *Attorney-General v. Chemical Works*, *Cir. Ct., Dist. R. I.*, May, 1876, 2 Ban. & A. 208, *Shepley, J.*, followed. *U. S. Cir. Ct., Dist. Mass.*, Sept. 26, 1887. *United States v. American Bell Tel. Co.* Opinion by Colt, J.

**STATUTE—"SPIRITUOUS LIQUORS"—WINE AND BEER.**—The term "spirituous liquors," as used in the Code of North Carolina, §§ 3110-3116, relating to the prohibition of the sale of spirituous liquors, includes fermented liquors, such as wine and beer, as well as distilled liquors. It is contended by the counsel for the defendant that these words extend to and embrace only distilled spirits; on the other hand, the attorney-general insists for the State that they are used in a comprehensive and remedial sense, and embrace all kinds of intoxicating liquors, including wine and lager beer, except in so far as domestic wine is expressly excepted. The term "liquor," in its most comprehensive signification, implies fluid substances generally, such as water, milk, blood, sap, juice; but in a more limited sense, and its more common application, it implies spirituous fluids, whether fermented or distilled, such as brandy, whiskey, rum, gin, beer and wine, and also decoctions, solutions, tinctures and the like fluids in great variety. The term "spirit" or "spirits" has a general meaning as applied to fluids, mostly of a lighter character than ordinary water, obtained but not produced by distillation, but as applied particularly to liquors, it signifies the essence, the extract, the purest solution, the highly rectified spirit, the pure alcohol contained in them. The spirit of liquors is really the alcohol in them. It is this characteristic, this essential element, that makes them spirituous—that gives to all liquors of whatever kind their intoxicating quality and effect. Alcohol, this essen-

tial element in all spirituous liquors, is a limpid, colorless liquid. To the taste, it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source, the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch, which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce it by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit—the alcohol—from the mixture whatever it may be, in which it exists. That what we have thus said is in substance true and correct every one knows who is familiar with the terms defused, the nature of alcohol, the method of its production, and who has accurate knowledge of the essential elements and qualities of spirituous liquors. "Spirituous" means containing, partaking of, spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. Hence spirituous liquors imply such liquors as above defined—as contain alcohol, and thus have spirit—no matter by what particular name denominated, or in what liquid form or combination they may appear. Hence also distilled liquors, fermented liquors, and vinous liquors are all alike spirituous liquors. These liquors respectively may have different degrees of spirit in point of fineness and strength. Distilled liquors may be stronger or weaker according to the quantity and quality of the alcohol in them, and so of the other kinds mentioned. We know from common observation and knowledge, and it is a generally admitted physical fact, not denied in this case, that lager beer and wine contain alcohol, and generally in such quantity and degree as to produce intoxication. These liquors are therefore spirituous, and obviously come within the meaning and are embraced by the words "spirituous liquors" as used in the statute, unless there is something in the latter that shows that these words were intended to have a more limited application, and to exclude such beer and wine. The closest reasonable scrutiny of the statute, its terms, phraseology, connections and purposes shows no such narrow application of the words "spirituous liquors" employed in it as to exclude such beer and wine. But we think the contrary plainly appears. The terms used are, severally and taken together, broad and sweeping, not exceptive or limiting but in a single respect, presently to be mentioned, and the manifest purpose is to prevent and suppress drunkenness, and the attendant evils produced by the free use of intoxicating spirituous liquors. The terms are not "any distilled spirituous liquors," not "any fermented spirituous liquors," but they are "spirituous liquors," and "any spirituous liquors." If the purpose of the statute is to prevent drunkenness by prohibiting the sale of spirituous liquors, is it not plain to the mind of the simplest observer that such purpose would only be partially served by preventing the sale of only distilled liquors? Fermented and vinous liquors—lager beer and wine—are spirituous liquors, and produce intoxication and drunkenness as certainly as distilled liquors produce a like effect. It simply requires the greater quantity of them to do so. Can it be said with any show of reason that the Legislature would have intended to cripple, prevent and hinder its purpose by prohibiting the sale of one kind of intoxicating spirituous liquors, and not another? Can any just and fair mind reach the absurd conclusion that it intended to prevent drunkenness by prohibiting the sale of distilled spirituous liquors, and to allow, and in practical effect to encourage drunkenness by the toleration of the sale of fermented and vinous spirituous liquors? And if for any reason

it had such mixed, contradictory purpose, would it not have said so—so provided as to leave no doubt as to such partial purpose? The presumption is, it intended to further and accomplish, not hinder and defeat, its plain purpose. We may advert to the general fact of common knowledge that the Legislature, the legal profession and the people generally who took note of the subject, understood that the inhibition of the statute in question extended to fermented as well as distilled liquors. The contrary has not been insisted upon, so far as we know, by any one, until the decision of this court in *State v. Nash*, 97 N. C. 514, in which the chief justice simply suggested a doubt in respect to the extent of the inhibition in a connection not at all material. He expressly declared that any question in that respect was not decided. What he said was scarcely said *obiter*. It was not, nor was it intended to be, authority, and so every intelligent lawyer must have understood. *State v. Lowery*, 74 N. C. 121. It was likewise contended on the argument that the inhibition surely could not be treated as extending to all liquors that contained spirit, because very many liquors contain so small a percentage of alcohol as that it is scarcely perceptible; that the inhibition only applied to strong distilled liquors, and therefore not to lager beer or wine. This argument is without force. As we have seen, the purpose of the statute is to prevent and suppress drunkenness and promote sobriety. The inhibition therefore extends to such spirituous liquors, whether fermented or distilled, as by their free use produce intoxication. Hence when it is of common knowledge and observation that a particular kind of spirituous liquors in question produces intoxication, then the court may so declare, but if it is doubtful whether or not the liquor be such, then a question of fact is raised for the jury, as was decided in *State v. Lowery*, 74 N. C. 121. N. C. Sup. Ct., Dec. 12, 1887. *State v. Giersch*. Opinion by Merrimon J.

**TAXATION—EXEMPTION—MUNICIPAL PROPERTY.**—Revenue Act of Illinois, § 2, exempts from taxation all property belonging to a city used exclusively for the maintenance of the poor; all public buildings belonging to a city, with the grounds on which they are erected; all implements used for extinguishing fires, with the building used exclusively for their safe-keeping, and the lot whereon the building stands, when belonging to a city; all market-houses, public squares or other public grounds, used exclusively for public purposes; all works, machinery and fixtures belonging to a city, and used exclusively for conveying water to such city. *Held*, that under this provision a toll-bridge owned and operated by a city for its own benefit, but situated outside the city, is not exempt from taxation. Ill. Sup. Ct., Nov. 11, 1887. *People v. City of Moline*. Opinion by Magruder, J.

**TRADE-MARKS—GEOGRAPHICAL WORDS—INFRINGEMENT.**—In 1810 B. began the manufacture of mustard in Lexington, Ky., which became widely known as "Lexington Mustard." After some years plaintiff purchased the business, and in 1877 removed it to Louisville. Prior to that time the label described the goods as "Burrowes Mustard, Lexington, Ky.," which was changed to "Burrowes Lexington Mustard," giving the address of the manufacturer as Louisville. Defendant began to make mustard in Lexington in 1873, calling it "Metcalf's Improved Lexington, Kentucky Mustard," and in 1877, "Metcalf's Lexington, Kentucky Mustard." *Held*, that where it is uncertain whether a geographical word is used as an address or as the name of a manufactured article, and it is uncertain which of two first used it in the last named way, neither party can appropriate the word to his exclusive use as a trade-mark. If a

geographical name be used as such it cannot be protected as a trade-mark. Clearly all persons living in a town or city may use its name as an address, and of course many persons may make the same article in the same town, and show that it is so manufactured by having the name of the place stamped upon it or printed upon the label or covering as their address or place of business. Otherwise monopolies, which are destructive of individual right and public interests, would be created and fostered. The right of one person to appropriate the name of a region of country to the exclusion of others, who produce or sell a similar product of the same region, may be regarded as settled by the Supreme Court in *Canal Co. v. Clark*, 18 Wall. 811, commonly known as the *Lackawanna Coal case*. Lackawanna is the name of a considerable region of country. Lackawanna coal is a natural product of that region, and the name was descriptive of the general character or quality of the product. It not only indicated the place from whence the coal came, but the general quality of the article. Being generic, and thus descriptive, it was held that each of the contestants had a right to call his coal "Lackawanna Coal;" but this case cannot be regarded as holding that the name of a place can under no circumstances become a trade-mark. The general qualities of a natural product are indicated by the name of the region from whence it comes. All have a right to sell it, and in doing so to call it by the name of the section where it is produced, or from whence it originally came, as that in effect describes the article. Such a name indicates the quality, and not the producer or the ownership. All may use it with equal truth. It is not like a sale of one man's goods as those of another. There is no invasion of a man's business reputation, and no imposition practiced upon the public. For these reasons such phrases as "Sea Island Cotton," "Hungarian Grass," "Kentucky Hemp," or "Virginia Tobacco," will not be protected as trade-marks. This is not so however of a manufactured article. The name of the place in which it is made serves in no possible way to indicate its quality or composition; and where the manufacturer has given it a geographical name, which he was the first to use in connection with the article, it seems to us that it may from long use in such connection acquire a secondary meaning, and instead of designating the place where the article is made, indicate its origin, or that it is the product of a particular manufacturer or made according to his method. When this is the case it becomes, in our opinion, a valid trade-mark. It then designates the particular goods of this one man. The public so understand it, and this is the aim and end of a trade-mark. The name is no longer used to indicate the place where they are made, but becomes the name of his goods. It gives notice that he is the maker. It by reason of first and continued use and association with the name of the article made or sold by him acquires an understood reference to him. It is the trade denomination of his article. It acquires a secondary meaning in connection with a particular manufacture. Thus we will suppose that John Doe has for years made at Mt. Sterling, Ky., a revolving book-case, which he has called during all that time "The Mt. Sterling Revolving Book-Case." The materials out of which he constructs it come from different places. No one else has made such a case there, or used this name, and it does not express in any way the quality of the article, save as referring to Doe as the maker. The public, when they ask in the market for the "Mt. Sterling Revolving Book-Case," understand that it is the one manufactured by him. The name "Mt. Sterling," as used in this connection, and under such circumstances, indicates the particular book-case of this one man. His skill has given it excellence and reputation in the mar-

ket, and justice to him as well as the protection of the public requires that its name should be protected as a trade-mark. It will create no monopoly. Upon the contrary, it will serve to stimulate invention and competition. It will not hinder Richard Roe or others from making the same article, at the same place, and using the name of the place merely geographically or to show their place of business, or as their address; but they must not use it as the name of their book-case. Indeed unless they aim to deceive the public, they would not desire to so use it. If their article is as good or better than that of Doe, there would be no incentive to do so. It will not do to say in such a case that as Roe's manufactory is at Mt. Sterling, therefore he, a new-comer, may give his book-case the same name as Doe's, because equity will not enjoin against telling the truth. It is done for deceit, and when so done it cannot be said, in a true sense, that it is done truthfully. It is at best but a nominal truth, amounting to a deception. There is really a false representation, which equity from a sense of common justice will enjoin. A person's name may be a trade-mark, as "Decker Brothers" upon pianos. There may be other brothers of the same name, and they could, in a certain sense, truthfully use the same name upon pianos, which they might subsequently begin to manufacture, and a man cannot be deprived of the right to use his own name; but in such a case he must use it as his own name, and not as the name of his goods. Each case must of course turn upon its own particular circumstances. *Browne Trade-Marks*, § 192, says: "A word may be considered to be geographical or not, according to the circumstances of the case," and evidently a distinction should be drawn between the use of a geographical name, indicating the particular manufacture of a certain person, and its use in describing a natural product of a particular locality, possessing qualities depending upon the place. The above view, we think, is supported by both reason and authority. In the *Anatolia Licorice case*, 10 Jur. (N. S.) 550, the complainants were manufacturers of a new character of licorice out of materials obtained from different places, upon which they stamped the name "Anatolia." The name used was held to be a trade-mark. Mr. Browne, in speaking of this case, says: "This is a recognition of the doctrine that a geographical name may cease to be merely such, and acquire a new function, as an arbitrary symbol." *Browne Trade-Marks*, § 184. The *Glenfield Starch case*, 5 Eng. & Ir. App. Cas. 506, appears to have been well considered. There the plaintiffs, as in this case, were the assignees of the business, and had removed their manufactory from the little village of Glenfield to Paisley, but still continued to use the word "Glenfield" upon their starch. The defendant, residing at Glenfield, and doing business in the very house previously used by the plaintiffs, began to make what he termed upon his labels "Glenfield Starch." He was enjoined from so using the name. *Slegert v. Findlater*, L. R., 7 Ch. 801, is to the same effect. The opinions in *Newman v. Alvord*, 51 N. Y. 189, and *Lea v. Wolf*, 15 Abb. Pr. (N. S.) 1, appear to have been based mostly upon an intended fraud; but where a trade-mark is infringed, the false representation, either directly or indirectly made, is really the essence of the wrong. The *Moline Plow case*, *Candee v. Deere*, 54 Ill. 439, and that of the *Brooklyn White Lead Co.*, 25 Barb. 416, do not, when closely examined, raise any conflict. In the one case the word "Moline" was used as an address, while in the other the complainant was not the first user of the word "Brooklyn." *Ky. Ct. App.*, Nov. 29, 1887. *Metcalfe v. Brand*. Opinion by Holt, J.

WATER AND WATER-COURSES—SURFACE WATER—ERECTION OF BARRIERS—AGREEMENT TO FENCE.—De-



defendants erected a tight board fence between their lot and that of plaintiffs, whereby the surface water from plaintiffs' lot was stopped from flowing on their lot. The fence was built in part on a portion of the division line, which was to have been fenced by plaintiffs. *Held*, that defendants had a right to erect a perfect barrier to the surface water, and it was not modified by the agreement as to the portion of the fence to be built by them. Conn. Sup. Ct. Err., July 15, 1887. *Chadeayne v. Robinson*. Opinion by Pardee, J.

### OUR NEW YORK LETTER.

THE trial of Messrs. Squire and Flynn, indicted for conspiracy, came to a most inglorious end, so far as the prosecution was concerned, before Judge Lawrence last week. It was the first important trial conducted by the new district attorney and his staff, and in its result must have been most mortifying to the friends of that official, who looked for a continuation of the good work that distinguished the conduct of the department under Judge Martine. Col. Fellows' first-lieutenant was a Mr. Dos Passos, whose appearance in the case was little short of pathetic. Mr. Elbridge T. Gerry and his most excellent society would have been quite justified in interfering in the young man's behalf. He seemed to adopt the legend of the Leadville fiddler, "Please do not shoot the performer; he is doing the best he can." He announced that it was his first criminal case, and besought his doughty opponents when they sat down on him to sit lightly; but Bourke Cockran and Judge Davis have not yet acquired the habit of sitting very lightly on their antagonists, and the result was that the little "people" were crushed. Cockran came into court loaded for elephants, but the game he brought down was a badly mutilated hare. There seems to be little explanation or excuse for such a humiliating spectacle as that furnished by the people on this occasion. The selection of Col. Fellows as district attorney seems to have been a case of putting a bugler in command of the regiment. He is a bugler *par excellence*, but has yet to make his reputation in planning and conducting a campaign against the enemy. Like the famed piper of familiar story, he can charm the rats so that they follow him, bewitched by his sweet tones, but he has not yet struck the key which drives them to their holes. As your Martin I. Townsend used to say, "A man can accomplish a great deal by the unassisted power of wind," but that he can run a district attorney's office by that motive power—even though it is sweetened wind—is yet to be demonstrated. Bourke Cockran's argument and the impression he produced in the Sharp case have done much to send him toward "the top round." He is still under forty, and has a great career before him if he continues to master his cases as he has the important ones lately conducted by him.

Thirteen years ago the chief justices of the courts of this department designated the *Daily Register* as the official paper in which the calendar of the courts and legal notices should be published, and in all the period since then that paper has faithfully and accurately performed the functions assigned it. If the bar of this city has an organ the *Daily Register* is the one. Now comes one of the party organs with a great show of influence, and is making the greatest effort of its life to have itself substituted for our familiar and ever-faithful *Register*. What prospect of success there may be in the movement I know not, but I am sure that every member of our bar would regard it as a personal calamity to have any change made. Why such conscientious discharge of duty as that shown

by those who conduct that paper (whom I have not the pleasure of knowing) should not entitle them to profit by the civil service rules, I am at a loss to understand.

The law's delay is no longer a current phrase here. Any lawyer here who is desirous of a speedy trial for his client can secure it in four months; get to the General Term in thirty days, and to the Court of Appeals—ah, there's the rub.

I was interested in reading a communication which appeared in the columns of your journal some weeks ago, in which the writer bewailed the fact that there were no great judges here now, and strung his harp to the tune of "And there were giants in those days." I think his conclusions were unjust, and I affirm that there has never been a time in the history of the jurisprudence of this State when reversals were more infrequent, in proportion to the volume of litigation considered, than at present. Perhaps he distinguishes between great judges and good judges. What qualities aside from great learning in the law must a good judge have to be considered a great judge? Are they not personal qualities? If a good judge is master of the principles of jurisprudence, is quick to apply them, discriminating in judgment, patient in hearing argument, and last but not least, courteous to the great and small advocates who appear before him, he is equipped with nearly every thing that goes to make a great judge. I claim that for the most part our higher courts of record in this city are made up of such men, and that there never has been a time when our Supreme Court was stronger than now. Judge Barrett was never reversed in a criminal case until he went down on the Sharp case, concerning which he is said to have remarked: "To err is human; to reverse, divine."

A very interesting trial came off in the Supreme Court before Judge Andrews last week, in which two of your former towns-people were concerned. Gerrit Smith, a grand nephew of the great abolitionist, and formerly organist of St. Peter's Church in your city, and now at the South Dutch Church in this city, sued Dr. Cornelius J. Dumond for malpractice in the care of his broken ankle. Mr. Smith had been knocked down by a cart in the street and sustained a fracture of the fibula just above the ankle-joint and of the tip of the internal malleolus on the other side of the ankle. The doctor diagnosed and treated the injury as a fracture of the leg about five inches above the ankle, and failed to reduce or even discover the fracture for a fortnight, thus subjecting the patient to great and unnecessary suffering. At the end of this period the family called in the aid of the celebrated surgeon Dr. Sands, who at once discovered the difficulty, administered ether, and reduced the fracture, and from that time it was treated to recovery by Dr. Wier. The injury is a very common and palpable one, known among surgeons as Potts fracture. Malpractice suits are rare and a recovery of damages is seldom had, thanks to the tendency of the doctors to stand by one another, but in this case the blunder was so gross that Mr. Smith was advised to sue, and Messrs. Arnoux, Ritch & Woodford acted as his attorneys, Messrs. Paddock & Cannon representing Dr. Dumond. The trial was very lively, and the attendance of the most celebrated surgeons in the city, and the high social and professional standing of the plaintiff, and his wife, who is also well-known to your citizens, and is the leading singer at the Church of the Incarnation here, drew large crowds. Some questions of veracity between the doctor on one hand, and the plaintiff and his wife and mother and Mr. Louis S. Burchard, the lawyer of this city, were easily resolved in favor of the plaintiff, and some indiscreet and unwarranted abuse of the younger Mrs. Smith by Mr. Palmer, the defendant's counsel,

rendered it evident that it would be a mere question of damages. On behalf of the plaintiff Messrs. Sand and Wier, and the famous expert, Dr. Louis A. Stimson, were called, and for the defendant, Drs. Bryant, Stephen Smith, Ripley, and one or two others. There was really very little conflict between the experts, all agreeing that it was essential to reduce such a fracture at once and keep it firmly reduced; but Dumond's doctors did what they could for a desperate case. We have heard many expert physicians and surgeons testify, but never have we heard a medical expert at once so intelligent, comprehensible, candid and learned as Dr. Stimson—a model witness. Dr. Bryant is also a capital witness. The jury gave \$1,000 damages. Four were in favor of \$5,000, but considering that Mr. Smith has not sustained serious permanent injury—thanks to Drs. Wier and Sands—the award was probably just and discreet. The trial lasted four days, and was most admirably and discreetly conducted for the plaintiff by Mr. Haley Fluke, of the firm of Arnoux, Ritch & Woodford, who has distinguished himself by his management of the great libel case of *Hinman v. Hare*, and whom I regard as one of the most promising of our younger advocates. Mr. Palmer had not much of a case, but he easily made the worst of what he had by making fun of the plaintiff's sufferings, and by slurs upon his amiable, accomplished and beautiful wife. He has probably learned in this trial that it will not answer to abuse a woman in court, especially a pretty one, and his client has received a liberal, if rather expensive education in Potts fracture. I am sorry to observe that the defendant is a graduate of the Albany Medical College. His radical mistake was in undertaking to act as a surgeon at all. Judge Andrews presided with his accustomed impartiality, patience and dignity. He was at times, I thought, a little too patient.

DEMOT ENMOT.

### CORRESPONDENCE.

#### MR. KAHN'S LUNACY SCHEME.

*Editor of the Albany Law Journal:*

I have read your criticism on my pamphlet, but you have overlooked the provisions in my pamphlet, viz.: on page 3, paragraph 5, you will find there that in New York State there are only two counties which have a population of 400,000—New York city and Brooklyn—and therefore the figures you mention would not be in accord with my suggestions, nor do my work justice, and the salaries would only amount to in the aggregate of \$60,000. As to the other parts of your criticism I most respectfully differ, and from the opinions expressed verbally and in writing by judges, lawyers, laymen and physicians, my bill or suggestions meets the approval of all, except in a few instances that they think the salary ought to be less. Of course that can easily be reduced by our law-makers, or leave it as they desire.

Yours truly,

NEW YORK, Feb. 25, 1888.

AARON KAHN.

[This explanation renders the scheme still more objectionable, because it renders it special. New York city and Brooklyn lunatics should have no more favor than rural lunatics.—ED.]

#### THE CODE AND THE NEW YORK CITY BAR ASSOCIATION.

*Editor of the Albany Law Journal:*

Your criticisms of the objectors and objections of the New York City Bar Association to the enactment of the Civil Code, though somewhat severe, are doubt-

less just. And this suggests the field of usefulness that such an association of several hundred lawyers in one locality could, if they would, occupy in the Empire State of New York in the interest and to the progress of the people, not alone of this State, but of the whole country—aye, of the world.

We do not believe the Civil Code is perfect, nor even as perfect as it could easily be made if any body of lawyers could be found who were sufficiently patriotic and self-sacrificing to do the needed work. This work is a discussion of its provisions, section by section, to discover if they are well based, and tend to a true and desirable end; and then what are the lawyers doing to aid the reforming and improving of our State Constitution?

If the New York City Bar Association had as high an appreciation of its obligation to the profession and the public as could reasonably be expected, the work of detailed examination of the Civil Code would have been undertaken and completed years ago, and done thoroughly in all honesty and good faith, and not omitted or done partially and with a seeming desire to belittle the labors, ability and patriotic devotion through long years of its eminent and venerable chief author. It would have met at its rooms once a week, for two years if necessary, and discussed and passed upon its provisions as a deliberative body, which the association now is not, and if it believed that changes would improve it, it would have recommended them.

It cannot be that the association is opposed to any Code at all—some of its members may be, but certainly not a majority—however I must not say more on this subject, as I am not now a member.

NEW YORK, Feb. 27, 1888.

LAWYER.

### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, March 6, 1888:

Order vacating assessment affirmed with costs—In re Petition of Matthew Colling to vacate assessment.—Judgment reversed, new trial granted, costs to abide event—Jane Kinney, respondent, v. City of Troy, appellant. This and the following case were appeals from judgments recovered for injuries received by falling on icy sidewalks. In Mrs. Kinney's case the judgment was \$1,132.62, and in Mrs. Kaveny's, \$2,806.05.—Judgments reversed, new trial granted, costs to abide event—Sabrina Kaveny, respondent, v. City of Troy, appellant.—Judgment reversed, new trial granted, costs to abide event—President, etc., of Manhattan Company, respondent, v. Richard H. Laimbeer, impleaded, etc., appellant.—Judgment affirmed with costs—Henry J. H. Tamsen, appellant, v. Henry and others, respondents.—Appeal dismissed with costs—Adolph Strasser and another, respondents, v. Adolph Moonells, appellant.—Judgment affirmed with costs—John G. Scott, respondent, v. Pedro Montello, appellant.—Motion to dismiss appeal denied without prejudice to an application to the court below to return remittitur to this court—Wm. F. Parks v. Margaret A. Murray.—Motion to dismiss appellants' appeal from the order of the General Term is granted, and the motion to dismiss appellants' appeal from the judgment herein is denied without costs to either party—Nathaniel Hooper and others, respondents, v. Charles McC. Beecher and others, appellants.—Motion for reargument denied with \$10 costs—Routh McCormick, respondent, v. City of Brooklyn, appellant.—Motion for reargument denied with costs—People, ex rel. Hiram Sinkler, appellant, v. Irving C. Terry, superintendent of Onondaga penitentiary, respondent.—Motion to put on calendar granted with costs—Conrad Loos, respondent, v. Wilkinson and others, appellants.

# The Albany Law Journal.

ALBANY, MARCH 17, 1888.

## CURRENT TOPICS.

THE letter from Mr. Creed Haymond, of California, which is printed in another column of this number, comes in very opportunely as an answer to two doubters on the practicability and efficiency of codification. *First.* It serves as a very conclusive, practical answer to Mr. Hornblower's argument founded on the comparative number of appeals in California and in New Jersey. There can be very little foundation for an argument against or for codification in such statistics. That is one reason why we laid no greater stress on Mr. Hornblower's mistake about the comparative number of reports in the two States. So long as there are lawyers and litigious clients, nothing, not even codification will stop appeals, and these classes may be more litigious, or the lower courts may be less intelligent, in one community than in another. It is also probable that a good deal of New Jersey litigation is transacted in New York, especially that of the most important character, such as that pertaining to corporations, for New Jersey is to a considerable extent an overflow from New York, and much important business is done in the city of New York by residents of New Jersey. The great question is, is codification practicable and efficient? And this can best be answered by intelligent lawyers and judges of a State where there has been a code in operation for fifteen years. Mr. Haymond, one of the most intelligent, and influential, and busiest lawyers of California has answered this question very conclusively, as it seems to us. Of similar weight and to the same effect is the opinion of Governor Church of Dakota, who was a warm opponent of codification when in the Assembly of this State a very few years ago. Such testimony is far more pertinent and satisfactory than counts of volumes of reports or of the number of appeals. Truly, "an ounce of experience is worth a ton of theorizing."

We commend Mr. Haymond's letter also to the editor of the *Central Law Journal*, who in the last number of that excellent periodical, mingles reproof, lamentation and scepticism about the matter of codification in nearly equal proportions. The *Central* says: "The ALBANY LAW JOURNAL, in its issue of February 25th, in particular, manifests the courage of its convictions by its criticisms, 'speaking right out in meeting' with the fervor of an enthusiast, and in language of exceeding richness and volume. The matter is beyond all question intensely exciting, but we trust that our contemporary will bear in mind the nursery admonition against letting 'angry passions rise,' and will not descend, except by way of hypothesis, to the level 'of an ordinary

newspaper.'" We hope indeed we may never get quite so low as that level. But we have no "angry passions." Our brother might as well reprimand a zealous advocate in court for being "angry." At times we have intended to express, and hope we have expressed, a righteous indignation at men who have stigmatized the venerable survivor of the codifiers as "Jack Code" and "Dogberry," and ridiculed his work — which they have never read — as "not worth a dime novel." But so far from anger have we been that we believe we have never refused to print any thing that the opponents of the Code have sent us, from Prof. Dwight to Mr. Miller and Mr. Hornblower. The difference between the *Central* and us is that the *Central* is not a "reformer," and we are, and have been for thirty years — were born, have lived, and propose to die a law reformer. So much for that.

But we proceed to quote the following testimony and doubts of the *Central* as to the condition of the common law and the proposed remedy: "Seriously, the subject of codification is one of great interest to the profession as well as the public. The evils with which it is proposed to deal are inveterate, of long standing and rapidly increasing. And at the very outset of any consideration of the subject we are confronted by the question whether they are not past all surgery, inextricably interwoven with the very vital chords of our system of jurisprudence. On this point we entertain grave doubts, although we would be glad to be convinced that they are without foundation. The common law is neither more nor less than an immense mass of precedents, each of which has the force of law, not because the court which decides it thinks that the ruling is just and right, or consistent with the statute which it professes to expound, but because it follows the *dicta* of antecedent courts whose decisions rests upon a like foundation. \* \* \* Each construction is itself construed, differences are found, distinctions are taken, rulings are modified and each new case goes in the reports to swell the mass of precedents, now more numerous than the locusts of Egypt, and increases yearly, without stop or stay, let or hindrance. \* \* \* The fact remains that thousands are annually added to the already overgrown mass of adjudicated cases, and any one of the new cases may possibly very critically affect important litigation. This is somewhat appalling to a practitioner who wishes to keep fully up with the profession, and should be very seriously considered by statesmen who would like to secure a sure, swift, honest and cheap administration of justice. \* \* \* Will these and other evils incident to the administration of the law be remedied by reducing the law of the land to the forms and dimensions of a code? And if that be the proper remedy, is it possible, without great derangement of business and gross injustice, to bring within the compass of a series of statutes so vast and so undigested a mass of jurisprudence as the common law of England, so far as it is in force in

this country? And is it possible to put into the form of a series of statutes so large a body of legal principles which can be found in no other form than precedent, adjudged cases and inferential *dicta*? We think that the system of law under which we live differs most materially from that system which was successfully codified by Justinian and Napoleon, in this, that the civil law rests upon positive enactment or edict, or *responsa prudentum* which had the force of the statute law, and precedent had far less value than in England. \* \* \* Now whether an agglomeration of principles dependent wholly upon authority can be made available as material for a code like the Code Napoleon, is a question not easily answered, and equally uncertain would it be whether the compilers could satisfactorily adjust and deferentiate the weight to be allowed to the authorities by which conflicting principles are supported. \* \* \* It remains to be seen whether the men of the law can keep step with their brethren of science; if they can achieve a code which will extinguish the manifold evils under which the profession labors and the public suffers, they will have performed a service gratefully recognized by the present, and freshly remembered by all coming generations." Now in answer to these queries and doubts of our esteemed brother, we point to the testimony of Messrs. Church and Haymond, and again we say, "an ounce of experience is worth a ton of theorizing." We also point to the astounding example of England, where in a quiet and gradual way the law-makers are enacting the common law into statutes, and have codified a great part of the common law. And especially do we point to the fact that the law of bills and notes is codified there, and only six cases of construction of the act have arisen in four years. If one will not believe such testimony as this, he would not believe though one rose from the dead. We are not called on to conjecture about an experiment; we need only observe the facts of experience, and the successful and improved administration of justice.

In a recent English case (*Union Bank of London v. Munster*, 57 L. T. Rep. [N. S.] 877), we find the following interesting observations by Kekewich, J., on the authority of text-books written by judges: "The argument however is rested entirely upon one passage in the work of Fry, L. J., on Specific Performance. It is to my mind much to be regretted, and it is a regret in which I believe every judge on the bench shares, that text-books are more and more quoted in court, and some judges have gone so far as to say that they shall not be quoted. I mean, of course, text-books by living authors. In this particular book we have a warning against it by the learned author himself. I cannot forbear quoting the words which must be well known to every one, and which have been read by myself many times (Fry on Specific Performance; preface to second edition): 'There is one notion often ex-

pressed with regard to works written or revised by authors on the bench, which seems to me, in part at least, erroneous, the notion I mean that they possess a *quasi*-judicial authority;' and then he points out a reason obvious to all students why that is so. In the passage relied upon the lord justice refers to the general equitable principle, and then on that rests his opinion that the fraudulent act of a mere stranger to which the plaintiff was neither party nor privy would deprive him of his right to enforce the performance of the contract. If that position were advanced by way of argument at the bar, counsel would of course be asked, 'what do you mean by the fraudulent act of a mere stranger?' One cannot ask this question of the learned author, and it may be that the learned author here did not think it wise or desirable, there being no judicial answer to the question he puts, to go into the matter more fully," etc. This practice of quoting text-books in court, which the judge deprecates, undoubtedly grows out of the tendency toward codification. It is such a relief to find a mass of decisions gathered and grouped, and their essence expressed by an intelligent text-book writer, that we find the judges themselves, in this country, more and more citing and quoting from them, to the exclusion of the decisions. Why should Kent or Story be less authoritative as a commentator than as a judge? Is Judge Metcalf's treatise on Contracts, or Judge Dillon's work on Municipal Corporations, or Judge Redfield's various work, less authoritative than their judicial decisions on the same subject? Nay, with the possible exception of Kent, are not the commentaries of these men infinitely more authoritative than their judicial decisions?

Here comes *Gibson's Law Notes* again, with several funny cases. "At Greenwich County Court a widow sued a baker for damages, medical fees and loss of time, caused by a pin, which had been negligently left in a Bath bun, sticking in her throat. The judge said it was a most peculiar case. The only similar one he remembered was where a man swallowed a needle at the Holborn restaurant while eating some spinach. It was in that case clearly proved that no needles were ever used or allowed in the restaurant, and the verdict was for the defendants. This case was different. The pin might have got into the flour, or any person visiting the bakery might have dropped it. Of course it was an unfortunate accident for both parties, but he must give a verdict for the plaintiff. If the pin could be proved to have been in the flour, would that baker have a right of indemnity over against the miller?" In *French v. Vining*, 103 Mass. 132; S. C., 3 Am. Rep. 440, the defendant sold the plaintiff hay on which white lead had been spilt, and by eating which the plaintiff's cow died; the plaintiff recovered damages. A public caterer is liable for an injury by unwholesome provisions. *Bishop v. Webber*, 139 Mass. 411; S. C., 52 Am. Rep. 715. A farmer bought of a miller a sack of bran

for his cows, and without negligence on the miller's part two copper clasps fell into it, and one of the cows swallowed them and was killed. *Held*, not actionable. *Lukens v. Freund*, 27 Kans. 664; S. C., 41 Am. Rep. 429.—In a recent case of patent-right between two rival manufacturers of hand-organs, Mr. Justice Kekewich ordered both organs played in court. "That dancing-doll case," says *Gibson's*, "should clearly have been consolidated with this organ-grinding case."—A tobogganer sued a slide company for an injury caused by their not having put proper mats on the slide. "Needless to say that one of the judges had never heard of tobogganing."

#### NOTES OF CASES.

**I**N *Hayman v. Pennsylvania Railroad Co.*, Pennsylvania Supreme Court, Jan. 16, 1888, plaintiff, a passenger, was injured in passing from the defendant's waiting-room to their ferry-boat by contact with a swinging door, of ordinary construction and use, at the end of the passage-way, which was permitted to come violently against him by a person moving in advance. *Held*, that there was no presumption of negligence. The court said: "This was the whole case, and upon it the plaintiff contends that he should have been allowed to go to the jury upon the ground that the mere happening of the injury raises *prima facie* a presumption of negligence, and throws the burden of disproving negligence on the carrier. In support of this position he cites *Laing v. Colder*, 8 Penn. St. 474, and several cases following it. The authority of these cases is beyond question, but the applicability of the rule established by them to this case is not. The rule requires that a carrier of passengers shall exercise 'the utmost degree of care and diligence' to secure the safety of its passengers. To this end it must provide a safe road-bed, well constructed cars, engines, and skillful, trustworthy servants to take charge of the movement and management of trains. All these things are under the exclusive control of the officers of the company. The public have no right and no opportunity to interfere in regard to them. When therefore a passenger is injured by a collision or other accident while on his journey, the law presumes the accident to be due to want of proper care on the part of the company conducting the transportation, and puts the burden of showing the actual condition of the track, the car, or other appliances involved in the accident, upon the only party in a condition to bear it, viz.: the carrier, which has the exclusive possession and care of it. The legal presumption takes the place of the proof which the injured person is unable to make, and puts the carrier at once upon the defense. *Laing v. Colder*, *supra*; *Meier v. Railroad Co.*, 64 Penn. St. 226; *Railroad Co. v. Anderson*, 94 Penn. St. 358. But the reason ceasing, the rule ceases. If an intoxicated person, after having purchased his ticket at a railroad station, should, on his way out of the ticket office,

stumble upon a heated stove and suffer serious injury, there would be no reason for excusing the injured man from making out his case because he had a railroad ticket in his pocket, or because the stove on which he fell belonged to a railroad company, or was standing in a railroad station. It was no part of the machinery of transportation, and was in no sense peculiar to the business of the railroad company. The same thing is true of the case in hand. The plaintiff was injured in the waiting-room or passage-way leading to the wharf, by putting his hand through the glass in the swinging door. The door was no part of the machinery employed for the carriage of passengers. It was not built upon a pattern peculiar to the defendant company. So far as the pleadings or the plaintiff's evidence enable us to judge, it was constructed like the swinging doors to be met in places of business in every part of the country. It was certainly visible to all comers and goers passing between the waiting-room and the boat, for it was so located that all passengers were obliged to push it open in passing to and from the landing. If there was any thing in the construction of the door that made it unfit for the purpose for which it was used, or the place at which it was located, it was easy for the plaintiff to show it by a multitude of witnesses. There was no reason therefore for resorting to the legal presumption of negligence in aid of the plaintiff's case. The cause of the accident and the erection and construction of the door were as clearly known to the plaintiff as to the defendant and its employees, and it was the duty of the plaintiff to make out his cause of action in this case as he would be bound to do if the swinging door had been in a hotel or store. Not having done this, the court was clearly right in ordering the nonsuit."

In *Matthews v. Munster*, Court of Appeals, 57 L. T. Rep. (N. S.) 922, an action for malicious prosecution was settled by counsel in the course of the trial upon the terms that there should be a verdict for the plaintiffs for 350*l.*, and that all imputations should be withdrawn. The defendant was not present when the settlement was arrived at, and upon coming to the court an hour later he repudiated it. *Held*, that he was subsequently bound by the settlement in question. Lord Esher, M. R., said: "A request to a counsel to act as advocate does not mean, of course, that he is to act for the client except as advocate. It is a request to him to do those things which an advocate does for his client. The profession of an advocate is to merely advise his client with reference to a case before it comes into court, but as soon as it comes into court to act for him altogether in the conduct of it. In court the advocate is acting as the superior in the matter, and has unlimited power as to the conduct of the case. That power is not unlimited in the sense that it cannot be overruled, because it is part of the conduct of the cause, and is therefore under the supervision of the court, who will not allow in-

justice to be done. If therefore the advocate does something which gives a clear advantage to the other side, and does clear injury to his own client, or makes a slip which results in injury to his client, the court can set aside the proceedings and order a new trial. But as against his client the authority of the advocate is unlimited in the conduct of a cause in court. That authority can be withdrawn by the client at any minute, but the client must take care to let the other side know that the authority has been withdrawn. If when the client is present the advocate is going to do something in court to which the client objects, the client cannot direct the advocate not to do it. If the client tells his counsel to do something other than that which the counsel thinks advisable, it is the duty of the counsel to say to the client, 'withdraw the authority you have given me to act for you and I will at once make that known to the other side, and will return my brief.' That is the only way in which the client can get rid of the authority of the counsel. That authority however is strictly limited to the conduct of the cause. If a counsel were to do something beyond what was fairly necessary for the conduct of the cause, that would not be binding upon his client. He has no request to do more than that which his duty as an advocate requires. It therefore becomes necessary to consider what acts may be fairly regarded as necessary in the conduct of a cause. I think that the principle has been as well expressed as it can be by Pollock, C. B., in *Swinfen v. Lord Chelmsford*, 5 H. & N. 922. He says: 'We are of opinion that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, \* \* \* we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it.' That is the limitation—I will not say of the authority—but of the power of the counsel. Then he gives instances, which I purposely omitted in reading the passage, but which I will read now, of what is incidental to the conduct of the suit—'such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial.' It follows from that that he thinks that there are many things which properly belong to the management and conduct of the trial besides those which he specifies. One of the things that must properly belong to the management and conduct of the trial must be the assenting to a verdict for a particular amount and upon particular terms. In the present case the amount was 350*l.*, and the terms were that all imputations should be withdrawn. It is impossible to say that such an arrangement must be an unreasonable one. Counsel may see that if the case goes to the jury a verdict for a very large amount will be given. If the client is in court and says, 'I will not agree to those terms,' his counsel ought to say, 'then I will not act for you any longer,' and ought to leave him to

conduct his own case. If the client allows the negotiation to go on, and makes no audible objection, the settlements will be binding upon him, because he has not withdrawn the authority of his counsel and made that withdrawal known to the other side. But I wish to repeat that although the authority of counsel is unlimited until it is withdrawn, the court retains control over his proceedings. In the present case the client was not present in court at the time the settlement was come to, and therefore could not have put, and did not put, an end to the relationship of advocate and client which existed between himself and his counsel; but he comes now and says, 'I do not like what my counsel has done for me, and I ask the court to set it aside.' There is no symptom of any injustice having been done. The counsel exercised his judgment to the best of his ability in the matter, and I have no doubt did what was really best for his client."

In *Keenan v. Gutta Percha and Rubber Manuf. Co.*, 46 Hun, 544, the defendant was held liable for an injury to its employee by the bite of a dog harbored by the defendant, and known to its foreman to be vicious. The court said: "Notice to the foreman of the defendant was notice to the corporation, and the contention to the contrary is hardly entitled to serious consideration. Corporations can be charged with negligence in no way other than by showing some carelessness or omission of its agents. The wrong or negligence in this case consisted in keeping the animal after she bit the first boy, and that was with the knowledge of the foreman and the book-keeper, that is, the book-keeper knew the dog was kept on the premises of the defendant."

#### SURETY'S LIABILITY ON BOND CONDITIONALLY SIGNED.

##### II

**B**UT slight evidence appears to be sufficient to justify a finding of an express condition. In *Pauling v. United States*, 4 Cranch, 219, where the surety was held not bound, the sureties who signed simply said: "We acknowledge this, but others are to sign;" and this was held sufficient proof of a condition.

In *Gibbs v. Johnson* (Mich.), 30 N. W. Rep. 343, the court seems to have considered something more than a mere expectation necessary, the court saying: "It is not clear from the record that Royce made the delivery of this bond dependent upon the fact of Stack signing it as a co-surety. Royce says that he did not tell Johnson not to deliver the bond to the sheriff unless Stack signed it. He told him he would sign the bond if Stack would, and upon Johnson's word that Stack would sign it, he signed it, and instructed it thereafter to Johnson. But the Circuit judge virtually treated it as a condition."

The question should not be determined by any technical rule, but should be decided in accordance with the surety's intention. Still there ought to be enough evidence to warrant a finding that the parties understood that the bond was not to take effect unless certain persons signed it. The understanding may be expressed, or it may be a tacit understanding.

In *Pauling v. United States*, where, as we have just seen, the sureties who signed merely said, "Others are to sign," the court said that the jury might, under such evidence, have found that there was a condition, and that the judges who composed the court might not as jurors be perfectly satisfied with the finding of the jury *did* make, *i. e.*, that there was a condition. The court however said that the evidence was sufficient to support the finding, and the surety was held not bound, the obligee having notice of the condition.

It was intimated in *Nash v. Fugate*, 24 Grat. 202; S. C., 18 Am. Rep. 640, that delivery to a third person in escrow would be sufficient to protect the surety in case the bond was delivered to the obligee in contravention of the conditions on which it was intrusted to such third person.

But in *County of Taylor v. King* (Iowa), 34 N. W. Rep. 774, the court opposed to this dictum an express adjudication. The bond was delivered in escrow to third parties, Johnson and Dunlavey, on condition that it was not to be delivered to the obligee until other signatures had been obtained. They were not obtained, and the principal in the bond, having procured the same, delivered it to the obligee, but the obligee did not know that the bond had been delivered to Johnson and Dunlavey for any purpose. *Held*, that the sureties were bound. It is true that the persons to whom the bond was delivered in escrow did not themselves deliver it to the obligee. If they had, the fact that the instrument was in the hands of third parties being brought to the knowledge of the obligee might be regarded as sufficient to cause the obligee to take notice of the condition. It is on this ground that the dictum in *Nash v. Fugate*, 24 Grat. 202; S. C., 18 Am. Rep. 640, is based. The court in this last case said: "The obligee finding the papers in the hands of such a person is bound to know how he obtained possession of it, and by what authority he undertakes to dispose of it." \* \* \* "When the bond is in the possession of a stranger, there is nothing in the character of the agent or in the custody of the instrument calculated to mislead the obligee in unduly accepting it. On the contrary, the mere fact that a stranger, having no apparent interest in the bond, has possession of it is of itself sufficient to excite suspicion and to put the obligee upon inquiry as to his authority to dispose of it."

This distinction is based not upon the difference between the power of a stranger and the power of the principal obligor to deliver an instrument to be delivered by him on a certain condition, but upon the fact that the possession of the instrument by a stranger is sufficient to excite the suspicion of the obligor. When therefore, as in *County of Taylor v. King*, the obligee does not know that it has been intrusted to a third party, but receives the bond direct from the principal obligor, the surety is liable. The court seems to have acted on this distinction in *County of Taylor v. King*. "If the supervisors had received the bond direct from Johnson and Dunlavey it may be that they would have been charged with the duty of discovering what their powers were. But they received the bond from the very person who might be expected to deliver it, and who had the apparent power to deliver it." To the argument that the sureties were not bound because they had taken the precautions to put the bond into the hands of third parties, the court made the following answer: "To this however we have to say that it appears to us that Johnson and Dunlavey were the agents solely of the sureties, and if the bond was delivered in violation of the conditions upon which the sureties signed it, it was the fault of their own agents." The fact that the obligation was delivered to a stranger to it, will not exonerate the surety; the

obligee must have notice of that fact. It is on this principle that *Smith v. Bank*, 32 Vt. 341, was decided. The obligee in this case had knowledge that the bond came from the hands of the third person, to whom it had been delivered on condition, and the court said that this made it the duty of the obligee to inquire as to the extent of the power of the third person to deliver it.

Some of the cases have decided that a bond cannot be delivered to a co-obligor in escrow, and that therefore the attaching of a condition to such a delivery is nugatory. It is on this principle (?) that the court held the surety bound in *Millett v. Parker*, 2 Metc. (Ky.) 608. See also *Deardorff v. Forseman*, 24 Ind. 481, and *State v. Churchill* (Ark.), 8 S. W. Rep. 352-351.

But this position is so absolutely untenable that it will not be necessary to do more than refer to the authorities holding the contrary. *Ward v. Churn*, 18 Grat. 801-814; *Nash v. Fugate*, 32 id. 595; S. C., 34 Am. Rep. 780; *Jordan v. Jordan*, 10 Lea, 124; S. C., 43 Am. Rep. 294; *Pauling v. United States*, 4 Cranch, 219; *Guild v. Thomas*, 54 Ala. 414; S. C., 25 Am. Rep. 708.

Of course notice of the condition that another surety was to sign the bond is notice to the obligee, if given to an officer of the obligee charged with the duty of receiving and approving the bond. This has been held or assumed in many of the cases cited, and it will not be necessary to collate them here. It is held in *Pauling v. United States*, 4 Cranch, 219, in express language, where the court say: "Here the representative of the government had notice on the face of the instrument that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors." But when such officer is also a surety on the bond a different rule, it is said, obtains. *Stevens v. Bay City*, 26 Mich. 44. The bond in this case was signed on condition that it should not be delivered until certain others signed it. The mayor, whose duty it was to approve it for the city, the obligee signed it as surety, and evidence was offered to show that he knew of this condition officially. The evidence was excluded, and the court on appeal held that this would not have been notice to the city of which he was mayor, the obligee. The language of the court on this point is: "It appeared however that McCormick himself was one of the sureties on the bond. Being a party to it, of course he could not approve it, or represent the city by an official action in regard to it. This would put him in a double and antagonistic position, where his public and private interests would directly conflict. No man can thus deal with himself as a representative of some other interest."

But the force of this decision is much modified by the facts that the recorder of the city had authority to approve, and that he probably did approve it. On these facts the court in *State v. Churchill* (Ark.), 8 S. W. Rep. 352-358, distinguished the case from the one before it for decision. There the State treasurer executed to the State of Arkansas his official bond on which the governor of the State, A. H. Garland, was one of the sureties. The governor approved the bond, and it was his duty to approve it, and no one else had authority to approve it. The court decided that his knowledge as governor of the erasure of the name of one of the sureties from the body of the bond, and at the end where it had been signed by him, was notice to the obligor, the State. The court thus draws the distinction between this case and *Stevenson v. Bay City*. Referring to *Stevenson v. Bay City* the court say: "It is nowhere mentioned in the statement or opinion whether the mayor or recorder approved the bond. The presumption is however that it was approved by the recorder, because it is evident the point would have been more strongly pressed had it



been approved by the mayor; because it was the duty of the mayor, under the circumstances, to decline to act upon it, leaving it to the recorder, every officer being presumed to have done what duty required; and because the court would hardly have failed to state so important a fact as that the mayor did actually approve the bond, and that it was delivered to him for that purpose. This being the presumption, the reasoning of the court is much strengthened. The recorder had no notice of the condition, otherwise the plea would have been good. It was not the official duty of the mayor to transmit the notice he had received from his co-surety to the recorder before the approval of the bond. The recorder's approval of the bond could not possibly be affected by information looked up in the brain of the mayor, who presumptively had nothing whatever to do with the approval, and for aught we know, never saw or heard of it after the notice of the condition was given him by his co-surety. In this case Governor Garland had no alternative, no choice in the matter, so far as acting or not acting upon the bond is concerned. The law imposes upon him the duty of approving it as soon as presented. *He had no doubt, no substitute to whom he could refer the matter.* He could not have disqualified himself to act by any previous act of his own. He simply was compelled to act in the matter."

In *State v. Lewis*, 73 N. C. 138; S. C., 21 Am. Rep. 481, the court intimated that notice of the condition given to the clerk of the court would not be notice to the court, but the remarks were purely *obiter*.

Is an agent, authorized to receive and approve a bond, the representative of the obligee so that delivery to him is delivery to the obligor, within the rule which prohibits the attaching of any condition to a delivery to the obligee? *Ordinary of New Jersey v. Thatcher*, 12 Vroom, 408; S. C., 32 Am. Rep. 225, so decides.

Where the obligee is only a nominal party, and the bond is given as security for others, will notice of the condition acquired by the obligee, or by his agent or officer, be operative against the person who brings suit on the bond in the name of the obligee, but for the use and benefit of such person, so that as against him the surety may set up the defense that the bond was delivered on condition? On principle, the answer would seem to be in the affirmative, and the cases impliedly hold this by admitting in such cases that if the nominal obligee had had notice the defense would have prevailed. *State v. Potter*, 63 Mo. 212; S. C., 21 Am. Rep. 440; *Brown v. Probate Judge*, 42 Mich. 501.

Any other rule would render the surety inevitably a victim to the villainy of the principal, for he could never bring home notice to every one who might have an action on the bond.

Suppose the surety signs with blanks in the bond which he authorizes the principal to fill up, is he liable in case they are filled up in accordance with his instructions? There would seem to be nothing for courts on which to base a decision holding the surety not bound; and yet the cases are far from few which adjudge such a bond to be void as to the surety. *Upton v. Ancher*, 41 Cal. 85; S. C., 10 Am. Rep. 266; *Preston v. Hull*, 23 Grat. 600; S. C., 14 Am. Rep. 153; *United States v. Nelson*, 2 Marsh. 64 (in this case however there was no express authority to fill in the blanks); *Wynne v. Governor*, 1 Yerg. 149; S. C., 24 Am. Dec. 448; *Williams v. Crutcher*, 5 How. (Miss.) 71; S. C., 35 Am. Dec. 422; *Davenport v. Sleight*, 2 Dev. & B. 881; S. C., 31 Am. Dec. 420; *People v. Organ*, 27 Ill. 29.

These cases all rest upon the old rule that authority to execute a sealed instrument must be under seal.

The courts deduce from this doctrine the corollary that such an instrument cannot be added to or made complete by an agent acting under parol authority.

This is contrary to Lord Mansfield's ruling in the case of *Tetraz v. Evans*, 1 Anst. 228. This case has been followed in this country by the majority of the courts. *Ex parte Kerwin*, 8 Cow. 118; *Wolfe v. Constant*, 4 Johns. 60; S. C., 4 Am. Dec. 246; *Wiley v. Moor*, 17 Serg. & R. 438; *Stigfried v. Levan*, 6 id. 309; S. C., 9 Am. Dec. 427; *City of Chicago v. Gage*, 95 Ill. 593; S. C., 35 Am. Rep. 182; *Smith v. Crooker*, 5 Mass. 538; *Butler v. United States*, 21 Wall. 272; *Inhabitants, etc. v. Huntress*, 53 Me. 89; *McCormack v. Bay City*, 23 Mich. 457; *State v. Pepper*, 31 Ind. 76; *State v. Young*, 23 Minn. 551; *Bartlett v. Board of Education*, 59 Ill. 364; *County of Westing v. Lee* (Iowa), 30 N. W. Rep. 481; *Drury v. Foster*, 2 Wall. 24; *Swartz v. Ballou*, 47 Iowa, 188; S. C., 29 Am. Rep. 470; *Field v. Stagg*, 52 Mo. 534; S. C., 14 Am. Rep. 435; *Van Etten v. Emerson*, 28 Wis. 33; S. C., 9 Am. Rep. 436.

Many of the cases hold that an express authority to fill in the blanks is not necessary; that the delivery of the bond in that condition to the principal is sufficient to make his act in filling in the spaces binding upon the surety. *Swartz v. Ballou*, 47 Iowa, 188; S. C., 29 Am. Rep. 470; *City of Chicago v. Gage*, 95 Ill. 593; S. C., 35 Am. Rep. 182; *State v. Young*, 23 Minn. 551; *Drury v. Foster*, 2 Wall. 14.

The true foundation of the rule is the doctrine of estoppel. When the surety intrusts the principal with the bond signed in blank, he puts it in the power of the principal to make the instrument an apparently perfect instrument by filling up the blanks. Under this view of the matter the surety would be bound, although the principal should disregard the instructions of the surety, and fill in a larger penal sum, etc. This has been held. *Butler v. United States*, 21 Wall. 272; *City of Chicago v. Gage*, 95 Ill. 182; S. C., 35 Am. Rep. 182.

In the first case the defense was that the surety signed with the understanding that the penalty to be inserted in the bond was to be \$4,000. The principal inserted as the penalty \$15,000. The bond was not to be delivered unless filled in in accordance with this understanding, and unless other sureties were obtained. It would appear from the opinion of the court holding the surety liable that the obligee knew that the bond was signed in blank. The court say: "It is true that according to the plea this authority was accompanied by certain private understandings between the parties intended to limit its operations, but it was apparently unqualified. Every blank space in the form was open. To all appearances, any sum that should be required by the government might be designated as the penalty."

If as appears from this language the obligee knew that the bond was signed in blank, then the decision is a very strong authority in favor of the protection of obligees, as it might with some force have been urged that the obligee, knowing the blanks were in the bond when the surety signed, it was the duty of the obligee to inquire what amount the principal had authority to insert as the penalty. Holding that this is not notice of any restriction upon the amount of penalty to be inserted, is the case of *City of Chicago v. Gage*. The action was upon the bond of a city treasurer. Defense: that the surety signed with the understanding that if the penalty to be inserted in the bond exceeded a certain amount he was not to be bound. The penalty did exceed that amount. The court assumed in its opinion that the city had notice of the fact that the bond was signed in blank by the surety, and that the amount of the penalty was subsequently inserted, the court waiving the question whether notice to certain city officials was notice to the city. The defense was held bad, the court saying:

"Appellees claim that there was notice here on the part of the city of the secret understanding of the

sureties, or one of them, that the penalty of the bond was not to be more than \$250,000. If such were the fact, we would agree with them as to the fatal effect. The disagreement is in regard to what facts will constitute such notice. It is claimed that the notice to Hotchkiss, the city clerk, to Holden, the alderman, and to Clyde, the clerk in the office of the corporation counsel, that the blanks in this bond were filled subsequently to the signing of the bond by the sureties, and in their absence, was notice to the city of such fact, and that that would be sufficient notice to the city of the secret condition upon which the sureties signed the bond.

"Waiving the question whether the knowledge of the persons named of such signing in blank and subsequent filling of the blanks, would be notice of such facts to the common council, who were the body appointed by law to approve and accept the bond, and thus notice to the city, we will assume that it would. But we cannot then assent to the view taken, that the knowledge by the city of those facts affected the city with notice of the secret condition upon which the sureties signed the bond.

"The position taken is that any material defect whatever apparent upon the face of the bond is sufficient to give notice of the actual facts respecting the condition of the execution of the bond.

"There were several defects here apparent upon the face of the bond, but no one of them that we can see should affect the obligee with notice that it was the understanding of the sureties that the penalty of the bond was not to be more than \$250,000, or put them upon inquiry on the subject to ascertain whether it was not to be any larger than that. Surely the lack of a date in the bond would not do so; nor the absence of the names of the sureties in the body of the bond; nor the omission of the name of the office; and no more so, as we conceive, did the blank in the bond for the penal sum. This could not excite suspicion of there having been a limitation of the amount of the penalty. One could reasonably be led to infer no more from it than that as by the law the amount of the penalty was to be fixed by the common council, the penal sum had been left blank, to be filled in when the common council should have determined what the amount of the penalty should be. Under the decisions, the principal obligor had an apparent implied authority to fill up the blank, and the blank was filled by his direction.

"The obligee was justified in assuming, and acting upon the assumption, that Gage really possessed the authority with which he was apparently clothed. Knowledge of the unfilled blank for the penalty was but knowledge of the implied authority to fill it; and consequently could be no ground of suspicion of the lack of authority. The imperfection upon the face of the bond which is to have the effect of the notice contended for must, as we regard, be of such character, that it points toward, indicates and excites suspicion of the particular matter of defense alleged against the instrument, and as an ordinarily prudent man, to put the obligee to make inquiry as to the existence of the very thing which is set up in defeat of the instrument, as in this case, the condition of the limitation of the penalty to \$250,000. All of the cases cited by the appellee's counsel are cases of this character. All but two of them are of this class, namely: where in the body of the bond several persons are named as co-obligors, and it is signed by only a portion of the persons named in the bond as obligors, and it was set up in defense to the bond by the signers, or a portion of them, that they signed the bond upon the condition and agreement that all or certain named of the obligors in the bond were to sign it before delivery, and that they

had not done so. In such case the bonds purported to be the bonds of those who never executed them, and indicated on their face that they had not been completed according to the original intention, and properly enough the obligees were held to be put upon inquiry whether those who had signed consented to the bonds being delivered without the signatures of the others who were named as co-obligors, the defect in the bond indicating on the face of the instrument the very thing which was set up in defeat of the bond.

"Thus it will be seen that in every one of the cases the very matter of exception taken to the validity of the bond was indicated upon the face thereof, or the circumstance of incompleteness in the instrument pointed at and indicated on the face of the bond the existence of that particular secret condition or agreement, which was set up as attending the signing of the bond, and as defeating it.

"This is all that the exhaustive research of the very able counsel for appellees has produced in the way of authority in support of this last position, that a defect in a bond is notice, and we do not consider that the authorities at all meet the exigency of the present case.

"The point in this respect of notice is not whether there was knowledge of the existence of these blanks unfilled, but whether there was notice of this secret understanding in regard to the amount of the penalty of the bond. It is in reality a question of good faith—whether these blanks in the bond indicated the existence of the secret understanding as to the amount of the penalty, and should have put the obligee upon inquiry whether the sureties consented to the delivery of a bond with a larger penalty than \$250,000. We do not think such a circumstance as the blanks in the bond was in any way indicative of such a secret understanding, or excited any suspicion of its existence, or put the obligee upon any inquiry as to such an understanding, and we must believe the obligee acted in entire good faith in taking the bond."

This case is correctly decided. Of course where the blank is filled in in accordance with the instructions or under a general authority, the knowledge of the obligee that the bond was signed in blank will not affect the validity of the bond. *County of Lee v. Welsting*, 30 N. W. Rep. 481, and the two cases last above cited; *Minnesota State v. Young*, 23 Minn. 551.

The last case was decided on the ground of estoppel. It was urged that the sureties were not bound, because they did not know that there was any blank in the bond for the insertion of the penalty. This argument was thus answered by the court: "Moreover in this case, as we have already said, the board had a right to presume that the sureties knew of the existence of this blank, and in view of this and all the other circumstances of the case, there was an apparent implied authority to the board upon which they had a right to act, and having thus acted, the sureties cannot now be heard to say that they did not know of the existence of the blank. In other words, they are now estopped from denying the existence of the apparent and presumptive state of facts, which they by their conduct have authorized the board to believe and act upon."

What rules are settled by the authorities discussed? The writer deems himself warranted in stating them as follows:

1. A surety who signs a bond on condition that the same shall not be delivered unless others execute it, is nevertheless bound, although the bond is delivered by the principal obligor without securing the required signatures, provided the obligee has no notice, actual or constructive, of the condition.
2. If the obligee has actual notice of the condition, or notice of facts sufficient to put him upon inquiry

as to the existence of a condition, the surety is not bound.

3. The fact that the name of the person appears in the bond who has not signed the bond is sufficient to put the obligee upon inquiry as to the existence of the condition, and the surety is not bound.

4. If a bond signed by a surety has in the body of it the name of the other surety who has to sign, and the principal obligor before delivery erases the name, the obligee is put upon inquiry, except perhaps in a case where the name is so skillfully erased that the fact cannot be ascertained by a careful examination of the paper. But this should not prejudice the surety. This fourth proposition however cannot be regarded as fully settled by authority, but it is certainly supported by principle.

5. The fact that the word "sureties" is in a bond, although only one surety has signed the bond, is not sufficient to put the obligee upon inquiry, when no other name appears in the body of the bond.

6. The fact that the law requires two or more sureties is sufficient notice to the obligee of the condition that another surety shall sign, where the bond is signed by only one, although no other surety is named in the body of the bond.

7. A bond cannot be delivered by the surety directly to the obligee upon any condition whatever, for the reason that it cannot be delivered to the obligee in escrow. Therefore delivery by the surety to the obligee on condition that another surety shall sign, makes the bond binding upon the surety who does sign, although the condition is never fulfilled.

8. A bond can be delivered to the principal or any other co-obligor in escrow, and therefore a surety can attach a condition to such delivery which will be valid if the obligee has notice of it, actual or constructive.

9. A mere promise on the part of the principal obligor to procure other signatures is not sufficient to exempt the surety from liability, although the obligee had notice of it, actual or constructive, unless such agreement amounts to a condition that the bond shall not be delivered without such persons signing. However, very slight evidence seems to be sufficient to sustain a finding that there was a condition, and the question is largely a question of fact.

10. Delivery of bond to third party, to be delivered to the obligee on the performance of the condition, will not protect the surety if the bond is delivered to the obligee by the principal obligor, and the obligee has no notice of the fact of the delivery to the third person, whether knowledge that there had been such delivery to a third party would be sufficient to give the obligee constructive notice of the condition is not settled, but it probably would be sufficient.

11. Notice, actual or constructive, to the agent of the obligee, whose duty it is to approve the bond, is notice to the obligee. But this was held not to be the rule where the agent was also surety on the bond, and another agent of the obligee, who had no notice, approved the bond. *Stevenson v. Bay City*, 26 Mich. 44.

12. Notice to the nominal obligor is sufficient to bind all who sue upon the bond, either in the name of such obligee for their own use, or in their own names where the statute authorizes the suit to be so brought.

13. Notice to any agent of the obligee is not sufficient. He must be charged with some duty with respect to the bond.

14. Surety who signs a bond with blank spaces in the body is bound, although the principal obligor fills in the blanks in defiance of the conditions on which the surety signed and the surety expressly provided that he should not in that case be bound. Some cases hold that express authority by parol will not render

the surety liable, although the blanks are filled in according to such authority and in harmony with the condition.

15. Knowledge by obligee, that surety signed the bond with blanks in it, will not exonerate the surety, though the conditions as to filling in the spaces are not complied with.

16. Express authority to fill in the blanks is not necessary. It may be implied from the circumstances.

17. The fact that the name of a surety, as signed, is erased from the bond is sufficient to put the obligee upon inquiry as to a condition that such surety should sign.

18. The law will imply a condition that another surety or the principal obligor was to sign, when his name appears in the body of the instrument. This presumption would be rebutted if it appeared that all the parties delivered the bond without disclosing any such condition, but it is doubtful if a delivery by part would be sufficient to rebut such presumption, except as against themselves. As to all who delivered the obligation without stating the condition, the existence of a name in a bond not signed thereto would not be notice of the condition that such person was to execute the bond.

19. If the law requires the principal to sign the bond, his failure to do so will discharge the sureties, unless possibly in case they waived his signing it. Some cases hold absolutely that he must sign it.

20. If the law requires the principal to execute the bond, the obligee takes with notice of the condition, created by the law, that he must sign, and the sureties are not liable in case he does not sign. Of course if the principal is named in the bond, this is notice the same as in the case of a surety.

21. Whether in case a signature is forged the surety is liable is perhaps not settled. On principle he should be. Some cases hold the contrary.

22. But it has been held that where sureties sign, assuming that others whose names are signed are bound, and it transpires that for some reason they are not liable, the sureties who subsequently signed on the faith of their liability will not be held. These are cases where the bond has been actually signed by other sureties, but they are not bound because of subsequent alteration of the instrument, or for some other reason. But where the bond is never in fact signed by the surety by whom it purports to be signed, and his signature has been forged thereto, then the sureties subsequently signing should perhaps be held on the ground that they take the risk of the signature being genuine. But should they not also take the risk of the surety, whose name is in fact signed, being bound?

The liability of the surety when conditions are not complied with, and when blanks are filled in, in defiance of instructions, rests upon estoppel. Yet many of the cases go upon the theory of agency. This is illogical. The principal obligor to whom the surety intrusts the bond is at most only a special agent, with restricted powers. He is to deliver the bond under certain conditions. They are not performed. Even in these cases, the surety is bound. The logic of the grave-digger is preferable. It is only a non sequitur. But this deduction is exactly the reverse of the sound conclusion from these premises. The surety is not bound; but he is not allowed to show the facts upon which his exemption from liability rests. That great mediator between justice and the integrity of legal principles—equitable estoppel—seals his lips, or if he speaks, makes deaf the ear of the court to such a defense.

GUY C. H. COE

GRAND FORKS, DAKOTA.

## JURISDICTION OF FEDERAL COURTS—INJUNCTION TO MUNICIPAL OFFICERS.

SUPREME COURT OF THE UNITED STATES, JAN. 9, 1888.

## IN RE SAWYER.

A Circuit Court issued an injunction to restrain the city authorities of Lincoln, Nebraska, from proceedings to remove a police judge from office. *Held*, that the court, sitting in equity, had no jurisdiction or power over the matter to try and determine itself, nor to restrain by injunction the tribunals of the State or city from trying and determining it, and any decree or order made therein was void; and this is so, whether the proceeding of the city authorities be regarded as criminal or civil, judicial or administrative.

**P**ETITION for writ of *habeas corpus*, in behalf of the mayor and eleven members of the city council of the city of Lincoln, in the State of Nebraska, detained and imprisoned in the jail at Omaha in that State by the marshal of the United States for the district of Nebraska, under an order of attachment for contempt, made by the Circuit Court of the United States for that district.

G. M. Lamberton, for petitioners.

L. C. Burr, in opposition.

GRAY, J. The question presented by this petition of the mayor and councilmen of the city of Lincoln for a writ of *habeas corpus* is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal. Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481, 484-487; *Thompson v. Railroad Co.*, 6 Wall. 134; *Heine v. Levee Com'rs*, 19 id. 655. The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned. 2 Hale P. C. 147; *Gee v. Pritchard*, 2 Swanst. 402, 413; 1 Spence Eq. Jur. 689, 690; *Attorney-General v. Insurance Co.*, 2 Johns. Ch. 371, 378.

From long before the declaration of Independence, it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the mean time said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and if they did, this court would break it, and protect any that would proceed in contempt of it." *Holderstaffe v.*

*Saunders*, Holt, 136; 6 Mod. 16. Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had, by his bill, submitted his rights to its determination, from proceedings as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: "This court has not originally and strictly any restraining power over criminal prosecutions;" and again: "This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of." *Mayor, etc., v. Pilkington*, 2 Atk. 302; 9 Mod. 273; *Montague v. Dudman*, 2 Ves. Sr. 396, 398. The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney-General v. Cleaver*, 18 Ves. 211, 220; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, 10 Ch. App. 64; *Kerr v. Preston*, 6 Ch. Div. 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. 2 Story Eq. Jur., § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State, or under municipal ordinances. *West v. Mayor, etc.*, 10 Paige, 539; *Davis v. American Soc.*, 75 N. Y. 362; *Tyler v. Hamersley*, 44 Conn. 419, 422; *Stuart v. Board Sup'rs*, 83 Ill. 341; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 id. 620; *Moses v. Mayor, etc.*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Mayor, etc.*, 61 id. 386; *Cohen v. Goldsboro Com'rs*, 77 N. C. 2; *Oil Co. v. Little Rock*, 39 Ark. 412; *Spink v. Francis*, 19 Fed. Rep. 670, and 20 id. 567; *Suess v. Noble*, 31 id. 855.

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow school, within its undoubted jurisdiction over public charities, was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the motion of corporators of any description." *Attorney-General v. Clarendon*, 17 Ves. 491, 498.

In the courts of the several States, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases.

Upon a bill in equity in the Court of Chancery of the State of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the governor, and that the new appointee was insolvent, and praying for an injunction, a receiver an-

an account of fees, until the plaintiff's title to the office could be tried at law. Vice-Chancellor McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or a decree of ouster of the office;" but he overruled a demurrer, upon the ground that the bill showed a *prima facie* title in the plaintiff. *Tappen v. Gray*, 3 Edw. Ch. 450. On appeal, Chancellor Walworth reversed the decree, "upon the ground that at the time of the filing of this bill the Court of Chancery had no jurisdiction or power to afford him any relief." 9 Paige, 507, 509, 512. And the chancellor's decree was unanimously affirmed by the court of errors, upon Chief Justice Nelson's statement that he concurred with the chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill, 259.

The Supreme Court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by *quo warranto*. *Hagner v. Heyberger*, 7 Watts & S. 104; *Updegraff v. Crans*, 47 Penn. St. 103.

The Supreme Court of Iowa, in a careful opinion delivered by Judge Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. *Cochran v. McCleary*, 22 Iowa, 75.

In *Delahanty v. Warner*, 75 Ill. 185, it was decided that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by *quo warranto* or *mandamus*. In *Sheridan v. Coltrin*, 78 Ill. 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of commissioner of police; and the court, repeating in a great part the opening propositions of Kerr on Injunctions, said: "It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property; nor do matters of a political nature come within the jurisdiction of the Court of Chancery; nor has the Court of Chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Ill. 247. Upon like grounds it was adjudged in *Dickey v. Reed*, 78 Ill. 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in *Harris v. Schryock*, 82 Ill. 119, the court, in accordance with its previous decisions, held that the power to hold an election was political, and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the Supreme Court of Alabama, overruling its own prior decisions to the contrary. *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 id. 320.

The statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city.

"All county officers, including justices of the peace, may be charged, tried and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceedings shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the State that he believes the charges to be true." No formal answer or replication is required, "but if there be an answer and reply, the provisions of this [the?] statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book." Neb. Comp. Stat., chap. 18, art. 2, § 7. The nature of this proceeding before county commissioners has been the subject of several decisions by the Supreme Court of the State. In the earliest one the court declared, "The proceeding is *quasi* criminal in its nature, and the incumbent undoubtedly may be required to appear without delay, and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to every one thus charged with an offense for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." *State v. Sheldon*, 10 Neb. 452, 454. The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the Constitution of Nebraska which requires that "the judicial power of this State shall be vested in a Supreme Court, District Courts," and other courts and magistrates therein enumerated. Const. Neb., art. 6, § 1; *State v. Oleson*, 15 Neb. 247. But it has always been considered as so far judicial in its nature that the order of the county commissioners may be reviewed on error in the District Court of the county, and ultimately in the Supreme Court of the State. *State v. Sheldon*, above cited; *Minkler v. State*, 14 Neb. 181; *State v. Meeker*, 19 id. 444, 448. See also *Railroad v. Washington Co.*, 3 id. 30, 41; Code Civil Proc. Neb., §§ 580-584, 599; Crim. Code (ed. 1885), § 572.

This view does not substantially differ from that taken in other States, where similar orders have been reviewed by writ of *certiorari*, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. *Charles v. Mayor, etc.*, 27 N. J. Law, 203; *People v. Fire Com'rs*, 72 N. Y. 445; *Donahue v. County of Will*, 100 Ill. 94.

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee to the office, may be tried by *quo warranto* or *mandamus*. Comp. Stat. Neb., chap. 19, §§ 13, 24; id. chap. 71; Code Civil Proc. §§ 645, 704; *Cases of Sheldon, Oleson and Meeker*, above cited; *Queen v. Saddlers' Co.*, 10 H. L. Cas. 404; *Osgood v. Nelson*, L. R., 5 H. L. 636.

The provisions of the statutes of Nebraska as to the removal of officers of cities of the first class (of which the city of Lincoln is one) are more general, simply conferring upon the mayor and council "power to pass any and all ordinances not repugnant to the Constitution and laws of the State; and such ordinances to alter, modify or repeal;" and "to provide

for removing officers of the city for misconduct;" and to fill any vacancy occurring in the office of police judge or other elective office by appointment by the mayor, with the assent of the council. Comp. Stat. Neb., chap. 13, §§ 11, 15; Stat. 1887, chap. 11, §§ 8, 68, 114.

The original ordinance of the city council of Lincoln, made part of the record, appears to have been framed with the object that the rules established by statute for conducting proceedings for the removal of county officers should be substantially followed in the removal of city officers elected by the people. After ordaining that whenever any such officer "shall be guilty of any willful misconduct or malfeasance in office, he may be removed by a vote of two-thirds of all the members elected to the council," it provides that no such officer shall be removed unless "charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant to support such charges, shall be filed with the city clerk, president of the council or mayor," and be read at a regular meeting of the council; and a certified copy thereof, with a notice to show cause against the removal, be served upon the officer five days before the next meeting; that if he does not then appear, and file a denial in writing, "the said charge and specifications shall be taken as true, and the council shall declare the office vacant;" but if he does, the council shall adjourn to some day for his trial; "and if upon the trial of said officer said council shall be satisfied that he is guilty of any misconduct willfully or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance;" and that all proceedings and notices in the matter of such charges may be served by the city marshal or by a policeman, and the "service and return shall be in the manner provided by law for the service of summonses in justices' courts. The only material change made in that ordinance by the ordinance of August 24th is that the trial of the officer and the finding of his guilt, may be either by the whole council or by a "committee of the council to whom such charges shall have been referred." In either case the finding is to be entered upon the minutes of the council, "and the council shall declare the said office vacant and the said officer removed therefrom," and certify the fact to the mayor, whereupon the vacancy shall be filled by appointment by the mayor, with the assent of the council.

The whole object of the bill in equity filed by Parsons, the police judge of the city of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order for the disregard of which they are in custody, is to prevent his removal from the office of police judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon. The case stated in the bill is that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders (Hyatt, not otherwise named in those charges, would seem to have signed them as the additional witness required by that ordinance); that the charges were referred by the mayor to a committee of three members of the council; that upon the notice to the accused, and his appearance before that committee, he objected that the committee had no authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges,

and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant, and appoint another person to fill it. The bill prays for an injunction to restrain the mayor and councilmen of the city of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office.

The matters of law suggested in the bill as grounds for the intervention of the Circuit Court are that the amended ordinance was an *ex post facto* law, and that all the proceedings of the city council and its committee, as well as both ordinances, were illegal and void, and in conflict with and violative of those articles of the Constitution of the United States which provide that no person shall be deprived of life, liberty or property without due process of law; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, and to have compulsory process for obtaining witnesses in his favor, and that no State shall pass any *ex post facto* law, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

The fifth and sixth amendments to the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law, and secure to the accused in criminal prosecutions trial by jury, and compulsory process for obtaining witnesses in his favor, apply to the United States only, and not to laws or proceedings under the authority of a State (*Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. Rep. 21); and that provision of the Constitution which prohibits any State to pass *ex post facto* laws applies only to legislation concerning crimes. *Culder v. Bull*, 3 Dall. 386. If the ordinances and proceedings of the city council are in the nature of civil, as distinguished from criminal proceedings, the only possible ground therefore for the interposition of the courts of the United States in any form is that Parsons, if removed from the office of police judge, will be deprived by the State of life, liberty or property without due process of law, in violation of the fourteenth amendment of the Constitution, or that the State has denied him the equal protection of the laws, secured by that amendment.

It has been contended by both parties in argument, that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in *State v. Sheldon*, 10 Neb. 452, 456, before cited. But if the proceeding is of a criminal nature, it is quite clear, for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity. If those proceedings are not to be considered as criminal or quasi criminal, yet if by reason of their form and object, and of the acts of the legislature and

decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the State, they are to be considered as proceedings in a court of the State (of which we express no decisive opinion), the restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress, that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt act. Act March 2, 1798. chap. 22, § 5 (1 St. 385); *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How. 612, 625; Rev. Stat., § 720; *Watson v. Jones*, 18 Wall. 679, 719; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 id. 340; *Sargent v. Helton*, 115 id. 348. But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board intrusted by law with the administration and regulation of the affairs of the city, still their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity. The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States, and the officers in question are officers of a State. If a person claiming to be such an officer is, by the judgment of a court of the State, either in appellate proceedings or upon a *mandamus* or *quo warranto*, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court. In any aspect of the case therefore the Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." *Elliott v. Peirson*, 1 Pet. 328, 340; *Wilcox v. Jackson*, 13 id. 498, 511; *Hickey v. Stewart*, 8 How. 750, 762; *Thompson v. Whitman*, 18 Wall. 457, 467.

We do not rest our conclusion in this case in any degree upon the ground suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court; because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. *Prigg v. Adams*, 2 Salk. 674, Carth. 274; *Fisher v. Baselt*, 9 Leigh, 119, 131-133; *Navigation Co. v. Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217. Neither do we say that in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full adequate and complete remedy at law, will render its decree absolutely void. But the ground of our conclusion is that whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and

determine for itself, nor restrain by injunction the tribunals and officers of the State and city from trying and determining. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution, which was *coram non iudice*; or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or an indictment by a grand jury. *Case of the Marshalsea*, 5 Coke, 68, 76; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Bain*, 121 id. 1.

The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void, their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 118 id. 718; *In re Ayers*, 123 id. 443, 507. Writ of *habeas corpus* to issue.

Waite, C. J., and Harlan, J., dissented.

#### NEW YORK COURT OF APPEALS ABSTRACT.

APPEAL—WHO MAY TAKE—SUBSTANTIAL RIGHTS OF PARTIES.—A prisoner, arrested for selling liquor in New York on Sunday, was remanded upon *habeas corpus* by L., one of the justices of the Supreme Court. He was then discharged from custody by the General Term of that court upon *certiorari*. The notice of appeal from this order was signed "E., Counsel to the Corporation" (of New York city), and stated that "L., one of the justices of the Supreme Court, appeals to the Court of Appeals from the order of the General Term." *Held*, under the Code of Civil Procedure of New York, § 2059, declaring that an appeal from a final order discharging a prisoner committed, etc., may be taken in the name of the people by the attorney-general or the district attorney," that L., the justice, did not represent the substantial rights of all parties defending in his name, within the Code of Criminal Procedure of New York, § 519, providing for an appeal from the Supreme Court "from a final determination affecting the substantial rights of a defendant." We find no provision of law or practice which makes him a vicarious agent or officer. On the contrary, the Code of Civil Procedure (§ 2059) vests that function in other officers by declaring that "an appeal from a final order discharging a prisoner committed upon a criminal accusation, or from the affirmation of such an order, may be taken in the name of the people by the attorney-general or the district attorney." This provision took the place of section 70, part 3, chapter 4, title 1, article 2, page 573, Rev. Stat., which made it the duty of the attorney-general to prosecute a writ of error to the court for the correction of errors in case of the discharge by the Supreme Court of a prisoner from a commitment upon a criminal accusation. Hence the appellant is not only not aggrieved—he is in no sense entitled to represent those, if any there are, who have cause to complain of the order made by the Supreme Court. The learned counsel for the appellant cites, in support of the appeal, *People v. Gilmore*, 88 N. Y. 626. In that case, although the order was not reviewable on its merits, the appeal was entertained because the court below had without authority imposed costs upon the relator, and so much of it was reversed. Jan. 17, 1888. *People v. Lawrence*. Opinion by Danforth, J.



**APPEAL FROM DECREE OF DIVORCE — CONDITIONS OF JUDGMENT — REQUISITES OF APPEAL.**—Where the judgment in proceedings for divorce dissolving the marriage, not only requires the defendant (the husband) to pay alimony in installments, but also directs him to execute and deliver to the plaintiff a mortgage on his real estate as security therefor, in order to stay execution pending appeal from the Supreme Court to the Court of Appeals, the appellant must not only execute the undertaking required by Code Civil Proc. N. Y., § 1327, but also execute and deposit with the clerk of the Supreme Court the mortgage called for by the judgment, as directed by Code Civil Proc. N. Y., § 1330. Jan. 17, 1888. *Galusha v. Galusha*. Opinion by Earl, J.

**CARRIER — OF PASSENGERS — NEGLIGENCE — FREE PASS—DRAWING-ROOM CAR.**—The fact that a passenger traveling on a free pass was riding in a drawing-room car for which he bought a ticket at the time he was injured, does not affect the immunity from liability for negligence secured to the railroad by the provisions of the pass, the right to purchase the particular accommodation depending upon the right to transportation, and that being determined by the pass. This pass bore the following printed indorsement: "In consideration of receiving this ticket, the person who uses it voluntarily assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, for any injury to his person, or for any loss or injury to his property, and that as for him, in the use of this ticket, he will not consider the company as common carriers, or liable to him as such." It is claimed that by reason of the purchase of a ticket entitling him to the use and occupation of a particular seat during the passage in the drawing-room car "Empire," he became a passenger for hire, and that the contract expressed in the pass must be deemed to have been abrogated and annulled to a certain extent by the new contract. By reference to the opinion delivered in the court below upon a former appeal of this case, and which is contained in the appeal book, we infer that the judgment in favor of the plaintiff rendered by the trial court was affirmed upon the theory that the contract for a seat in the drawing-room car was made with the agents of the defendant, and that such a contract subverted or modified for this trip that formed by the pass and its indorsements. It is not pretended but that the plaintiff secured his transportation on this occasion by virtue of his pass, but it is suggested by the opinion referred to that the contract for the purchase of a seat annulled the express condition upon which the pass was issued to the plaintiff, while it left the pass in full vigor so far as it gave the plaintiff a right to be carried on defendant's road from Albany to New York. Perhaps the language used by the court below will afford a more accurate view of its position, viz.: "The defendant has taken money from the plaintiff for carrying him, and it has no right to say that he was a free passenger, and to ask the court to incorporate into the drawing-room ticket the provisions of the free pass." The vice of this argument is in the assumption that "the defendant has taken money from the plaintiff for carrying him." Assuming, for the purposes of the argument, that the purchase by a passenger on a train of a drawing-room ticket from a drawing-room car conductor has the same force and effect as though purchased from the train conductor, of which there is much doubt, we yet think that such a purchase has no effect upon the status of the purchaser as a passenger. The contracts of a railroad corporation must be construed by the same rules which apply to those of all other parties, and must be

given the force and effect which were within the contemplation and understanding of the parties when they were made. The inquiry then is, what was the intention of the parties in the transaction culminating in the sale of a seat in the drawing-room car for the trip? It is undoubtedly true that if the plaintiff had paid his fare, or had made a valid contract with the defendant for passage which was inconsistent with the provisions of the pass, it might be inferred that the parties intended by such an arrangement to rescind the contract previously existing between them at least to the extent of any inconsistency. But we are of the opinion that the transaction in question had no such effect, and that the purchase of a right to enjoy particular and exclusive accommodations during the trip, whether made with the defendant or otherwise, did not, so long as the pass was used to secure transportation in any way affect the validity of the agreement expressed therein. Indeed the terms printed upon the ticket by which the plaintiff secured his seat in the drawing-room car repel a contrary inference, and plainly indicate that the plaintiff was required to rely for transportation upon his pass; for it is there stated that "this check, with *passage ticket or fare*, will be taken up by the conductor in charge of train." The inference is irresistible that the ticket for a seat had no relation to his right to transportation, but that the latter was expected to be made the subject of a distinct and separate contract to be formed by an agreement between the plaintiff and the defendant. Instead of its being supposed by the parties that the purchase of a seat modified the previous contract, it was expressly understood that the passenger was to secure the right of transportation by some arrangement already or thereafter to be made with the conductor of the train. This he did by the production and presentation of the pass to the conductor and its recognition by him; and by the express provisions of the contract embodied therein, he forfeited his right to claim damages for any injuries suffered either to his person or property occurring during that trip. The contract for a seat did not make the purchaser a passenger in any sense, but it simply provided that if the purchaser secured a right to ride on that train he could also enjoy the advantages of a specified seat during the trip if he so desired. The securing of a right to ride on the train was the condition upon which he became entitled to occupy the specified seat during the trip, and non-compliance with this condition would clearly preclude the purchaser from deriving any advantage from his purchase of the drawing-room ticket. We can discover no principle upon which it can be held that the contract expressed by the pass should be considered rescinded or inoperative. Certainly no express agreement was made to that effect, and we think none can be implied from the transaction referred to. It cannot be claimed that the purchase by a passenger of special and exclusive accommodations on a railroad train, not open to the enjoyment of passengers generally by virtue of their passage tickets, gives the purchaser a right to transportation, and yet the argument of the respondent implies that he had the right to use the pass to secure his transportation, and still repudiate the conditions upon which alone he was authorized to use it. The pass gave the plaintiff the right to enter any of the cars attached to the train and occupy a seat therein during the passage from Albany to New York, except certain cars set apart for special service and use. The pass gave the passenger no right to occupy a seat in such cars, and the money paid by the plaintiff to secure this seat had no relation to his right of transportation. The passenger could not have supposed that it did, for he not only used his pass for that purpose, but from the insignifi-

cance of the price paid for his seat as compared with the regular fare for such a trip, the idea is repelled that he supposed he was thereby securing transportation also. It could not be contended for a moment that the holder of a drawing-room car ticket could by force of such ticket alone insist upon being carried over a railroad to his place of destination, or that the railroad company would be liable for damages for ejecting such holder from its cars for non-payment of fare, if he should refuse to pay the customary sum charged for transportation. No such rights are contemplated by the parties to such a transaction. The contract indicated by his purchase of a drawing-room seat certainly did not by express terms refer to or provide for any modification or rescission of the previous contract, and there is not a circumstance attending the transaction from which an intention that it should can be inferred. The court below seemed to suppose that the case of *Thorpe v. Railroad Co.*, 76 N. Y. 409, tended to support the recovery in this case, but we are of the opinion that it has no bearing upon the question involved therein. That case holds that the servants in a drawing-room car, in their relations to passengers, and their conduct in preserving order and enforcing the rules and orders of the company, are the servants of the railroad corporation; but that case is very far from holding that such servants have the right to make contracts on behalf of the company for transportation, or that if they do, they necessarily rescind other contracts existing between the passenger and the company. Jan. 17, 1888. *Ulrich v. New York Cent. & H. R. R. Co.* Opinion by Ruger, C. J.

**CONTRACT—RESCISSION—STATU QUO.**—A party who has made a grant of an easement in land in consideration of stock certificates, and thereafter transferred the stock to his minor children, on the books of the company, cannot rescind the contract, and place the corporation whose stock he receives in *statu quo* by tendering the certificates owned by his children, but still in his possession. The theory of a rescission is that the party preceeded against shall be restored to his original position. The plaintiff cannot rescind if he retains in himself, or withholds through another, any fruit of the contract. Here as between the company and the infants, the latter had been vested with the title, and the corporation *prima facie* put under a new duty or obligation to them. The surrender by the father of the three certificates might tend to prevent any transfer in good faith from the children, and make difficult an estoppel in behalf of others; and yet that the corporation is not restored to its original position is evident from the fact that if it accepted the tender made, and restored what is now sought to be recovered, it would still be exposed to a claim of the infants that the stock was theirs, and be compelled to bear the risk of the inquiry whether the gift was executed and complete, and would be exposed to litigation over that question, and under circumstances in which the father, now unwilling to admit a gift, might become rather willing than otherwise, and confess some intention or purpose in that direction. That would be very far from restoring to the company its original position. He who would rescind, must rescind wholly, and leave no right flowing from him outstanding which imperils the completeness of the rescission. Jan. 17, 1888. *Francis v. New York & B. E. R. Co.* Opinion by Finch, J.

**CRIMINAL LAW—JURY—QUALIFICATIONS—PREJUDICE—HOMICIDE—CORPUS DELICTI.**—(1) The fact that a large number of men were called before a jury was finally chosen does not show that the jury was either prejudiced or unfavorable toward the accused, or moved by improper motives. (2) The *corpus delicti*

must be proved before a person can be convicted of murder; but where parts of the body were found, and marks and indications pointed to the identity of the deceased, the question is properly met by evidence, and the guilt of the accused is properly submitted to the jury. "I would never," says Lord Hale (2 Hale, P. C. 290), "convict any person of murder or manslaughter unless the fact was proved to be done, or at least the body was found dead." The proposition is elsewhere somewhat differently stated, as by Starkie (1 Starkie Ev. 575), that upon charges of homicide, the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body; by Greenleaf (3 Greenl. Ev., § 80), that even in cases of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of the death is so strong and intense as to produce the full assurance or moral certainty; in Ruloff v. People, 18 N. Y. 179, that in order to warrant a conviction of murder, there must be direct proof either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of the body. Jan. 7, 1888. *People v. Beckwith.* Opinion by Danforth, J.

**INJUNCTION—WHEN GRANTED—CONTINUING TRESPASS.**—Defendant, who was a stranger to plaintiff, obtained permission to place "a few stones" on his uncoupled lots until the next spring. No charge was made for the accommodation. In plaintiff's absence, defendant covered the lots with heavy boulders to a height of fourteen to eighteen feet. Held, that defendant was guilty of a continuing trespass, and that plaintiff was entitled to a mandatory injunction for the removal of the stone within a reasonable time, the remedy at law by action for the trespass being inadequate and involving multiplicity of suits. But it is said that he could not sue at law for the trespass. That is undoubtedly true. The case of *Uline v. Railroad Co.*, 101 N. Y. 98, demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass new actions following on in succession would have to be maintained. But in a case like the present, would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount, and possibly somewhat speculative in their character. The defendant therefore might pay those damages, and continue his occupation, and if there were no other adequate remedy, defiantly continue such occupation, and in spite of his wrong make of himself in effect a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it is not adequate to redress the injury or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued each day, *die de die*, for the renewed damages following from the continuance of the trespass; and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided, and especially under circumstances like those before us. The rocks could not be immediately removed. The courts have observed that peculiarity of the case, and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily ac-

tions. For reasons of this character it has very often been held, that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the *Murdock* case, 73 N. Y. 579, and the rule deemed perfectly settled. That case and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference, as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the *Uline* case. *Bowyer v. Cook*, 4 Man., G. & S. 236; *Holmes v. Wilson*, 10 Ad. & El. 506. In one stumps and stakes had been left on plaintiff's land, and in the other buttresses to support a road; in each an action of trespass had been brought, and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained—so that, as I have said, the legal remedy is identical, however the trespass originated. It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law; but that rule has its exceptions. *Railroad Co. v. Railroad Co.*, 86 N. Y. 128. Where the facts are in doubt, and the right not clear, such undoubtedly would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed I am inclined to deem it more a rule of discretion than of jurisdiction. In *Avery v. Railroad Co.*, 106 N. Y. 142, to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the ground here invoked; those of a continuing trespass, the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring. Jan. 17, 1888. *Wheelock v. Noonan*. Opinion by Finch, J.

**LANDLORD AND TENANT—DESTRUCTION OF BUILDING—REBUILDING—AGREEMENT TO PAY MORE RENT.**—A tenant under a written lease for three years remained in possession of the ground after the building was burned down, erecting and occupying a temporary shanty on the premises for his business. The landlord entered and put up a new building, much larger than the one which had been destroyed. The tenant then, when the lease had two years and six months yet to run, agreed in parol to pay more rent than the lease called for, and moved from the shanty into the new store. *Held*, in New York, where under Laws of 1860, chap. 345, a tenant may, upon the destruction of the demised building, avoid liability for rent by declaring the lease at an end and surrendering possession, that the parol agreement to pay more rent was without consideration, and being void under the statute of frauds, did not operate as a surrender of the old term. The sole object and purpose of the new contract seems to have been to continue the occupation of the defendant under the existing lease with an increased rent. The old lease was neither surrendered, abro-

gated nor annulled, and indeed no allusion was made to it in the conversation; and the only purpose of the parties seemed to be to leave it in operation, and change one of its provisions, viz., that relating to the amount of rent reserved. There was no attempt to create a new term, or to change the extent of the estate demised, or in fact to execute a new lease inconsistent with the continued existence of the original one. It seemed to have been assumed by the parties that the defendant could still continue in possession of the whole premises, including that part not covered by the buildings, and that he should continue thus to occupy them during the unoccupied term of his original lease. It would be doing violence to the plain purpose of the parties to assume that the defendant thereby intended to surrender the rights which he had in possession, under his written lease, for a new tenancy, subject to be terminated by his lessor at the end of one month, or that he intended to surrender that portion of the property which was not covered by the buildings. No such purpose can be implied from the conversation. If it could in any way be held to have effected a new lease of the premises, it must also be held in view of the circumstances and the obvious intention of the parties that it was intended to continue during the unexpired term of the existing lease. Such a term could not be created by parol, and the agreement therefore could not create a valid lease, and thereby effect a surrender of the existing lease by operation of law. The case seems to us to come directly within the decision in *Coe v. Hobby*, 72 N. Y. 145, and to be controlled by it. Jan. 17, 1888. *Smith v. Kerr*. Opinion by Ruger, C. J.

**MUNICIPAL CORPORATION — NEGLIGENCE — DEFECTIVE CANAL—ACTIONS AGAINST STATE FOR WRONGFUL DEATH—LAWS N. Y. 1870, CHAP. 321.**—(1) In proceedings before the board of claims by a widow, as administratrix of her deceased husband, to recover damages for his death, it appeared that the decedent, in crossing a bridge over the canal, fell through a defective railing and was drowned. It was in evidence also, that the defect had existed for a long time and was known to the officers in charge, who often tied up the broken rail, sometimes with twine and sometimes with wire. *Held*, on appeal by the State, that there was evidence tending to make out a case against the State, and that the question of contributory negligence on the part of decedent was therefore a question of fact not reviewable here. (2) The fact that the special statute (Code Civil Proc. N. Y., § 1902) giving the personal representatives a right of action for the death by wrongful act of the decedent omits to include actions against the State, does not affect the right of an administratrix to proceed before the board of claims to recover damages for the drowning of her husband in the canal; the State assuming, under Laws 1870, chap. 321, the same measure of liability incurred by individuals and corporations engaged in similar enterprises. *Sipple v. State*, 99 N. Y. 254. Jan. 17, 1888. *Bowen v. State*. Opinion by Finch, J.

**POLICE DEPARTMENT—RETIREMENT ON PENSION.**—Laws of New York of 1885, chapter 364, section 2, amending Consolidation Act, section 307, provides that any member of the police force of New York city who shall have served for twenty years or more, "upon his own application in writing, \* \* \* shall, by resolution adopted by a majority vote of the full board, be relieved, \* \* \* and placed on the roll of the police pension fund," etc. *Held*, that the mere filing of such application by a member of the force did not dissolve his connection with it, but that until the resolution referred to in the statute above was adopted, the applicant remained a policeman,

subject to dismissal by the board for improper conduct. Jan. 17, 1888. *People v. French*. Opinion by Finch, J. Ruger, C. J., dissents.

**NEGOTIABLE INSTRUMENT—RELEASE OF INDORSER—EXTENSION OF TIME.**—In an action upon a promissory note drawn to their own order by defendants J. & B., a firm, and indorsed by them and by defendant S. S. set up the defense that he was an accommodation indorser, and that plaintiff had, after the maturity of the note, extended the time of payment without his consent. There was evidence tending to show that plaintiff had advanced the face of the note to J. & B. in consideration of their taking his son into their employ, and that the son was retained there after the note fell due, under an understanding that in return J. & B. were not to be pushed for payment. *Held*, that the question of an extension was for the jury. Jan. 17, 1888. *Powers v. Silberstein*. Opinion by Andrews, J.

**RAILROAD—STREET—LOCATION OF DEPOT—REMOVAL—INJUNCTION.**—(1) The courts will not restrain a city railroad company from moving its depot and business to a point more convenient and safe for the travelling public, and thereby abandoning a portion of its road. The right, if it exists, to complain of the non-user, is a simple legal one, and an adequate remedy at law exists; and as the public is not injured by the move, an order restraining the company will not be granted. (2) The commissioners of highways of the town of New Utrecht have no legal capacity to maintain a suit for injunction against a city railroad company to restrain the change of location of its depots, where the action is not to sustain the rights of the public in or to a highway, or to enforce the performance of any duty enjoined upon a railroad corporation in relation to a highway. This is not an action brought to "sustain the rights of the public in and to a highway, or to enforce the performance of any duty enjoined upon a railroad corporation in relation to a highway," within the act of 1855, chap. 255; nor is it maintainable under the general law regulating the power and duties of commissioners of highways. *Cornell v. Turnpike Co.*, 25 Wend. 385; *Cornell v. Town of Guilford*, 1 Denio, 510; *Palmer v. Plank-Road Co.*, 11 N. Y. 376. Jan. 17, 1888. *Moore v. Brooklyn City R. Co.* Opinion by Andrews, J.

**RECEIVER—EFFECT OF APPOINTMENT—PRIOR LEVY—ADVISING APPOINTMENT—AID—TROVER AND CONVERSION.**—(1) Where a receiver of personal property has gone into possession, a sale of such property without leave of the court appointing the receiver, by the sheriff, under an execution levied two days before the decree for a receiver, is void, and the purchaser thereat takes no title, as against the receiver or a subsequent purchaser from him at a legal sale. (2) As against one claiming title to personal property of the common debtor under a prior execution sale thereof, a creditor who legally procured the appointment of a receiver for such property, and aided and assisted the receiver in conducting a sale thereof under an order of court to that effect, is not a trespasser, and is not liable in damages for wrongful conversion. Jan. 17, 1888. *Walling v. Miller*. Opinion by Earl, J.

**VENDOR AND PURCHASER—DEFECT IN TITLE—WHAT CONSTITUTES—ACTION TO RECOVER MONEY PAID.**—(1) A defendant showed a clear paper title to certain land in New York from a patent given by one of the early governors in 1668, to date, and possession from 1836 to 1868, and nothing was shown by either party as to possession since that date. Plaintiff showed a chain of title running from about 1814, from a party who had no title to the land, and there was some contro-

very as to whether the latter's title covered the land in question. *Held*, that there was no doubt or cloud upon defendant's title by the latter's chain. (2) One who has contracted for land, and paid a percentage thereon upon condition of a good and marketable title, in an action to recover the percentage on account of defects in the title need not show an absolutely bad title, but only one that is in reasonable doubt, and therefore not marketable. We think that if there was a reasonable doubt as to the vendor's title, such as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, the plaintiff's cause of action would be sustained. *Heilreigel v. Manning*, 97 N. Y. 58. This rule obtains as well where the vendee sues to recover back the price paid as when the vendor sues to compel performance. The case of *Romilly v. James*, 6 Tannt. 268, has been cited as authority for a contrary holding. That was an action brought to recover the deposit paid on the contract for the purchase of lands in fee-simple, upon the alleged insufficiency of the title. The question was argued at length in the Common Pleas, and at the end the court took time to consider, but before doing so observed: "It is said that the plaintiff will have made out his claim to recover back his deposit if a cloud is cast on the title. That is not so in a court of law. He must stand by the judgment of the court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit." The court subsequently held that defendant could give a good title, and hence ordered judgment in his favor. The case of *Romilly v. James*, *supra*, was the one upon which the Superior Court based its holding in *O'Reilly v. King*, 28 How. Pr. 408, and this latter case was cited in the opinion delivered by the learned judge at General Term in the case at bar. We think that case should not be followed. But upon the ground that no such reasonable ground exists in this case, from the facts as disclosed at the trial, we think the judgment of the court below should be affirmed. Jan. 17, 1888. *Methodist Episcopal Church Home v. Thompson*. Opinion by Peckham, J.

**WILLS—DEVISE DURING WIDOWHOOD—TRUST FOR BENEFIT OF CHILDREN—POWER TO SELL.**—(1) Testator appointed his widow executrix and guardian of their minor children, and gave the entire estate for her own use during her life, or until she remarried, and devised the residue to the children upon her death or remarriage. The executrix was authorized to mortgage, lease, dispose of and convey the whole of testator's property according to her discretion, and as she should deem best for carrying the provisions of the will into effect. *Held*, that the executrix was invested with a general power in trust, and the children, upon her remarriage, took an absolute fee in the land, subject to the execution of the power. (2) A mortgage executed by executrix after re-marriage was valid in the absence of proof that it was for any other purpose than to carry out the provisions of the will, or that the mortgagee was chargeable with notice. (3) A will empowered the executrix to make advances to the testator's children, for their support and maintenance out of the residue of an estate, the whole of which was devised to her own use during her life, or until she remarried. *Held*, that the "advances" which the executrix was authorized to make were expenditures for their support and maintenance, and that it was immaterial whether defrayed from income or from the widow's own property, and repaid from rents or money obtained on mortgage or by sale of the devised property. Jan. 17, 1888. *Mutual Life Ins. Co. of New York v. Shipman*. Opinion by Danforth, J.

## THE CIVIL CODE IN 1888.

THE hearing on the Civil Code held this year before the two judiciary committees in joint session, was so remarkable that I have thought it would be useful to the members of the Legislature, few of whom were able to be present, to have some account of it. There were two sittings, in one of which the Code was, as usual, denounced by Mr. James C. Carter, and in the other the denunciation was continued by Mr. William B. Hornblower, Ex-Judge Noah Davis and Mr. Frederick R. Coudert. These gentlemen are all lawyers, deputed by an association of lawyers, the New York City Bar Association, to oppose the Code. Whether the Association has spent any of its corporate funds this year in support of its opposition I do not know, but its treasurer's report shows that it expended in one year \$1,750. Among the developments of the present year were the following:

I. Every one of the gentlemen protested that all the codification heretofore had in this State was a misfortune. Mr. Davis declared it to be an "historic calamity." This, of course, included the Penal Code, as well as the two Codes of Procedure, civil and criminal. Such a protest must be accepted as a declaration of war by this Bar Association against all efforts to have the law as it is made by the judges written out for the information of the people, though enforced upon their persons and estates. If this is once understood by the citizens of the State, they will make short work with bar associations which happen to stand in their way.

II. Mr. Hornblower opposed the Code, because of the forty-one sections on corporations, declaring that they would upset all the present law on the subject. He said this, in face of the following section:

"551. The powers of corporations, the time, place and manner of exercising the corporate powers; the means by which persons may become members or lose membership, the kind and number of officers and the manner of their appointment or removal, are prescribed by this Code, or by the statutes relating to the corporations respectively, or the by-laws made in pursuance of law."

III. Mr. Davis followed, with self-conceit, incredible if it had not been seen, and avowing that he had read no part of this Code, until retained by the Bar Association three days before, and that he made his notes upon the sections, coming up in the train, proceeded to criticise with the arrogance of ignorant and presumptuous folly. He declared, among other things, that the Code authorized an infant at the breast to execute a power over real estate. Interrupted by the chairman of the assembly committee, with the question, "Do you mean really to assert that the Code does this?" he answered, "I do." This he said having before him section 439, as follows: "A power cannot be executed by any person not capable of disposing of real property." After this it can hardly be necessary to take further notice of the ex-judge.

IV. Mr. Coudert, admitting the excellence and the success of the French Codes, accounted for them by the original and entertaining observation, that the French language had a peculiar aptitude for codification! He then complained of these two sections:

"Section 1368. One who hires part of a room for a dwelling is entitled to the whole of the room, notwithstanding any agreement to the contrary; and if a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the

term agreed upon, and is relieved from all obligation to pay rent to him while such double letting of any room continues."

"3157. All statutes, laws and rules heretofore in force in this State, inconsistent with the provisions of this Code, or repeated or re-enacted herein, are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this Code provided. If there is an existing rule of law omitted from this Code, and not inconsistent therewith, it continues to exist in the same form in which it now exists."

If anybody can explain Mr. Coudert's reasons, if reasons there were, for complaining of these sections, he can do better than I can. Many other things, equally pertinent and equally astonishing, were said by the four gentlemen who represented the Bar Association. But these that I have given may be taken as samples of the rest. And such is the food with which this Bar Association would satisfy the law-givers of the State! The following two papers may help to assure over-timid persons.

D. D. F.

NEW YORK, February 27, 1888.

Letter of Mr. Creed Haymond, an eminent member of the California Bar:

WASHINGTON, D. C., February 14, 1888.

Hon. DAVID DUDLEY FIELD, New York City:

MY DEAR SIR—I am in receipt of your note inquiring how the Civil Code is esteemed in California, and whether at the present time any dissatisfaction exists there in relation to it.

I beg in reply to state that the question of codification is no longer an open one in California. There is no discussion upon the subject. Codification in that State is an accomplished fact, the propriety of which is no more discussed than is the propriety of the written Constitution.

The Codes have worked well in California, and have been so acceptable that the drift of public opinion is strongly in favor of the establishment of a permanent Law Commission to which all bills introduced in the Legislature shall be referred for form and style.

The Civil Code of California was passed on the 21st of March, 1872, and went into effect on the 1st of January, 1873. The commission was continued until 1874, and an advisory commission consisting of eminent lawyers was formed and existed during the year 1873, and both commissions during that time examined with great care the Code as adopted, prepared many amendments to it, some of which were to correct clerical errors and others of which went to the substance. Those amendments were adopted by the Legislature of 1874.

From 1874 to 1880 very few amendments were made. Probably during the whole of that time not ten sections were changed, and those changes were chiefly in sections of the Code relating to corporations. At the time the Code was framed there was great excitement in California upon the subject of corporations, and the commission for that reason made no material changes in the laws of that State relating to corporations, but embodied them substantially as they stood in the Code. The changes made were required in order to bring the sections altered into the form of Code enactments.

In 1879 a new Constitution was adopted. The District Courts and County Courts of California were abolished, and a Superior Court, the territorial jurisdiction of which was limited to the county, was created in the place of the District and County Courts

which had formerly existed. The title of the clerks of these courts was changed from that of clerk of the District and County Courts to that of clerk of the Superior Court. This change in the Constitution necessitated changes in the Code, and all sections of the Civil Code which contained the words "District Court" or the words "County Court," or the words "clerk of the District Court" or "clerk of the County Court" were altered, and the names of the new courts and of the new clerks substituted, and those were about the only changes made in the year 1880. Since 1880 I do not think over ten sections of the Code have been altered or amended.

You will perceive from this statement that in the fifteen years during which the Civil Code has been in force in California, only about a score of sections have been amended by bill originating with members of the Legislature.

The Political Code of California was approved March 12, 1872, and went into effect January 1, 1873. It contains 4505 sections. It treats of the sovereignty of the people of this State and of the political rights and duties of all persons subject to its jurisdiction. It defines the political divisions of the State, fixes the seat of government and the legal distances. It enumerates and classifies all public officers, legislative, judicial and ministerial, and fixes their salaries and duties. It contains the election laws of the State, the laws in relation to the University, of State normal schools and public schools, the laws in relation to the militia and national guard, and to all public institutions; the laws in relation to highways, public order, toll rate bridges and ferries, the general police of the State; the public lands of the State, revenue and taxation; the laws in relation to the government of counties, cities and towns, and in fact covers in its scope the whole civil polity of the State.

Many sections of this Code are necessarily amended at every session of the Legislature. The rate of taxation is fixed, the amount of money to be raised for public purposes designated by amendments to this Code. All changes in the duties of public officers, in relation to their salaries, and all changes in the election or revenue laws and all of the important laws relating to the government of the State are made by amendments to this Code.

From the nature of this Code it attracts more general attention than either of the other Codes, and the people of the State have become more familiar with its provisions. The benefits derived from codification are more easily illustrated by it than by either of the other Codes. Every member of the Legislature has a copy of the Codes upon his desk, and when a bill is introduced amending any section, there is no difficulty in ascertaining at once what change is proposed in the law. This is done by the simple process of comparing the bill with the section which it is proposed to amend, and the legislator is enabled at a glance to determine whether the change proposed is a proper one to be made.

Our sessions of the Legislature are now biennial and are limited to sixty days. Without a system of codification, and with the statutes of the State scattered through thirty or forty volumes, and badly indexed, it would be impossible to have intelligent legislation at a session so limited in time. Under our system the time is ample. Nearly all of the bills introduced in the Legislature are short, as they are framed in the concise language of the Code and are readily understood. Besides all the other advantages, there is great economy in this. Often the change of a word in one section of the chapter of the Code will accomplish all the purposes of an elaborate bill under the old system of legislation.

I will illustrate this by one case which I now have in mind. The valleys of California are subject to periodical overflow in the winter, and some parts of them to drought in the summer. During overflows domestic animals are often surrounded upon high spots of land and would perish if assistance were not rendered; while during the summer months such animals frequently seek the swampy land for water, becoming mired down and would be lost if not assisted.

In 1874 the Legislature, with these facts before them, and willing to encourage persons in their attempts to save animals so situated from drowning or from starvation, desired to enact a law which would give to the persons who saved any such animals a lien upon them for the value of the services and the cost of food in that behalf. Consequently an act was drawn and presented to the Legislature providing for the case. It covered several printed pages, and provided in detail the mode and manner of proceeding to fix and enforce the lien.

The committee to whom this bill was referred accomplished all the purposes of the bill by an amendment to section 3136 of the Political Code. That section was part of chapter 6 which related to lost and unclaimed property and which provided the mode and manner in which the finder of lost, or the holder of unclaimed property might establish a lien upon it for services rendered or material used in preserving it.

Section 3136, the first of the chapter, provided in substance that if any person find any money, goods, things in action or other personal property of the value of ten dollars or more, he must inform the owner thereof, if known, and make restitution without compensation further than a reasonable charge for saving and taking care thereof. But that if the owner was not known, the finder himself within five days should make an affidavit before some justice of the peace in the county, stating when and where he found or saved such property, and describing it, etc.

To accomplish the intention of the Legislature in relation to domestic animals, the section was amended by inserting after the phrase "if any person find any money, goods, things in action or other personal property," the phrase "or shall save any domestic animal from drowning or from starvation."

I could give many illustrations of this kind showing the ease with which amendments are made, and the vast amount of time and labor which is saved by the existence of a Code. But this probably will be a sufficient illustration of one of its useful purposes.

Editions of the Codes have from time to time been printed in cheap form. Nearly every justice of the peace and notary public in the State has a copy. Copies will be found upon the desks of the merchant and the banker, in the offices of corporations and in the editorial rooms of nearly every newspaper. Business men become familiar with their provisions, and are thereby enabled to test whether the advice given to them by counsel upon business propositions covered by these Codes is sound or not. Public officers have the law relating to their offices before them in plain and concise form, and cannot well mistake their duties. And I undertake to say that the people of California have a very much better knowledge of the laws of their State than do the people of any State where the laws have not been put in Code form.

The Pacific States and Territories have, since 1873, in a great measure followed the example of California, and have codified their laws, in whole or in part, with the same good results which have been obtained in California.

Permit me to say, in conclusion, that while the people of California have appreciated and profited by

your work in the cause of law reform, they cannot fully sympathize with you in your regrets that the people of the State of New York were not the first of English-speaking people to supplement a written Constitution by written laws; for, had the people of New York done so, the people of the State of California would have been deprived of the credit and honor which now in that behalf belongs to them.

With kind regards, I am very sincerely yours,  
CREED HAYMOND.

**AN OPINION OF THE PRESS ON THE CIVIL CODE WHERE IT HAS BEEN TRIED. CALIFORNIA TESTIMONY FOR CODIFICATION AFTER TWELVE YEARS OF ACTUAL EXPERIENCE.**

[*San Francisco Alta, California.*]

An animated discussion has been in progress in New York, in and out of the Legislature, over the adoption of the Field Civil Code, which is substantially the same as the Civil Code of California. In 1872, California adopted a complete set of Codes—Political, Civil, Civil Procedure and Penal—based on the Codes prepared for the State of New York by a commission, of which David Dudley Field was the leading member. But these famous Codes have had a fate which verifies the proverb that a prophet is not without honor save in his own country. It is true the Code of Civil Procedure was adopted by New York on the 1st of July, 1848, but the Code of Criminal Procedure did not go into effect until 1881, and the Penal Code in 1882, while the Civil and Political Codes have not yet been enacted in the State of their birth. Meantime these Codes, in letter or in spirit, have been widely adopted abroad. Twenty-three States and Territories have in this way approved of the Code of Civil Procedure, and nineteen of the Code of Criminal Procedure. But the influence of the New York Codes has not been confined to the United States. In British India, several of them have been closely copied, while the Judicature Act of 1873 in England and Ireland is based on the New York Code of Civil Procedure. The *New York Tribune* recently undertook to ascertain the sentiment of the bar of that State regarding the adoption of the Civil Code. Out of 2,000 lawyers addressed, 640 expressed themselves in favor of codification and 569 against it, while 364 were in favor of the Field Code and 745 against it. But lawyers are not the only class, or the most numerous to be consulted about such a matter as codification. Independent of the courts and the lawyers there is a benefit conferred by Codes which is of no mean importance. This is the accessibility and comprehensibility of the law to the people. The law should be in such a shape that the mass of the people can know something about it. There will be just as much need for the professional lawyer when the law is codified as there was before, but it is nevertheless a great convenience and satisfaction to the property-owner and the workman to be able to learn for himself something about his rights as established by the laws under which he lives. It is a necessary part of the political education of the people. In California this benefit has been greatly restricted by not giving the Codes a wider circulation. It is one of the strangest things of the day that some enterprising publisher has not long before this brought out an edition of the California Codes for popular circulation. Printed in small type and bound in a single volume, our Codes could be sold for \$1.50; and at that price there are 30,000 farmers, mechanics, tradesmen and professional men who would desire to possess a set. Why does not somebody undertake this work of putting the law in the hands of the people.

**CORRESPONDENCE.**

**MR. HORNBLOWER DOES SOME MORE FIGURING.**

*Editor of the Albany Law Journal:*

I quite agree with you "that an ounce of experience is worth a ton of theorizing." Will you pardon me for sending you an ounce? In 1886 there were 444 cases reported in the State of California. In the same year there were 347 reported in the State of New Jersey. I have taken the year 1886 because it is the last year for which the reports are complete in either State. The population of New Jersey, according to the census of 1880, was over 1,100,000, while the population of California, according to the same census, was less than 900,000. The rate of increase in California during the past ten years has been no greater, I believe, than that of New Jersey, if as great; but I may concede for the purpose of this comparison, that the population of California has become equal to the population of New Jersey at the present time. Of the 444 cases reported in California, all are cases in the Supreme Court of the State. Of the 347 cases reported in New Jersey, 167 are cases in the Court of Chancery and the Prerogative Court, and only 180 in the two appellate courts, namely, the Supreme Court and the Court of Errors and Appeals. So that we have in New Jersey 180 reported cases on appeal against 444 in California, with a population practically identical. Is California still in a "formative period?" And if so, how long is it to continue forming? The Codes of California would certainly seem to require a good deal of "formation."

Trusting that I am not unduly intruding upon you by asking the publication of this letter, I remain,

Yours respectfully,

W. B. HORNBLOWER.

NEW YORK, Feb. 20, 1888.

**CHECK TO MISTAKEN ORDER.**

*Editor of the Albany Law Journal:*

I was much interested in the question started by your correspondent on page 183, current volume, and commented upon editorially, page 165. But if the proper distinction be noticed in the statement of the case, I do not see how lawyers can differ as to the law.

If I draw my check upon my banker in favor of E. J. Jones, and he presents it at the counter, and gets the money, I must and ought to bear the loss. The bank has nothing to do with my intention, and has no business to inquire. It cannot presume that I meant J. E. Jones, and refuse to honor my check. It pays to the man named. The check is genuine, and bears my well-known signature. To hold that the bank should lose the money under this state of facts would be preposterous. But apart from the injustice and absurdity of throwing the loss upon the bank rather than upon the drawer of the check, there is a well-settled legal principle that at once decides it. It is this: that where one of two innocent persons must suffer a loss, that one whose inattention or mistake caused it is the one who must bear it.

But when we add this further fact to the case a very different question may arise. "The party cashing the check for Jones took fifteen per cent off the face for cashing it." With this additional information, the natural inquiry arises: Did the bank act in good faith in paying the check? Was not this offer to take so much less than the face of the check enough to put the bank upon inquiry? Would anybody but a fool or a knave discount a good check, honestly obtained, at the rate of fifteen per cent? That would be for the jury to say,



unless the court should withdraw it from their consideration upon the principle so popular with some judges, that there was *contributory negligence*.

Yours truly,

J. ALEXANDER FULTON.

DOVER, DEL.

### NEW BOOKS AND NEW EDITIONS.

#### BERRYMAN'S INSURANCE DIGEST.

A *Digest of the Law of Insurance*, being an analysis of fire, marine, life and accidental insurance cases adjudicated in the courts of the United States, England, Canada, Ireland and Scotland, including the cases relating to insurance in mutual benefit societies. By John R. Berryman. Chicago: Callaghan & Co., 1888. 1 vol. Imp. 8vo. pp. lxxv, 877.

The title completely describes the work. It seems to be very well done, and the abstracts are unusually full. It will serve as a remarkably good substitute for many volumes of reports. It is well printed.

#### BATES ON PARTNERSHIP.

This work, by Clement Bates, of Cincinnati, and published by T. H. Flood & Co., of Chicago, forms two volumes of 1234 consecutive pages of text, with a table of cases of 193 pages. The index covers 68 pages. It will be seen that the work is of great dimensions, and of importance enough to justify a more careful examination than can be given by the editor of a weekly journal. Mr. Bates says in his preface that he has been at work on this treatise for many years—at first with no idea of publishing—and that he has personally examined nearly 11,000 cases. His arrangement is by sections, with "the more fundamental, constant or ultimate principles in a comparatively prominent type, and offering illustrative, subordinate, qualitative or exceptional matter in a less conspicuous form, in proportion to its value." The references are in the usual form. This treatment steers between the ordinary form of sectional treatment and the treatment by rules or propositions with illustrations and authorities. In our opinion it is a better mode than that pursued—to cite an eminent example—by Mr. Benjamin in his work on Sales. A cursory examination leads us to believe that the treatise is of substantial and peculiar merit, and as the last utterance by a text-writer on this important topic, it must be of indisputable value. We much prefer it to an annotated English work. The author's undoubted industry is admirable, and he exhibits intelligence and discrimination. There can be no hesitation in recommending the work. The publisher has made a comely book.

#### BARDEEN'S COMMON SCHOOL LAW.

*Common School Law*. A digest of the provisions of common and statute law as to the relations of the teacher to the pupil, the parent and the district. With 500 references to legal decisions in twenty-eight different States. Fourteenth edition, entirely rewritten, with references to the New York Code of Public Instruction, edition of 1888. By C. W. Bardeen, editor of the *School Bulletin*. Published by the editor, at Syracuse, N. Y.

An excellent and admirable little manual of about 120 pages. It seems to contain every thing that has been decided, and the matter is presented in an interesting manner. That is because the compiler is an editor.

#### SMITH'S MERCANTILE LAW.

The basis of this "pony" volume is John William Smith's English work, and it has been annotated, ex-

tended and adapted by Carter P. Pomeroy. It is as good as such a book ever can be, and we do not see why it should not be valuable alike to lawyer and layman. The annotation is enormous but judicious. It is a fat little volume of 900 pages, including an index of 60. Published by Bancroft-Whitney Co., San Francisco—uniform with their stud of ponies.

#### FOWLER'S SUPPLEMENT TO THE REVISED STATUTES OF NEW YORK.

*Supplement to the Revised Statutes of New York*, showing, in connection with the seventh edition of the Revised Statutes, the history and condition of the entire general statutory law of the State, from the publication of such edition down to the close of the legislative session of 1887, and also the judicial decisions thereon, embraced in vols. 82-104 N. Y.; 24-44 Hun; 58-67 How. (N. S.); 1-18 Abb. N. C.; 1-7 N. Y. State Rep'r; 1-2 Edm. S. C.; 46-58 Super Ct. (14-21 J. & S.); 9-18 Daly; 4-5 Redf.; 1-4 Demarest; and 1-4 N. Y. Crim. Rep. (C. & N.); together with a supplemental index, and also a table of the general statutes of 1882-1887, briefly stating the subject of each statute, and the page where its subsequent history is given. By J. C. Fowler. Albany: Matthew Bender, 1888. Pp. 453.

A manual of very considerable labor, and of convenience to practitioners in this State. It is the key of the statutory history since January 1, 1882. It is judiciously arranged as to typography, and must form a very useful tool. A circular has been issued by a publishing house announcing an eighth edition of the Revised Statutes, right on the heels of this supplement. Such an edition certainly is not needed, now that this supplement is at hand, and it is heaping an unnecessary burden on the profession to put one out-

#### NEWMARK ON BANK DEPOSITS.

*The Law Relating to Bank Deposits*, embracing the decisions concerning deposits in commercial, savings and national banks, and checks, pass-books and certificates of deposit etc. With a survey of the law of deposits in general, and of banks in general. By Nathan Newmark. St. Louis, Mo.: Wm. H. Stevenson, 1888. Pp. xvi, 229.

This is an intelligent manual, addressed to a special subject of practical and frequent interest. It is no doubt convenient to have an enlarged and separate treatment of the subject unembarrassed by the other topics of a general treatise on banking, and the treatment given seems to be thorough and intelligent.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, March 13, 1888:

Judgment affirmed with costs—David D. Acker et al., appellants, v. Charles E. Leland et al., respondents; Mary H. Shelby, respondent, v. Sun Printing and Publishing Association, appellant; Michael Hickey, respondent, v. David D. Acker et al., appellants.—Order affirmed with costs—Charles A. Clegg, respondent, v. Andrew J. Aikens et al. (Aikens Newspaper Union), appellants; People, ex rel. Thomas Casey, appellant, v. James Jordan, police commissioner, etc., respondent.—Appeal dismissed with costs—Cora E. Fiske, respondent, v. Charles W. Bardeen, appellant.—Judgment reversed, new trial granted, costs to abide the event—Edward Donnelly, respondent, v. Brooklyn City Railroad Company, appellant.

# The Albany Law Journal.

ALBANY, MARCH 24, 1888.

## CURRENT TOPICS.

NOT in many a day has our blood been so caused to glow, have our few remaining hairs been so erected like editorial quills, has our general journalistic system been so electrified and agitated as upon the perusal of an article of four columns in the Fort Worth, Texas, *Gazette*, by Senator Temple Houston, directed against Judges White and Willson, of the Texas Court of Appeals, the criminal appellate court. It is boldly headed, "A Scathing Indictment," and the same headings charge a "sinuous and uncertain course," and a "trampling under foot." The writer charges these judges with preparing and publishing two volumes of civil cases decided by that court in spite of constitutional prohibition; charges Judge Willson with publishing a book of Forms, which he "upholds" from the bench (bad form as well as bad Forms); and charges both with very numerous detailed instances of uprooting, overturning, upsetting, capsizing, inverting, overruling, and otherwise unsettling and bringing to naught its own decisions and the law of the State. We know nothing of the merits of this indictment, and have not time to find them out, although we can believe almost any thing of a court which overrules the United States Supreme Court. (By the way, it is queer that the senator does not include that instance—the Drummers' case.) But we know fine writing when we see it, and this article is just scintillating and effervescing with it. We fear however that the writer "fit into the rebellion," for he speaks of the "horrors of reconstruction" and the "insolent and tyrannical judiciary" of that period. Never mind; we forgive him, and will send him back every flag of his which we have, and if he will come hither will shake hands with him across the supper-table. But how the senator does sling ink! "The simple laws of our ancestors, understood of all, have become dark and terrible riddles, as fatal and mysterious as those which the Sphinx asked of her foredoomed victims." "It is the solemn duty of every man in whose breast there yet glows a spark of patriotic fire, to make the fate of the delinquent a terrible atonement." "They display the eccentricities of genius with none of its brilliancy, the insolence of power shorn of its majesty." "Peddling their little reports." Judge Hurt's "dissenting opinions will become eternal rules of action when the pale creations of his associates have vanished as doth vapor." "John P. White, seated on high, reviling and overruling the opinions of Lipscomb, Roberts and their compeers; no contrast more mournful is seen along the Nile when the jackal snarls, sole lord of the desolate temples and deserted palaces of imperial Sesostria. But the opin-

ions of our dead jurists will survive this petty iconoclasm." "You, sir, as a district judge, virtually assumed that a sow and pigs could become part of the record and go up to the Supreme Court in the statement of facts as a part of the transcript. While no one is surprised at your holding thus, humanity is startled that you should, from your present proud eminence, desire to perpetuate the memory of such folly." (Of course such a thing could only be done by the aid of the pen.) "Could calumny, be it never so malignant, charge more than they confess with such celestial complaisance?" "When you dispense with fundamental matter all distinctions disappear, and the trial court is safe in reading as its charge to the jury a copy of the *Texas Siftings*." (Well, it might do worse.) "There are those to whom you will not deny that you knelt before the Moloch of Radicalism and intimidated your willingness to accept a judgeship at the hands of E. J. Davis, a proceeding for which you had prepared yourself by your attorneyship for the Freedman's Bureau, a position so odious that few decent Republicans could be found to accept it. \* \* \* It was not thus with us in the days of old. The men who freed Texas from the oppressors' thrall chose her worthiest to devise and to expound her laws; and her judges were known as much for the splendor of their learning as the spotless purity of their lives. The fame of their wisdom was heard on the shores of every ocean; the ermined chancellor of Albion's realm was proud to find his construction of her common law sustained by the genius and research of a Hemphill. It is not so now, and if the evils I have pointed out are allowed to pass unrebuked, if these pernicious inroads upon our ancient jurisprudence are not checked, the name of Texas will become a reproach and a hissing throughout the English speaking universe." One would naturally fear bloodshed after this, but no, the writer asserts that he is "actuated by no unkind spirit." But why, oh, why, has the senator lost sight of that Drummers' case?

Speaking of overruling—current reports bring us two remarkable instances of it. In *York's Appeal*, 110 Penn. St. 69, the case of *McClintock's Appeal*, 29 id. 360, is overruled. The court said: "Subsequent examination and reflection have satisfied us that it was a mistake not to have overruled *McClintock's Appeal*. That we did not do so then was due in part to two reasons. It was not considered absolutely essential to the decision of the present case, and we have great reluctance in revising and changing what our predecessors have done. Where a rule of property has been established it is better to let it stand, although subsequent experience should satisfy us that it is an erroneous one. A rule of property can only be changed by an act of assembly without unsettling titles. But *McClintock's Appeal* is not a rule of property, and it was a mistake. It is far better when this court commits a blunder to correct it in a manly way than to

imitate the ostrich by hiding our heads in the sand. *McClintock's Appeal* deliberately overturned the law as it had stood for more than one hundred years, and repealed the statute of limitations so far as it applies to the Orphans' Court. All this was done in an opinion of less than a page. No authorities were cited, for none existed, and the reasoning by which that judgment was sought to be sustained is unsatisfactory. It has been followed with reluctance since, and it is not too much to say that it never had the approval of any considerable body of the profession. It is an excrescence upon our system of jurisprudence which cannot stand, and the knife might as well be applied now as to wait a few years longer. The delay would only result in a few more dead men's estates being plundered. That it has only worked mischief, and that continually, we have ample means of knowledge. Without any authorities in its support, with a long line of cases against it which were not even noticed, and in the face of an act of assembly, by the mere stroke of the judicial pen it deprived the estate of a dead man of the benefit of the statute of limitations, while it left his living antagonist in the full enjoyment of it. \* \* \* *McClintock's Appeal* brushed aside a long line of authorities without so much as noticing them. It introduced a new rule which experience has shown to be erroneous and full of peril to the estates of the dead. That decision is but twenty-eight years old, and as before observed, is not a rule of property. We now overrule it and with it *McCandless' Appeal*, and other cases which have followed it; we restore the law as it stood before it was decided, and reinstate the act of assembly. We believe this course not only to be justified but demanded for the public good and the repose of dead men's estates." In *Union Savings Association v. Seligman*, 92 Mo. 635, the court said: "It is with reluctance that I agree to overrule any case decided by this court, and this reluctance is the greater where a line of decisions is to be overthrown, but the opinions delivered in the case of *Griswold v. Seligman*, 70 Mo. 110, and those following it, never had my entire concurrence, and one member of the court dissented, and I am now satisfied that I should not have given even the partial concurrence which I expressed." Then pointing out contrary decisions in the United States Supreme Court, the Maryland Court of Appeals, and the New York Commission of Appeals, he adds: "It does not become us to shut our eyes to what other respectable courts have held, and blindly follow what we have decided because we have decided it." But what about *stare decisis*? We must add that "Sherwood, J., dissented."

Without intention, this issue of the ALBANY LAW JOURNAL turns out to be an "animal" number. A dog case, full of poetry; some feeling remarks by a southern judge on cruelty to animals; a decision that a mayor cannot abolish dogs without an ordinance; and some doggerel by the author of "The

Animal Kingdom in Court," come together quite accidentally, but appropriately upon the death of Henry Bergh, a man whose memory every lover of humanity and justice must respect. Left with ample riches in his youth, Mr. Bergh might easily have avoided remark and ridicule by addicting himself to the current fashions and follies of the gilded and useless young men of society—to coaching, polo, racing, yachting, tennis and such things, to say nothing of vices—but he preferred to be of some use in the world, and so he devoted himself to the neglected duty of preventing cruelty to animals. In spite of ridicule—coarse or kindly—he has calmly gone on his way, not minding the reputation of a harmless crank. We admire the man who can do that thing. It is the "cranks"—the "one-idea" men—who have made their mark on the world. Mr. Bergh needed not to be ashamed of his work. "Thou shalt not muzzle the mouth of the ox that treadeth out thy corn," "a righteous man regardeth the life of his beast," and "not a sparrow falleth without the heavenly father's notice"—such utterances are sufficient warrant for his devotion to the dumb servants of man. It is pretty safe to judge a man's character by his treatment of animals. That is a powerful touch in "Anna Karénina," where the man who is endeavoring to seduce his neighbor's wife is made to kick his horse which has fallen with him in the hurdle-race, in her sight. If Anna had known human nature she would have turned a deaf ear to him from that moment. Great men have often been fond of animals; Montaigne, Robinson Crusoe and Mr. Dana have had pet cats, and it now seems that Mr. Justice Grantham favors the "cat."

The New Jersey *Law Journal*, referring to some articles by Mr. Cook in the *Atlantic Monthly*, on "Celebration of Marriage," says: "For the law of New York, Mr. Cook refers among other things to the testimony and decision in the recent case of the Lonsdale peerage in the House of Lords on the question whether a marriage by consent alone was valid. In summing up, with reference to all the colonies, he says, quoting Mr. Justice Gray in a Massachusetts case: 'The canon law was never adopted here, and it was never received here as common law that parties could by their own contract, without an officiating clergyman or magistrate, take each other as husband and wife, and so marry themselves.'" The decision in the Lonsdale case was in regard to a marriage under colonial law. There was never any doubt that under our State law a marriage by consent alone was valid. The *Journal* well observes: "We think it will appear that while the nations of Europe have been making more and more careful provisions for publicity and caution in the celebration of marriage, we in this country, in our zeal for liberty and toleration, have generally been becoming more and more lax, and have thrown away valuable safe guards. The feeling in favor of the religious cere-

mony, we are glad to say, is strongly imbedded in our minds and strengthened by our customs, and there is no need to substitute the civil ceremony for it, nor even to require it as a supplement, but while retaining the religious ceremony, it is easy to imitate the nations on the continent of Europe in requiring public notice and registration, and in the case of minors, the consent of parents, always remembering that the penalty for neglect of these should not be the nullification of the marriage."

#### NOTES OF CASES.

**I**N *Brooklyn v. Brooklyn City R. Co.*, 46 Hun, 564, the plaintiff sued for an injury sustained by stumbling over another passenger's basket on the floor of the car. The court said: "The counsel for the plaintiff asked to go to the jury upon the two questions, the construction of the wheel-box and the allowance of the obstruction in the passage-way. There was an entire absence of proof to show the construction or condition of the passenger car faulty or defective in any way, and no negligence can be charged against the defendant in that respect. Neither do we conclude that the defendant or its agents were chargeable with negligence or inattention for permitting one passenger to carry his basket in the car and place it on the floor between his feet, and another to take with him his umbrella. It is quite usual and customary for passengers to carry with them hand-bags, and baskets, and umbrellas, and other small parcels, and no rule is shown for their exclusion. It may become the duty of conductors to cause their removal upon complaint of inconvenience or annoyance, or obstruction to other passengers, but without some such complaint or request we are unaware of any rule which would require their removal. If this plaintiff had requested the conductor to clear the passage-way for her exit from the car, it would have been his duty to comply with her request, and so far as the case discloses the facts, the conductor of the car was without knowledge of any obstruction in the passage-way between the seats. Our examination fails therefore to disclose any negligence of the defendant, and it is unnecessary to make any examination respecting the contributory negligence of the plaintiff. Yet upon this point it is to be said that the plaintiff, with full knowledge of the obstruction in her pathway, undertook to pass, unassisted, between the two men, over the basket and umbrella, and by that act plainly assumed all the dangers and risks of such a passage, and the disastrous results of such a hazardous undertaking cannot be charged against the defendant." In *Morris v. N. Y. Cent. R. Co.*, 106 N. Y. 678, it was held, reversing the decision below, that the defendant was not liable for an injury to a passenger by the fall of a clothes-wringer placed in a rack over his seat by another passenger.

In *Gilbert v. Crystal Fountain Lodge*, Georgia Supreme Court, Nov. 1, 1887, it was held that an

action for slanderous words, spoken of and concerning the plaintiff by a mutual aid association of which he was a member when the alleged tort was committed, will not lie against the association sued as a partnership; but the redress, if any, is against the wrong-doers in their individual or non-partnership capacity. Nor does it make any difference in this respect, that in consequence of this the slander, the plaintiff was suspended from the benefits of membership for a term of years, and that the action was brought pending this term of suspension. Bleckley, C. J., said: "The plaintiff, a minister of the gospel (and as we construe his declaration, a most worthy and upright man), brought complaint for words against a mutual aid association, of which he was a member, alleging the uttering by that association, as a partnership (the suit being against it as a partnership), of certain words imputing to him, as he alleges, the offense of obtaining money by false pretenses from the association — cheating and swindling — and certain other words importing that he was afflicted with a loathsome and contagious venereal disease. \* \* \* If as the declaration alleges, the association was a partnership, the plaintiff was a member of it; and after diligent search we have been unable to discover any authority supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. Upon principle we do not see how he could charge the partnership assets with the damages that might be recovered, he having an interest in the assets as part owner of the same. Nor can we see how he can escape the general rule that in an action at law against a partnership, all the partners, so far as the partnership assets are involved, must be defendants. That rule, applied to this case, would require the plaintiff to sue himself. The equity powers of the court cannot be invoked to overcome this obstacle, for a court of equity has not, nor ever had, jurisdiction to decree damages for defamation or slander. Turning from the remedy to the wrong itself, there is much doubt whether the facts alleged make out the imputation of a crime or misdemeanor. \* \* \* The words laid imported that he had feigned sickness and drawn relief from the association upon a false pretext. Had he done so, he would have gotten assets which belonged to himself jointly with the other members of the partnership, and it is, at least, doubtful whether getting them, though in so disreputable a way, would amount to an offense punishable by law. But the case as a whole cannot be ruled upon this distinction, because the venereal disease was not a partnership malady; that was individual property. Whether a partnership can slander anybody might formerly have admitted of some question, for it is an old rule, going back to Croke's reports — perhaps further still — that there could be no joint action against several persons for oral words. The courts considered that if two uttered the same words simultaneously the vocal act of each would have a separate identity, and be an individual act; and so ac-

tions for such torts ought to be several, and not joint. It seems there was finally a sort of judicial acquiescence in the theory that a slanderous song, chanted in concert by a number of voices, would lay the foundation for a joint action against all the musicians, and this appears to be as far as decisions have gone, save where the 'new orders' could be cited. That defamatory music is not mere melody, but may be treated as harmony, is perhaps good law. On principle we can think of no reason why a partnership might not slander a third person through agents or members, authorized and empowered to defame orally; or by adoption and ratification, after defamation by slanderous words. The difficulty in the present case is, not alone that the partnership could not slander anybody, but that it could not slander a member of the firm, he being so united to the partnership that there could be no partnership tort that would not involve him as a tortfeasor, and he could not be both agent and patient in the infliction of an injury. Cases of defamation growing out of jars and bickerings among the members of associations, religious as well as secular, are unfortunately too numerous. Many of them are summarized and discussed in *Shurtleff v. Stevens*, 51 Vt. 501; S. C., 31 Am. Rep. 698, itself a case of much interest, and quite instructive on the literature of the subject. Such actions are not to be encouraged, but rather discouraged, and we are not sorry to mete out strict law against them."

In *Stephens v. State*, Mississippi Supreme Court, Jan. 30, 1888, defendant was indicted for killing hogs trespassing on his land after he had vainly tried to drive them away. Held error to refuse to charge the jury that if defendant killed the hogs while they were ravaging his crop, in order to protect the crops, and not from a spirit of cruelty, they should find him not guilty of cruelty to animals. Arnold, J., said: "The motive with which the act was done is the test as to whether it was criminal or not. Unless appellant was actuated by a spirit of cruelty, or a disposition to inflict unnecessary pain and suffering on the animals, he was not guilty of the offense charged. He may have committed a trespass for which he is liable in a civil suit, but if his purpose and intent was to protect his crop from depredation, he did not violate the statute under which he was indicted. 1 Bish. St. Crimes, §§ 594, 597; *Wright v. State*, 30 Ga. 325; *State v. Waters*, 6 Jones, 276; *Thomas v. State*, 30 Ark. 433; *Lott v. State*, 9 Tex. App. 206. This disposes of the case at bar; but speaking for myself, I wish to say that laws, and the enforcement or observance of laws for the protection of dumb brutes from cruelty are, in my judgment, among the best evidences of the justice and benevolence of men. Such statutes were not intended to interfere, and do not interfere with the necessary discipline and government of such animals, or place any unreasonable restriction on their use or the enjoyment to be derived from their possession. The common law recognized no rights

in such animals, and punished no cruelty to them, except in so far as it affected the rights of individuals to such property. Such statutes remedy this defect, and exhibit the spirit of that divine law which is so mindful of dumb brutes as to teach and command, not to muzzle the ox when he treadeth out the corn; not to plow with an ox and an ass together; not to take the bird that sitteth on its young or its eggs; and not to seethe a kid in its mother's milk. To disregard the rights and feelings of equals is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless is mean and cowardly. Human beings have at least some means of protecting themselves against the inhumanity of man—that inhumanity which 'makes countless thousands mourn'—but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable perhaps of feeling as great physical pain or pleasure as ourselves, deserve, for these considerations alone, kindly treatment. The dominion of man over them, if not a moral trust, has a better significance than the development of malignant passions and cruel instincts. Often their beauty, gentleness and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But however this may be, human beings should be kind and just to dumb brutes, if for no other reason than to learn how to be kind and just to each other."

#### CONFLICT OF LAWS—DEATH BY WRONGFUL ACT—STATUTE OF SISTER STATE.

INDIANA SUPREME COURT, JAN 24, 1888.

BURNS V. GRAND RAPIDS & I. R. Co.

Although, at common law, actions *ex delicto* for injury to the person abate upon the death of the person injured, yet where the statute in the State in which the injury is inflicted gives a right of action to the personal representative in such case, that right may be enforced in another State having a similar statute, in a court having jurisdiction of the defendant.

**A**PPPEAL from Superior Court, Allen county

L. M. Ninde, for appellant.

W. S. O'Rourke and John Morris, for appellee.

MITCHELL, J. On and prior to the 24th day of March, 1886, the Grand Rapids & Indiana Railroad Company was operating its line, which extends from Ft. Wayne, Indiana, to the northern lakes, in the State of Michigan. The complaint charges that while so engaged the defendant company negligently and wrongfully caused the death of William Burns, the plaintiff's intestate, while the latter was engaged in the line of his duty in coupling cars at Carey station, in the State of Michigan, the intestate being at the time an employee of the company. This action is by the administrator to recover damages which he alleges have accrued to the decedent's next of kin, whose names are set out in the complaint. The com-

plaint embraces a statute of the State of Michigan, in which it is enacted that any person or corporation, by whose wrongful act, neglect or default, the death of any person shall be caused, shall be liable to an action for damages, notwithstanding the death of the person injured, provided the injury shall have occurred under such circumstances as that if death had not ensued, the injured person would have been entitled to maintain an action. The action is to be brought in the name of the personal representative of the person whose death has been caused, and the amount recovered to be distributed to the persons, and in the proportion provided by law, for the distribution of personal property of persons dying intestate. The jury are authorized to give such damages as they shall deem just and fair, taking into account the pecuniary injury resulting from the death to the persons entitled. It may be remarked that this statute is not essentially dissimilar to that regulating the same subject in the State of Indiana, as found in section 284, Revised Statutes, 1881. The court below sustained a demurrer to the complaint, upon the ground that jurisdiction to enforce the right of action and liability, which it is alleged accrued in the State of Michigan under its laws, belonged exclusively to the courts of that State. The propriety of this ruling is the only question involved in this appeal.

It is a settled rule of the common law that the death of a human being cannot be complained of as a cause of action in a civil court. In the absence of statutory enactments, actions arising *ex delicto*, for injury to the person, abate on the death of the person injured, and do not survive to the personal representatives, the maxim *actio personalis moritur cum persona* being of universal application. The States of Indiana and Michigan have each enacted, as have most of the other States, statutes like that the substance of which is above set out. The statutes, while they do not in terms revive the common-law right of action for personal injury, nor make it survive the death of the injured person, create a new right in favor and for the benefit of the next of kin or heirs of the person whose death has been wrongfully caused. Although the right thus created is purely of statutory origin, its nature and incidents and the conditions upon which a recovery may be had, are in no essential respect different from that which relate to an ordinary civil action to recover damages for a civil injury. There is therefore, as we conceive, no propriety in the suggestion sometimes made, that statutes such as that set out in the complaint are penal in character. The recovery is not a penalty inflicted by way of punishment for the wrong, but is merely compensatory of the damages sustained by the heirs or next of kin, who had, or are supposed to have had, a pecuniary interest in the life of the intestate. *Mahew v. Burns*, 103 Ind. 328-335. If the plaintiff were asserting a right to recover a penalty, a different rule would prevail. *Carnahan v. Telegraph Co.*, 89 Ind. 528.

When the railway company wrongfully caused the death of William Burns in the State of Michigan, we have seen that a right of action, under the statutes of that State, accrued to his personal representatives to recover civil damages for the benefit of those to whom his personal property became distributable. The statute of Michigan fixed the rights of the next of kin and the liability of the railroad company. It is a well-established principle that rights which have accrued under the laws of a foreign State are treated as valid rights everywhere; and by means of this principle, cognizance is taken of extra-territorial laws, and of facts extra-territorial, when those laws and facts have conferred rights or imposed obligations upon persons who are within the jurisdiction of the court. *West. Pr. Int. Law*, § 58. The application of this

principle requires that the injury described must have given a right of action under the laws of the place where the default or neglect accrued. A civil right of action acquired under the laws of the State where the injury was inflicted, or a civil liability incurred in one State may be enforced in any other in which the party in fault may be found, according to the course of procedure in the latter State. *Dennick v. Railroad Co.*, 103 U. S. 11; *Leonard v. Navigation Co.*, 84 N. Y. 47; *Knight v. Railway Co.*, 108 Penn. St. 250; 26 Am. & Eng. Ry. Cas. 485; *Railroad Co. v. Swint*, 78 Ga. 651; 26 Am. & Eng. Ry. Cas. 482; *Railroad Co. v. Nix*, 68 Ga. 572; *Railroad Co. v. Doyle*, 8 Am. & Eng. Ry. Cas. 171; *Herrick v. Railway Co.*, 31 Minn. 11; *McLeod v. Railway Co.*, 58 Vt. 727; 28 Am. & Eng. Ry. Cas. 644; *Boyce v. Railway Co.*, 63 Iowa, 70; 23 Am. & Eng. Ry. Cas. 172; *Railroad Co. v. Sprayberry*, 8 Baxt. 341; *Railway Co. v. Lacy*, 43 Ga. 481.

Actions for the recovery of damages for personal injuries are transitory in their nature, and arise out of the supposed violation of rights which in contemplation of law are not local, nor confined to the State where the right accrued. Such actions have always been regarded as transitory in character; and although the injury and the right of action may have accrued in a foreign State, it is now settled by an overwhelming weight of authority that the jurisdiction of courts to entertain and enforce the right is not dependent upon whether the right is of statutory or common-law origin, provided the enforcement of the right in no way infringes upon or contravenes the policy of the State in whose jurisdiction the remedy is sought. *McLeod v. Railway Co.*, *supra*; *Boyce v. Railway Co.*, *supra*. There are comparatively recent decisions which proceed upon a supposed distinction between statutory rights in derogation of the common law and those generally recognized common-law rights. Some of these refused to recognize or enforce rights which are wholly dependent upon foreign statutory law. *Richardson v. Railroad Co.*, 98 Mass. 85; *Anderson v. Railway Co.*, 37 Wis. 321; *Betys v. Milwaukee*, id. 323; *Woodard v. Railroad Co.*, 10 Ohio St. 121; *McCarthy v. Railroad Co.*, 18 Kan. 46; *Taylor v. Pennsylvania Co.*, 78 Ky. 348. As is suggested in an elaborate and valuable note to the last edition of Story on the Conflict of Laws (note a, p. 844), most of the cases in which this distinction is attempted might well have been, and indeed some of them were, decided upon other grounds. But however that may be, the more recent decisions, and we believe the entire current of the later authorities, have entirely disregarded the distinction which was formerly supposed to exist between rights originating under a foreign statute and those of common-law origin. 3 *Wood Ry. Law*, § 411; *Story Conf. Law* (8th ed.), 844; and cases cited, *supra*.

The general proposition may be conceded that statutes have no extra-territorial force beyond the State in which they were enacted, but it is nevertheless true that civil rights acquired under a statute are not confined to the limits of the State in which the right accrued. Such rights, out of regard for the principles of comity existing between States, will be enforced in the courts of any State which can obtain jurisdiction of the defendant, provided to enforce them does not violate the law or policy of the State in which they are sought to be enforced. As was said in *Knight v. Railway Co.*, *supra*, a case in all respects parallel with the present: "In such cases the law of the place where the right was acquired or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought." *Herrick v. Railway Co.*, *supra*. In a case which involved the right of an administrator, appointed under the laws of the State of New York, to maintain a suit

in that jurisdiction to enforce liability for the death of an intestate wrongfully caused in the State of New Jersey, Mr. Justice Miller said: "It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand why the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, by either the common law or the State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." *Dennick v. Railroad Co.*, *supra*.

It is not perceived why a right of action transitory in its nature, arising *ex delicto*, under a statute of a foreign State, should not be as readily enforced by the courts of this State as are those which arise *ex contractu*, but which depend for their validity upon the statute of a foreign State. Rights of the latter class are enforced without hesitation. Some of the decisions seem to rest upon the principle that rights acquired or liability incurred, under a statute in one State, will not be enforced in a foreign State, unless the law of the forum and that of the place where the right of action accrued are of similar import and character, or unless both concur in giving a right of action for the injury complained of. *Leonard v. Steam, etc., Co.*, 84 N. Y. 48, and cases cited; *Boyce v. Railroad Co.*, *supra*. Other well-considered cases proceed upon the theory that in order to justify a court in one State in refusing to enforce a right of action which accrued under the law of another State, it must appear that the liability sought to be enforced is against good morals or natural justice, or that the enforcement of the law would be prejudicial to the general interests of the citizens of the State whose courts are asked to give it effect. *Herrick v. Railway Co.*, *supra*, and cases cited. As has already been seen, the statutes of the States of Indiana and Michigan are so nearly identical in import and character as to manifest the close coincidence in the policy of the two States in respect to the statutes applicable to cases like the present. Under such circumstances, there is, as is said in the case of *Railway Co. v. Richards*, 4 S. W. Rep. 627, a general concurrence of authority to the effect that the courts in either State, which can by their process obtain rightful jurisdiction over the person of the defendant, will enforce liabilities arising in the other. We need therefore give the question above suggested no further consideration, except to say that the better view, as applied to actions for death caused by negligence, seems to be that taken by the Court of Appeals of the State of New York, which is that while the statutes of the different States involved need not be alike in detail, they should be of the same import and character. Story Conf. Law, 845, note. Indeed this seems to be the better view in any case where the statute of a foreign State has made that actionable for which an action was expressly forbidden by the common law, since by the adoption of the common law it may plausibly be urged that prohibition was also adopted in the absence of an express statute making that actionable for which an action was previously forbidden. All the cases agree that whatever the law of the forum may be the plaintiff's case must stand, if at all, so far as his right of

action is concerned, upon the law of the place where the injury occurred. *Hyde v. Railroad Co.*, 61 Iowa, 441; *Allen v. Railroad Co.*, 45 Md. 40. In order to maintain an action of tort founded upon an injury to the person, or for wrongfully causing the death of the person injured, the wrong which caused the injury and death must at least be actionable by the law of the place where it was committed, if not also by the law of the place where redress is sought. Unless the alleged wrong was actionable in the jurisdiction in which it was committed, there is no cause of action which can be carried to and asserted in any other jurisdiction. *Le Forest v. Tolman*, 117 Mass. 109; *Davis v. Railway Co.*, 143 id. 301; 28 Am. & Eng. Ry. Cas. 223; *Devoise v. Railroad Co.*, 98 N. Y. 377; *Whitford v. Railroad Co.*, 23 id. 465; *McDonald v. Mallory*, 77 id. 564.

The principle last above stated ruled the decision in the case of *Buckles v. Ellers*, 72 Ind. 220. That was an action by an unmarried woman to recover damages for her own seduction. The injury complained of was committed in the State of Illinois. Notwithstanding the statute in this State which confers upon every unmarried woman a right to prosecute an action for her own seduction, in the absence of any thing to the contrary being made to appear, it was correctly assumed that the common law, under which no such action could be maintained, was in force in the State of Illinois. It followed, necessarily, that the court held the action not maintainable. On the authority of a text-writer of high repute, it was stated in an incidental way, in the case referred to, that even if it had been shown that there was a statute in Illinois which conferred upon the plaintiff in that case the right to sue for her own seduction, that would not have authorized her to maintain an action in the courts of this State upon principles of comity, as it was only common-law rights, or such rights as are recognized as existing by the general usage of civilized nations, which can be enforced by comity in a foreign forum. This statement in no way impairs the correctness of the conclusion reached in the case, but in the light of the more recent decisions and authorities, it may be doubted whether the text relied on can be regarded as expressing the law upon the subject with entire accuracy. To the extent that any thing found in the opinion referred to conflicts with what is here decided, that case may be deemed modified.

What has been said leads to the conclusion that the learned court erred in sustaining the demurrer to the complaint. The judgment is therefore reversed, with costs.

#### COPYRIGHT — EXCERPTS FROM BOOK — PROOF OF INFRINGEMENT.

UNITED STATES CIRCUIT COURT, E. D. MICHIGAN,  
JANUARY 9, 1888.

FARMER V. ELSTNER.\*

Complainant was the author and proprietor of an elaborate book of 1,024 pages, entitled "A History of Detroit and Michigan, or the Metropolis Illustrated." Defendant's publication was a pamphlet of 274 pages, entitled "The Industries of Detroit;" the first 70 pages of which were mainly historical, and contained about 100 short extracts from the complainant's book. The remaining 200 pages consisted of advertisements only. Held, that as three-fourths of the extracts from complainant's book, and practically all to which he could lay claim as original matter, were contained in the first chapter, being the first 11 pages of the pamphlet, the injunction should extend only to this portion of the publication.

\*33 Fed. Rep. 499.



*E. C. Hinsdale and C. I. Walker, for plaintiff.*

*George S. Hosmer, for defendant.*

BROWN, J. We have felt considerable difficulty in reaching a satisfactory conclusion in this case, from the fact that the piracies, though numerous, are not extensive; and from the further fact that defendant's pamphlet was evidently not intended to supersede, or in any way interfere with the sale of the elaborate and instructive work of the plaintiff. Where defendant's publication is designed to rival or compete with the plaintiff's in the market, courts are astute to protect the technical rights of the plaintiff to his composition, and will even enjoin an imitation of his general plan and arrangement, though there be no plagiarism of sentences or ideas. Where defendant has been guilty of a complete or substantial reprint of plaintiff's work, no difficulty is encountered in granting an injunction; but where the alleged violation consists in excerpts from the plaintiff, the court is bound to consider not only the quantity and quality of the matter appropriated, but the intention with which such appropriation is made, the extent to which the plaintiff is injured by it, and the damage to the defendant by an injunction.

With reference to the quantity and quality taken, of course no general rule can be laid down applicable to all cases. One writer might take all the vital part of another's book, though it might be but a small portion of the book in quantity. In many valuable books, particularly of a scientific character, the leading ideas of the author may be very few in number, the greater part of the work being devoted either to the illustration or amplification of these ideas, or to there production of the ideas of other authors upon the same subject. The person who could seize these leading ideas, or to use an expression attributed to Macaulay, who "could tear the heart out of the book," though it involved the republication of only a single paragraph, might do the author substantial damage, while another might republish pages without imparting the same information. It is not only quantity, but value and quality, that are to be regarded in determining the question of piracy. *Bramwell v. Halcomb*, 3 Mylne & C. 738. "It must appear," said Vice-Chancellor Shadwell, "where a complaint is made to this court, that the piracy has either been of what is called a large part or a material part." *Drone Copyr.* 524.

Regarding the intent with which the appropriation is made, it is obvious that the use of a certain amount of an author's production may be perfectly fair and legitimate in one case, while the use of a similar amount in another case might be unlawful. Thus great liberty is exercised in permitting a reviewer to make extracts for the purposes of criticism, so long as such extracts are not made as a cover for a republication, or for the purpose of superseding the original work. Indeed such quotations in the form of criticisms are frequently of great value to the author himself, and may actually increase the sale of his book. Other instances may be imagined, especially in the publication of legal and scientific works, where it would be almost impossible for a subsequent author to properly state the existing state of science, without making quotations from preceding works. On the other hand, if the selections are made *animo furandi*, with intent to make use of them for the same purpose for which the original author used them, to convey in a different publication the information which he imparted, or to supplant him in his own territory, a small quantity will suffice to render the defendant liable to a charge of piracy. Thus in *Campbell v. Scott*, 11 Sim. 31, the defendant published a work containing an original essay on Modern English Poetry, including biographical sketches of forty-three

modern poets, and selections from their poems, among which were six short poems, and parts of longer poems, the copyright whereof belonged to plaintiff. The selections constituted altogether the bulk of the defendant's work, but were alleged to have been introduced into it for the purpose of illustrating the essay. The court restrained the publication of the work as being an infringement of the plaintiff's copyright. The case of *Bradbury v. Hollen*, L. R., 8 Exch. 1, was an action at law by the proprietors of *Punch* against the defendant for reproducing nine cartoons of Napoleon III, published in *Punch* between 1849 and 1867, with descriptive writing underneath them. It was held by the court that a substantial part of the plaintiff's book or sheets of letterpress has been appropriated, and that he was entitled to recover. The jury however awarded but forty shillings damages.

In the case under consideration the defendant has made numerous, but not very lengthy, excerpts from plaintiff's book. The excerpts however are from the most valuable part of his work, and contain facts which had never before been published and which were obtained from original sources, at very considerable labor and expense. On nearly one-third of the first 70 pages of defendant's book there are evidences of republication from plaintiff's. On the first 11 pages in particular it appears very clearly that a considerable part of the information contained was taken from it, without any credit to him. On page 9 it is said that "Champlain heard of the strait from Indians in 1603." The same page also contains statements as to Joliet and La Salle, as well as a statement regarding mounds as "evidently of Aztec origin," all taken from plaintiff's book. On page 10 is the following statement: "Antoine Laumet de la Nothe Cadillac was born March 5, 1658, at St. Nicholas de la Grave, in the department of Taru and Garonne in France. He received a liberal education, was a lieutenant in the French army when he arrived in the new world, and was married at Quebec June 25, 1687, to Marie Terèse Guyon." These are specimens of the extracts made by the defendant from plaintiff's work to the number of about a hundred. There is no pretense that the compiler of this publication resorted to the original sources himself for this information, nor that he procured it from any other source than the plaintiff's book. Had he extended to this book the common courtesy of an acknowledgment, we should have looked upon his appropriation with much more favor than we are disposed to at present. As the case stands, the *animus furandi* is entirely clear.

The chief difficulty we have met with in this case is the absence of testimony showing that plaintiff has been, or is likely to be, injured by defendant's publication; and as it was not intended as a competing work in any sense of the term, it is doubtful in my mind whether its circulation would prevent the sale of a single copy of plaintiff's book. This book is an elaborate work upon the history, government, architecture, and present condition of the city. Defendants' pamphlet is a mere advertisement of its industries, prefaced by an historical sketch, which alone contains the pirated matter. Some of the facts taken from the plaintiff's book have never before been published, and were gathered by plaintiff from the original sources; but apparently that is not true of all of them. Many of these facts are matters within the common knowledge of those who are acquainted with the history of this city and state, and were taken by the plaintiff himself from prior works, or from sources equally accessible to the defendants. Such facts the defendants would have a right to republish without the plaintiff's assent, or without giving him credit for them. It is true there is an intimation in some cases

that actual damage to the plaintiff need not be proven, and that if the piracy be established it is for the plaintiff himself to judge whether he will insist upon his right to a monopoly. Thus, in *Campbell v. Scott*, 11 Sim. 81, it was said that the plaintiff was the person best able to judge of the damage done him; and if the court does clearly see that there has been any thing done which tends to an injury, the safest rule is to follow the legal right and grant the injunction. In this case however the defendants had published six poems and parts of other poems, the copyright of which belonged to the plaintiff, and it was impossible to estimate accurately the damage done him. At the same time the facts showed it to be very probable that the plaintiff had lost the sale of a number of copies. But notwithstanding this case, it was held by the same judge in the later case of *Sweet v. Cater*, 11 Sim. 572, that if the pirated matter is not considerable, that is, where passages which are neither numerous nor long have been taken from different parts of the original work, the court will not interfere to restrain the publication of the work complained of, but will leave plaintiff to seek his remedy at law. It seems to us however that plaintiff ought not to be remitted to his action for damages where the court can see that, from the impossibility of estimating these damages, the remedy must be entirely fallacious. It is probably on this ground that courts have been led in some cases to grant injunctions, though the piracy has been quite inconsiderable in extent. Thus, in *Kelly v. Hooper*, Drone Copyr. 525, it appeared that the defendant had taken only three and one-half pages from plaintiff's directory of 870 pages, but these formed a large part of defendant's almanac and constituted its chief value. An injunction was granted. So, in *Cobbett v. Woodward*, L. R., 14 Eq. 407, where an upholsterer who had published an illustrated furnishing guide, with engravings of the articles of furniture which he sold, and descriptive remarks thereon, filed a bill to restrain the defendant, another upholsterer, from publishing for purposes of his own trade a similar work, in which many of the engravings and portions of the letter-press of the first work were alleged to have been copied, it was held that the defendant could not be restrained from publishing the plaintiff's illustrations, or such parts of his work as were not original, but merely descriptive of the stock; but as the defendant had taken eight lines from plaintiff's synopsis, and these were original remarks, it was held that the defendant was not entitled to use them without acknowledgment from the source from which they came, and that plaintiff was entitled to an injunction to restrain the publication of these eight lines.

Where the piracy is not of the entire book, nor of entire chapters or pages, but consists of extracts from different parts of the publication scattered through the defendant's book, the courts have sometimes applied the familiar doctrine of "confusion of goods," and have enjoined the whole book. Thus, in *Mawman v. Tegg*, 2 Russ. 388, Lord Eldon says: "If the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses, in any work, to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the other parts of the work cannot be separated, and if by that means the injunction which restrains the publication

of my literary matter prevents also the publication of his own literary matter, he has only himself to blame."

But it is equally clear that if the pirated matter can be separated, the injunction should extend only to that matter, leaving the defendant to do what he pleases with the rest of the book. Drone Copyr. 527. Especially should this be done where an injunction is likely to lead to consequences to the defendant out of all proportion to the damage done to the plaintiff, such, as in this case, to the practical destruction of some hundreds and perhaps thousands of copies. *Mawman v. Tegg*, 2 Russ. 385; *Webb v. Powers*, 2 Woodb. & M. 497; *Greene v. Bishop*, 1 Cliff. 186.

Upon examining the two books in this case, we were at first of the opinion that an injunction should be refused, upon the defendants executing a bond to respond in any damages the plaintiff might obtain in the case, or in an action of law; but the difficulty of estimating such damages seem to us a serious objection to this method of procedure; and that if the plaintiff is entitled to any relief at all it should be given him by injunction against the pirated portions of his book. Upon a careful examination of defendants' pamphlet we find that three-fourths of the extracts from the plaintiff's book, and practically all to which he can lay claim as original matter, are contained in eleven pages of this pamphlet, viz., pages 9 to 20, inclusive, entitled "Detroit's Early History;" and that substantial justice will be done to all parties by enjoining this portion of the defendant's publication. It is true there are about twenty extracts in the following fifty pages; but we think the court may take judicial notice of the fact that most, if not all of them, are of facts which were not originally published by plaintiff, and which the defendants could easily, if they did not actually, obtain from other works readily accessible to the public. To this extent we think plaintiff is entitled to relief, and to this extent only the injunction will go.

## CRIMINAL LAW—LARCENY—OF DOG.

### FAYETTE COUNTY (OHIO) COMMON PLEAS.

#### STATE V. YATES.

A dog is a "thing of value," and may be stolen, and burglary may be committed by breaking and entering with intent to steal a dog.

R. C. Miller, prosecuting attorney, for State.

J. C. Welch, for defendants.

HUGGINS, J. This cause was heard upon demurrer to the indictment. In substance the indictment charged that the defendants, in the night season, forcibly broke and entered a stable with intent to steal two dogs, and that so entering, they did steal two dogs of the value of \$40.

The position taken and relied on in support of the demurrer is that dogs cannot be stolen, and that therefore a breaking and entering with intent to steal a dog is not burglary. To sustain this position the case of *State v. Lymus*, 28 Ohio St. 400; S. C., 20 Am. Rep. 772, is cited.

It must be conceded that if no material change has been made in the law of the State upon this matter since *Lymus'* case was decided, it is directly in point, and settles the question here. That case is on all fours with this, it being an indictment for breaking and entering a stable with intent to steal, and the stealing of a dog of the alleged value of \$25. It was held in that case that the Larceny Act of Ohio having defined what could be stolen by the words "goods,

and chattels," no larceny could be predicated upon the taking of a dog, because dogs were not "such goods and chattels as were esteemed at the common law to be the subjects of larceny."

"The reason generally assigned by common-law writers for this rule, as to stealing dogs, is the baseness of their nature, and the fact that they were kept for the mere whim and pleasure of their owners. \* \* \* In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, \* \* \* and yet they are as much under the protection of the law as chattels purely useful and absolutely essential.

"This common-law rule was extremely technical, and can scarcely be said to have a sound basis. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. Lord Coke, in his *Institutes*, said: 'Of some things that be *feræ naturæ*, being reclaimed, felony may be committed, in respect of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons who make them fitter for great employments, as all kinds of falcons and other hawks, if the party that steals them know they be reclaimed.'

\* \* \* One reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit that 'a person should die for them;' and yet those ancient law-givers thought it not unfit that a person should die for stealing a tame hawk." Earl, J., in *Mullally v. People*, 86 N. Y. 387.

It might be added that to hang a man for stealing a hawk, and hold him guiltless for stealing a dog, is a striking illustration of that peculiar "perfection of human reason" which once was a part of the common law, and of which lingering traces yet remain.

A dog saved the life of William of Orange, and thus probably changed the current of modern history. 2 Dutch Republic (Motley), 398.

The faithfulness of the dog is portrayed in nearly every reading book put into the hands of school children. It has been a favorite theme in literature. We read.

"Tis sweet to hear the watch-dog's honest bark  
Bay deep-mouthed welcome as we draw near home."  
— *Don Juan*, 1st Canto, XVIII Stanza.

"Lo, the poor Indian! whose untutored mind  
Sees God in clouds, or hears him in the wind;  
\* \* \* \* \*  
To be contents his natural desire;  
He asks no angel's wing, no seraph's lyre;  
But thinks, admitted to that equal sky,  
His faithful dog shall bear him company."  
— *Pope's Essay on Man*.

"The tither was a plowman's collie.  
\* \* \* \* \*  
He was a gash and faithfu' tyke  
As ever lap a sheugh or dyke;  
His honest sonsie, baws'nt face,  
Ay got him friends in ilka place."  
— *The Two Dogs*.—Burns.

"But the poor dog, in life the firmest friend,  
The first to welcome, foremost to defend,  
Whose honest heart is still his master's own,  
Who labors, fights, lives, breathes for him alone,  
Unhonored falls, unnoticed all his worth."  
— *Inscription on the Monument of a Newfoundland Dog*.—Byron.

Yet by the common law, and the law of Ohio as declared in *Lymus'* case, if some scoundrel had taken the honest watch-dog, or the poet's firmest friend, *lucri causa* and *animo furandi*, breaking into the mansion house in the night season for the purpose, no offense would have been committed.

At the highest point of the Great St. Bernard Pass, 8,000 feet above the sea, and near the line of perpetual snow, is the hospice of St. Bernard. There for many ages pious monks have dwelt, and made it the business of their lives to rescue perishing travellers caught and overwhelmed by the snow storms of the Alps. They have bred and kept dogs whose natural and trained sagacity in finding and saving persons, who but for them, must have perished miserably, has long made them celebrated the world over. Without doubt the lives of very many persons have been saved by these dogs. Yet if the pass and hospice of St. Bernard had been in Ohio when *Lymus'* case was decided, and some evil-disposed person maliciously, and for the sake of gain, had taken the whole kennel of St. Bernard dogs, no offense would have been committed, and that though a storm had been impending and many travellers on the road.

It might be interesting, if space permitted, to trace to its source this singular antipathy of the common law to dogs. I suspect it would be found in the influence ecclesiasticism had upon the common law in its early formative period, and that the cause for the exercise of that influence was found in Deuteronomy, 23d chapter and 18th verse: "Thou shalt not bring the hire of a whore, or the price of a dog, into the house of the Lord thy God for any vow; for even both these are abominations unto the Lord thy God."

These considerations are not directly in point, but may perhaps be excused because of the somewhat singular nature of the subject. The present question is, has any change been made in the law of Ohio since *Lymus'* case was decided, by reason of which it is no longer decisive of this case, and if so, what is such change?

As held in that case, "the property intended to be stolen by the burglar must be property of which a larceny may be committed." At the time that case was decided, as before said, our Larceny Act, in describing property which could be stolen, used the words "goods and chattels." "These words," says the opinion, "at common law have a settled and well-defined meaning, and when used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at common law to be the subjects of larceny. As dogs, at the common law, were held not to be the subjects of larceny, they are not included in the words 'goods and chattels.'"

Since that decision our Larceny Act has been revised and re-enacted, and the words now used to describe property that may be stolen are "any thing of value." These words, unlike the words "goods and chattels," have no "settled and well-defined meaning at the common law." We are left to find their meaning, if there is any question, by any legitimate aids in that behalf. As to the meaning of the words "any thing" there is no trouble. But as to the meaning of the word "value" the matter is not so plain. Much labor and learning have been expended upon the question of the meaning of the word "value." "Value" is defined by Bouvier as: "(1) The utility of an object. (2) The worth of an object in purchasing other goods." These definitions are pretty evidently obtained by Bouvier from Adam Smith.

"The word 'value,' it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one may be called value in use; the other value in exchange." *Wealth of Nations*, chap. 4.

By these definitions value has two meanings. But later learned writers, straining for the last analysis, reject one of these.

"Value is the relation of two services. The idea of ;

value entered into the world for the first time when a man said to his brother, 'Do this for me and I will do that for you.' They had come to an agreement. Then we could say the two services were worth each other." *Harmonies of Political Economy*. Bastiat.

"Value is the exchange power which one commodity or service has in relation to another." *Science of Wealth*. Walker.

Tested by the definitions of these philosophers, a dog has or may have a value. Tested by the common sense of men, and even by the common law, can there be any question that dogs come within the meaning of the phrase "any thing of value?" By the common law dogs were property, and "although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action." *State v. Lymus, supra*, citing *Blackstone, Bishop & Bacon's Abr.*

Why trespass would lie for stealing a dog, when it was no crime to steal him, is not plain to a mind unversed in that "perfection of human reason" once, as before said, part of the common law.

The indictment alleges that the dogs taken were of the value of \$40. The demurrer admits every thing well pleaded, and this being a direct averment material to the issue, is admitted, unless the fact that the indictment discloses that dogs are the property of which the value is alleged neutralizes the averment of value.

As to the utility of dogs opinions may differ. The flockmaster whose sheep are worried by dogs, may have one opinion. The shepherd in the hills of Scotland, whose flocks are herded and tended by his dogs, may have another. There are commodities whose value as represented in money is very great, and which it would be a crime to steal, but which many good people think the world would be better without. Dogs are property, sold and transferred in ordinary business transactions. "Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership, they possess all the attributes of other personal property." *Mullally v. People, supra*. No reason is now apparent why this kind of property should have no protection in the criminal law of Ohio.

The statutes of the State as to dogs have been examined. Without any extended reference to them, it may be said that they are not believed to have any controlling effect in the disposition of this question.

Demurrer overruled.

[See *State v. Harriman*, 75 Me. 562; S. C., 46 Am. Rep. 423; *State v. Brown*, 19 Baxt. 53; S. C., 40 Am. Rep. 81; *C. v. Doe*, 79 Ind. 9; S. C., 41 Am. Rep. 599; *Mayor v. Meigs*, 1 McArthur, 53; S. C., 29 Am. Rep. 578.—ED.]

## NEW YORK COURT OF APPEALS ABSTRACT.

BILL OF LADING—INTEREST UNDER CONTRACT—AGREEMENT TO PAY SIGHT-DRAFTS—ESTOPPEL—PLEADING—ANSWER—PRESUMPTION—TRANSACTIONS WITH CORPORATION—DENIAL OF CORPORATE EXISTENCE.—(1) Defendants contracted with plaintiffs to accept and pay sight-drafts drawn on them by a third party in payment of certain consignments of cattle and hogs, such drafts to be accompanied by a bill of lading of said consignment. Under this agreement they received and held a consignment of cattle and hogs, but refused to honor the sight-draft, accompanied with the bill of lading, for the same. Held, that the plaintiff had a special interest in the consigned property to the extent of the amount of the draft discounted by it. (2) When the defendant admits in his

answer the allegation in the plaintiff's complaint that he received, in accordance with the agreement, a bill of lading with the property, the inference is that it was such a bill as the contract called for, and the defendant is estopped from showing that the property was received under any other contract than that conceded by the pleadings. (3) When the evidence clearly shows that the party has had contractual relations with another as an existing corporation, and that such transactions, down to the date of the one in question, have been frequent, and for large amounts, and such as usually pertain to such institutions, he is estopped, after having received the property of such corporation into his hands, from disputing its incorporation, in an action brought to compel an accounting for such property. The general rule is stated in *Morawetz on Private Corporations*, § 142, "that a person who has contracted with an association assuming to be incorporated, and acting in a corporate capacity, cannot, after having received the benefit of the contract, set up as a defense to an action brought upon it by the company that the latter was never legally incorporated, or that it had no authority to enter into the contract in a corporate capacity;" citing among others, *Palmer v. Lawrence*, 3 Sandf. 181; *Brouwer v. Appleby*, 1 id. 158. The case of *Arms Co. v. Barlow*, 63 N. Y. 63, goes far to sustain the principle upon which this rule is predicated. In *Douglas Co. v. Bolles*, 94 U. S. 104, an action was brought upon county bonds given to a railroad company in payment of shares in its corporation. The county set up in defense that the railroad company had never been incorporated. The court held that the company had been a corporation *de facto*, if not *de jure*, from the date of its organization, and that its corporate existence, and its ability to contract, could not be called in question in a suit brought upon evidences of debt given to it. It is also said in *Morawetz on Corporations*, § 144, that "it is clear that in an action brought by a corporation *de facto* for a wrongful appropriation of property owned by it, it is no defense that the company was not incorporated according to law." We think it entirely clear that when an individual receives the property of a corporation through a contract made with such corporation by its corporate name, and there is extrinsic proof of the user of corporate powers by such corporation on previous occasions, a party so surrendering its property is estopped from disputing its incorporation in an action brought to compel an accounting for such property. *Congregational Soc. v. Perry*, 6 N. H. 184; *Williams v. Cheney*, 3 Gray, 220. Jan. 17, 1888. *Commercial Bank of Keokuk v. Pfeiffer*. Opinion by Ruger, C. J.

JUDGMENT—EFFECT OF—COLLATERAL IMPEACHMENT OF CONTRACT—FRAUDULENT CONVEYANCES—PURCHASE AT EXECUTION SALE—DEFENSE OF VALID JUDGMENT—LIABILITY OF PARTY TO FRAUD—SOLD AND UNSOLD PROPERTY—CREDITOR'S BILL—WHEN LIES—FRAUDULENT PURCHASE AT JUDICIAL SALE—PARTIES—DEFECT OF—OBJECTION, HOW TAKEN.—(1) The validity of a contract must be litigated when the contract is brought directly in issue by an action upon it, and not in a subsequent action, in the nature of a creditor's bill, for the purpose of satisfying the judgment obtained in the first action. (2) Where a party buys land sold upon execution sale, for the benefit of the judgment debtor, and holds it to defraud his creditors, the transaction is not unimpeachable because the judgment upon which it was sold was valid. (3) One who is a party to a fraudulent transfer of property, for the purpose of defeating a recovery by creditors, is liable to those creditors to the extent of the property in his hands, and to the value of that which has been sold. (4) An action in

the nature of a creditor's bill is the proper one to reach property in the hands of one who purchased the property at an execution sale, and holds it for the benefit of the debtor for the purpose of defrauding the creditors of the debtor, and is only barred by the lapse of six years from the discovery of the fraud. (5) A defect of parties must be taken advantage of either by demurrer, if it appears in the pleadings, or by answer, if it does not appear. Jan. 17, 1888. *Decker v. Decker*. Opinion by Finch, J.

**NEGLIGENCE—EVIDENCE—SUBSEQUENT REPAIR BY THIRD PERSON.**—Evidence that after plaintiff had fallen into a certain excavation, within the limits of the village, against which the action for damages caused by the fall was brought, a person living near the excavation had placed a fence about it sufficient to protect the public, is improper and inadmissible. Such evidence has sometimes been received by courts in cases where the party sued for an accident has soon thereafter made repairs or improvements for the purpose of making the machine or structure which caused the accident more secure, convenient or safe, and its admissibility has been defended on the ground that the act of making the repairs or improvements was an admission that the machine or structure was therefore imperfect, out of repair, or unsafe. We think however that such evidence does not tend to prove that the party sued knew, or was bound to know, that the machine or structure was imperfect, unsafe, or out of repair. After an accident has happened, it is ordinarily easy to see how it could have been avoided, and then for the first time it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe or perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury. Hence in this court, and generally in the Supreme Court, it has been held erroneous to receive such evidence. In *Salters v. Canal Co.*, 3 Hun, 338, it was held erroneous to admit evidence to show that after the accident the railroad company changed the character of its switch. Landon, J., writing the opinion, said: "The plaintiff was permitted to give evidence to the effect that after the accident the defendant substituted a target switch for the common one. Within the ruling in *Dougan v. Transportation Co.*, 56 N. Y. 1, this seems to be error. Whether the defendants were negligent was a question to be decided upon the facts as they existed at the time of the injury. What the defendants did afterward was immaterial, unless their acts could be construed as equivalent to their declaration that they were negligent at the time of the injury. But the question appears to be settled by authority, and not open for discussion in this court." In *Payne v. Railroad Co.*, 9 Hun, 526, the action was to recover damages for an injury to plaintiff's horse, received while passing over a crossing upon defendant's track. The plaintiff was allowed, against defendant's objection and exception, to show that shortly after the accident the defendant took up the planks at the crossing, and replaced them by new ones. This was held to be error. Learned, P. J., writing the opinion, said: "The only way in which such subsequent acts could bear upon the question would be as an admission that they had been negligent. So a jury would be likely to understand such proof. Yet it would plainly be unjust to the de-

fendants that they should not take additional precautions against accidents, without the risk that these precautions should be construed into an admission of prior negligence. To put down a new plank was an act which the defendants might do for various reasons. Yet it would be easy to argue from that act to a jury that the defendants themselves knew that the crossing had been badly constructed or was out of repair. It seems to me that the evidence was improperly admitted, and that a new trial is therefore necessary." In *Dougan v. Transportation Co.*, 56 N. Y. 1, plaintiff's intestate slipped from the deck of a steamboat under the outer railing, and was drowned, the proof was offered by the plaintiff that after the accident the defendant boarded up the space between the railing and the deck; and this court held that the evidence was properly excluded. Grover, J., writing the opinion, said: "This was immaterial; its negligence is to be determined by what was known before and at the time of the accident." In *Dale v. Railroad Co.*, 73 N. Y. 468, the plaintiff was a passenger on one of defendant's cars, and was seated near an open window, with his elbow on the window-sill, and while passing over a bridge his elbow was struck by some substance, and his arm broken. It appeared that some months after the accident the bridge was removed, and replaced by an iron one, with trusses that did not rise as high as the window-sill. Testimony was received, under objection, to the effect that on the new bridge the distance between the rails and the sides of the trusses was greater than the old one. The court charged the jury that they might take that fact into consideration in determining whether the defendants were not guilty of negligence in allowing the old bridge to remain. This charge was held to be erroneous. In all the cases to which we have thus called attention the change or improvement after the accident was made by the defendant in the action. But here the additional protection against danger was erected after the accident by the owner of the adjoining property, who had no connection whatever with the defendant. Even if it could have been claimed that this act, if it had been done by the defendant or under his orders, would in any degree have been a confession that the area was previously insufficiently protected, and that thus the defendant had been previously negligent, yet the act of a stranger certainly could furnish no legitimate evidence against the defendant, and we cannot say that it did not have some influence upon the jury in reaching their verdict. Jan. 17, 1888. *Corcoran v. Village of Peekskill*. Opinion by Earl, J.; Danforth, J., dissenting.

**STATUTE OF FRAUDS—ORIGINAL AND COLLATERAL PROMISE.**—Defendant was a creditor of the firm of Wheatcroft & Rintoul to the amount of \$5,000, for which he was fully secured by a chattel mortgage. He promised the plaintiff, who was the holder of two notes against the said firm, nearly matured, that if the plaintiff would wait a certain time after their maturing the defendant would pay such notes, at the same time informing plaintiff of his chattel mortgage, and telling him that he could not collect the notes. Held, that the promise, not being in writing, under the statute of frauds is void. The plaintiff has recovered upon a verbal promise to pay the debt of another and seeks to maintain his position in part upon the definition of an original promise framed in the old and familiar case of *Leonard v. Vredenburg*, 8 Johns. 29. That definition assumed, as the test of an original promise, that it was founded on a new or further consideration of benefit or harm moving between the promisor and promisee. There was found in this some accuracy of expression, for since every promise must have some consideration, to be valid at common

law, and that necessary and inevitable consideration, wherever the debt to be paid antecedently existed, is always "new" and "further," because different from that of the primary debt, and since also such new consideration does frequently move between the newly-contracting parties, giving benefit to promisor or harm to promisee, it became apparent that the terms of the definition were dangerously broad, and capable of a grave misapprehension, making it almost possible to say that a promise good at common law between the new parties was good also in spite of the statute. This difficulty was disclosed and measured, and then remedied, in *Mallory v. Gillett*, 21 N. Y. 412, by a divided court, it is true, but upon a prevailing opinion so strong in its reasoning, and so clear in its analysis, as to have commanded very general approval. The case was one where, in reliance on the promise made, the promisee had released to his debtor a lien which gave his debt protection. Within the language of the rule in *Leonard v. Vredenburg*, the promise was original, and not within the statute, since the consideration which supported it was "new" and "further," and passed between the newly-contracting parties, and consisted in the harm to the promisee involved in the surrender of his lien. But the promise was nevertheless held to be collateral, and the earlier definition modified so as to require that the new consideration should move to the promisor, and be beneficial to him. This claim shut out at once from the class of original promises all those in which the consideration of the promise was harm to the promisee, and the resultant benefit moved to the debtor instead of the promisor. The ground of the doctrine thus asserted was explained by the test then prevailing in Massachusetts, declaring the promise original where its leading and chief object is to subserve or promote some interest or purpose of the promisor himself, and upon which the respondent very much relies. *Nelson v. Boynton*, 3 Metc. 396. That this expression was understood to mean not merely some moral or sentimental object, but to relate to a legal interest or purpose tangible by the law, and a product of the consideration received from creditor or debtor, is apparent from the further current of the explanation. The learned judge contrasts a case in which the consideration benefits the debtor, but in it the promisor has no personal interest or concern, with one in which the consideration is the product of some new dealing between creditor or debtor and promisor, and in which the latter has a personal interest. That is what he means by a consideration of benefit moving to the promisor, and to obtain which is the object of the promise. But the rule thus stated and explained was again narrowed and restricted. In *Brown v. Weber*, 38 N. Y. 187, it was asserted that a promise might still be collateral, even though the new consideration moved to the promisor, and was beneficial to him. It was distinctly said that the existence of those facts would not in every case stamp the promise as original, but the inquiry would remain whether such promise was independent of the original debt or contingent upon it. The court added: "The test to be applied to every case is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of another third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety for the performance by some other person of the obligation of the latter to the creditor." If this statement was not needed for a determination of the case, or the generality of its language left it debatable what precise limitation or qualification was intended to be added to the rule of *Mallory v. Gillett*, both difficulties were removed by the recent case of *Aokley v. Parmenter*, 96 N. Y. 426, in which *Rapallo, J.*, states with

precision and accuracy the doctrine of the court. The debt there was the debt of one Sullivan, and the verbal undertakings were held to be within the statute, unless the defendant, before making the promise, had so dealt as to make Sullivan's debt his own, or had incurred a duty to pay the amount owing from Sullivan to the plaintiff. It was added, relatively to one possible view of the facts, that the plaintiff's undertaking was to pay out of the proceeds of the stock, and his duty to pay would not arise until he had converted the stock into money. "Consequently," it was concluded, "at the time of the alleged promise, he was under no present duty to pay, and the promise, though founded on a good consideration (viz., the adjournment of the sale) was nevertheless an undertaking to pay the debt of another." These four cases, advancing by three distinct stages in a common direction, have ended in establishing a doctrine in the courts of this State which may be stated with approximate accuracy thus: That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. The defendant was a secured creditor of the firm. Delay on the part of plaintiff is not shown to have been of the slightest consequence to the interest of defendant. It is not pretended that this security was inadequate. Beyond that, he asserted that he was to be first paid, and that plaintiff could get nothing if he sued. When the conversation took place the first note had not matured, and could not be sued under about a fortnight. It is not suggested or shown that defendant's claim was not due, and there was ample time, if further security was needed, to sue and levy in advance of plaintiff. That delay by the latter was in the slightest degree material to the safety of defendant's debt is a purely gratuitous assumption. The evidence is all to the exact contrary. The motive disclosed was regard for his son and desire that his business credit should not be damaged by a failure. The purpose for which he sought delay was wholly in the interest of that son, and to enable him to market his beer the next summer, and so procure the means to pay the plaintiff without sacrifice or discredit. The debt of the firm was in no sense defendant's debt. No consideration of benefit moved to him from either party, and least of all had there been any new dealing with either which put upon him a duty of payment. Before the promise was made he owed no such duty, and came under no such obligation. The doctrine of this court clearly stamps the promise as collateral and void for want of writing. Jan. 17, 1888. *Rintoul v. White*. Opinion by Finch, J.

#### SURETY—LIABILITY—INSURANCE—BOND OF AGENT.

—(1) A contract of employment between a life insurance company and its district agent provided that the company should, for six months, "advance" to the agent \$200 a month, the money to be used by him in advancing the interests of the company in his "territory," and "to remain a lien on all business \* \* \* secured to the agent under the contract, until repaid, with interest," etc. Held, that there was no personal liability of the agent for the money so advanced, and that his sureties on a bond, conditioned that he should "discharge his duties as agent," and "pay over all moneys belonging to the company," were not liable for his failure to do so. (2) The contract provided that the agent should "carry out in good faith all contracts then in force" with its sub-agents theretofore appointed by it in his "territory;" and further, that for the purpose of developing said agency in his "territory" the district agent should be allowed an

additional commission of fifteen per cent "on the premiums of all new policies placed by himself or his agents in the said field" during a certain time. *Held*, that the district agent was entitled to the fifteen per cent commission on premiums paid into the company by the sub-agents during said time. Jan. 17, 1888. *Northwestern Mut. Life Ins. Co. v. Mooney*. Opinion by Danforth, J.

**VENDOR AND PURCHASER—PURCHASE-MONEY MORTGAGE—AGREEMENT WITH GRANTEE OF VENDEE—PERSONALTY.**—Plaintiffs, the holders of certain purchase-money mortgages upon property conveyed by them to C., and simultaneously and with their knowledge by C. to P., agreed with P. that in consideration of the payment by him of the cash payment necessary to entitle C. to a conveyance from plaintiffs, P. should have the right to remove and sell the plant of a marine railway on the premises. *Held*, that the agreement was valid, though by parol, and being between different parties, not within the rule forbidding parol evidence to contradict a written instrument; and that the railway plant, though attached to the realty, was thereby reimpresed with the character of personality, and was not covered by plaintiff's mortgages. There can be little doubt however that the machinery, shafting, rollers and other articles became, as between vendor and vendee, and mortgagor and mortgagee, fixtures, and a part of the realty. *McRae v. Bank*, 66 N. Y. 489. But as by agreement, for the purpose of protecting the rights of vendors of personality, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way as, in the absence of an agreement, would constitute them fixtures (*Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hubbard*, 75 Id. 542), so also it would seem to follow, that by recent conversion, the owner of land can reimpres the character of personality on chattels, which by annexation to the land have become fixtures, according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their identity, and the reconversion does not interfere with the rights of creditors as third persons. The plant and machinery in question was personal property when placed on the land, and the only issue presented is, did the plaintiffs agree with Post that he might take the title to the plant and machinery for the security free of the mortgage, and remove them at any time from the mortgaged premises, thereby reimpresing the property with the character of personality? In determining this question it does not seem to us to be very material to inquire whether the deed from the plaintiffs to Cooney (the nominee of Carroll) and the mortgage back, embraced or was intended to embrace the plant and machinery. Post was not a party to the instruments, and is not concluded by them. The rights of Post depend wholly upon his agreement with the plaintiff, and if they receive his money upon the agreement that he should have the plant and machinery, with the right to remove them without restriction as to time, the agreement was valid, although by parol, and even if it contradicts the legal import of the mortgage. Jan. 17, 1888. *Tyson v. Post*. Opinion by Andrews, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**COPYRIGHT—PHOTOGRAPH—POSSESSION OF COPY—QUI TAM ACTION.**—Having control, as business manager, of sheets of a photograph, does not give a person such possession as to render him liable to the penalty imposed by the Revised Statutes of the Uni-

ted States, § 4965, which provides that when any one shall copy a photograph which has been copyrighted, he shall forfeit one dollar for every sheet of the same found in his possession. It will be seen that while this chapter provides a remedy by a civil action on behalf of the owner of the copyright of a book or dramatic composition which has been violated, it makes no such provision in favor of a copyright of "any map, chart, musical composition, print, cut, engraving or photograph, or chromo, or of the description of any painting, drawing, statue, statuary or model," etc., except so far as it forfeits the plates on which they are copied, and the sheets, either copied or printed, and one dollar for every sheet found in the possession of the defendant. Feb. 13, 1888. *Thornton v. Schreiber*. Opinion by Miller, J.

**INSURANCE—MARINE—SEAWORTHINESS—SUBSEQUENT DAMAGE—LIMITATION OF LIABILITY—LOSS BY BROKEN MACHINERY—PROXIMATE CAUSE—ORDINARY CARE—TOWING DISABLED TUG PAST PORT—BURDEN OF PROOF—TRIAL—OBJECTIONS—WAIVER—WITNESS—CREDIBILITY—EXPERTS—EVIDENCE—RES GESTÆ—SECONDARY—INSTRUCTIONS—REFUSAL OF SERIES.**—

(1) In the insurance of a vessel upon a time policy, the warranty of seaworthiness is complied with if the vessel is seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss is not the consequence of the omission. (2) In an action upon a policy of marine insurance on a tug boat, in which it was provided that the company should not be liable for loss occasioned by the breaking of any part of the machinery, it appeared that the tug broke her shaft, and was taken in tow by another tug, and while being towed sprung a leak and sunk. *Held*, that the insurer would not be released from liability because of the existence of one of the excluded causes, unless the loss was shown to be due to that cause. (3) It appeared that the tug was towed past two ports of repair on her way home, and then sprung a leak and sunk. *Held*, that it was proper to instruct the jury that permitting the tug to be towed in that condition past two ports of repair would not of itself constitute a breach of the policy, but it was for them to consider whether the master was guilty of lack of ordinary care and also whether the condition of the vessel was the cause of her ultimate loss. (4) And in such case it was proper to charge the jury that while the breaking of the shaft might have rendered the tug unseaworthy for propelling herself, it was competent for the insured to show that she was seaworthy to be towed to her home port. (5) Where the defendant, in its answer, alleges as a special defense that the loss was occasioned by the want of prudence and ordinary care, it is proper to instruct the jury that the burden is on the defendant to show the lack of ordinary care by a fair preponderance of testimony. (6) Where, after the introduction of the plaintiff's testimony, the defendant moved for a verdict, which motion was refused, the subsequent introduction of testimony by the defendant is a waiver of all objections to the refusal of the motion to direct a verdict. (7) In an action on a policy of marine insurance, where the issue was the negligence of the master of the vessel, witnesses who are shown to have been seamen for twenty and thirty years are competent to give testimony as experts, and the weight to be given to their evidence is a question for the jury. (8) Statements made by the captain, after they were taken in tow, cannot be admitted in evidence, unless shown to be part of the *res gestæ*. (9) Where, after notice, the defendant company failed to produce the proofs of loss made by the insured, the plaintiff had the right to show the facts contained therein by secondary evi-



dence. (10) Where a general exception is taken to the refusal of the court to change a series of propositions, such exception is bad if one of the series is objectionable. Jan. 30, 1888. *Unton Ins. Co. Philadelphia v. Smith*. Opinion by Blatchford, J.

**OFFICE AND OFFICERS—"PUBLIC OFFICERS"**—REV. STAT. U. S., § 3639.—The Revised Statutes of the United States, § 3639, provides for the safe-keeping of public money which may come into the hands of public officers, until transferred or paid out by them. *Held*, that a clerk in the office of the collector of customs for the collection district of the city of New York is not such a public officer charged with the safe-keeping of public money, and is not indictable as a public officer for the unlawful conversion to his own use of such public money. A clerk of the collector is not an officer of the United States within the provisions of this section; and it is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the president, by and with the advice and consent of the senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States v. Germaine*, 99 U. S. 508, and in the recent case of *United States v. Mount*, 124 U. S. What we have here said is but a repetition of what was there authoritatively declared. A clerk of a collector, holding his position at the will of the latter, discharging only such duties as may be assigned to him by that officer, comes neither within the letter nor the purview of the statute. The case of *United States v. Hartwell*, 6 Wall. 385, does not militate against this view. Feb. 6, 1888. *United States v. Smith*. Opinion by Field, J.

**PARTNERSHIP—TAXES ON PROPERTY—PAYMENT OF ONE-HALF—JOINT LIABILITY.**—In the years 1880 and 1881 plaintiff and defendant were copartners in the hotel business, each owning an undivided one-half of the hotel, and the furniture and personal property therein. In October, 1881, the partnership was dissolved, and defendant rented of plaintiff his undivided half for the term of two years. On the 1st of May, 1882, plaintiff and defendant were indebted for taxes assessed against their joint property for the years 1880 and 1881, in the sum of \$630. One-half of this sum defendant paid. *Held*, that the \$315 of unpaid taxes was a joint liability upon the property of the firm; that it was the duty of defendant, who was in possession of the property, to pay the taxes; and payment of one-half of the taxes did not discharge him from the obligation to pay the other half. And this obligation was not satisfied or discharged by the alleged statement of plaintiff to defendant that if he paid plaintiff's one-half of the taxes, he would not allow it to him in the payment of rent. Jan. 23, 1888. *Chapin v. Streeter*. Opinion by Miller, J.

**PATENTS—PRIOR STATE OF ART—PRESERVING BONDS.**—A scheme for preserving, filing and canceling bonds, etc., by pasting them in blank books with appropriate spaces for data, differing from one previously in use only in providing spaces in the file books for the bonds, and in grouping the coupons according to the dates of payment, instead of with the bonds to which they belong, does not involve a patentable novelty. Feb. 13, 1888. *Munson v. City of New York*. Opinion by Gray, J.

**POST-OFFICE—USE OF, TO DEFRAUD—INDICTMENT.**—The Revised Statutes of the United States, § 5480, renders it criminal for any person, having devised a scheme or artifice to defraud other persons by inciting them to open communication with him through the

post-office, to place any letter in, or receive any letter from, any post office. *Held*, that an indictment under the statute is insufficient which only charges the offense in general language, without disclosing the particulars of the alleged scheme or artifice to defraud, and such an omission is matter of substance, and not of form, and cannot be aided or cured by the verdict. Jan. 30, 1888. *United States v. Hess*. Opinion by Field, J.

**SALE—DUTY TO DELIVER—OFFER OF PERFORMANCE—INSOLVENCY—CHECK—EQUITABLE ASSIGNMENT.**—(1) Shipments of iron ore, as required by a contract of sale, were made from the place of delivery, until by reason of the apprehended insolvency of the vendee, the vendor suspended further shipments. At that time the vendor had at the place of delivery the balance of the ore, which, by the contract, was to be subject to its order until forwarded, but did not offer to make any further shipments, and did not give notice of its readiness to do so; nor did the vendee corporation nor its receiver, who meanwhile had been appointed, call for the ore, or offer cash in payment. The vendor, in pursuance of an order to present claims, filed its claim for the difference between the contract price of the undelivered ore and its then present value. *Held*, that the vendee's insolvency did not release the vendor from offering to deliver the property, and that the evidence justified the conclusion that the contract had been rescinded. (2) A check not drawn against any particular fund does not of itself operate as an equitable assignment of funds deposited to the drawer's credit. Jan. 23, 1888. *Florence Mtn. Co. v. Brown*. Opinion by Field, J.

**SHIPPING—REGULATION OF—CARRIAGE OF PASSENGERS—PENALTIES.**—The Revised Statutes of the United States, § 4270, which provides that the penalties imposed by the foregoing provisions, regulating the carriage of passengers in merchant vessels, shall be liens upon such vessels, applies to those sections which declare a "fine" for the violation of its provisions, as well as those which declare a penalty *ex nomine*; and a fine incurred by a violation of the Revised Statutes of the United States, § 4253, which prohibits carrying any greater number of passengers than is allowed by the Revised Statutes of the United States, § 4252, is therefore a lien upon the vessel. The lien for carrying passengers in excess of the limit prescribed by the Revised Statutes of the United States, § 4252, cannot exceed the amount of the fine imposed upon the master of the vessel upon criminal prosecution for the offense. Under 19 United States Revised Statutes, p. 250, chap. 69, extending the provisions, penalties and liens relating to the space in vessels appropriated to the use of passengers to all spaces appropriated to the use of steerage passengers, in vessels propelled by steam, the United States has a lien upon a steam-vessel for violation, as to steerage passengers, of Revised Statutes of the United States, § 4255, regulating the size, position and arrangement of berths; but not for violation of the Revised Statutes of the United States, § 4256, providing that the master of any vessel arriving from abroad shall give the district collector a list of the passengers on the vessel taken on board at any foreign port, the latter provision not being within the purview of the extending statute. Feb. 13, 1888. *The Strathairly; United States v. The Strathairly*. Opinion by Matthews, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CONSTITUTIONAL LAW—SALE OF INTOXICATING LIQUOR—POLICE POWER.**—The Legislature of the

State may, under its police power, not only regulate, but restrict, the retail liquor traffic. It is insisted however by distinguished counsel, with zeal and ability, that liquor is property; that this act forbids its sale, and is in effect a spoliation of it; that it is an exercise of absolute, arbitrary power over the property and individual right of the freeman, and is therefore interdicted by our bill of rights and the fourteenth amendment to the Constitution of the United States. It is now settled however by not only the decisions of the Supreme Court of the United States, but by the highest court of nearly every State in the Union, that the Legislature of a State may, under that police power which is vital to its existence, not only regulate, but restrict, the retail liquor traffic. It would be singular if it could not do so, if government be instituted for the good of the governed. If an evil which destroys the morals, the fortunes and the lives of so many of our best citizens — one which is so fruitful of pauperism and misery, and productive of probably eight-tenths of the crime in the country — was not subject to the legislative power, it would be strange indeed. If so, then all manner of crime is to be punished, and yet the people are powerless to wipe out the active cause of it. Surely one cannot exercise a right, and much less a mere privilege which may be revoked at any time, if it be destructive of the public morals or public health or public peace, and yet be beyond the reach of the legislative power. No one has ever had the right to sell whisky in this Commonwealth save as a privilege; it has always been the creature of license. The police power is properly and necessarily a broad one; it is difficult, if not impossible, to fix its limit. The property owner acquires and holds his property subject to the right of the Legislature, under this power, to control it, whenever the public peace or public morals or the public health is involved; otherwise the many would be at the mercy of the few; lawlessness and disorder would take the place of law and order, and the appetites and passions of a few persons would imperil the public peace, and endanger our social fabric. The individual profit of the few, arising from the wreck of fortunes, homes and lives, must give way to the happiness and security of the many. It belongs to the legislative department of the government to exercise this necessarily sweeping power, and determine primarily what measures are needful for the protection of the public health, the public morals, and the public safety. If a statute upon the subject has in reality no relation to those objects, and is a plain invasion of some private right secured by the organic law, then it would be one of the highest duties of a court to declare it a nullity; but this cannot be said of a law which controls and regulates a traffic which is an admitted evil in society. We have as yet not seen an official copy of the decision of the Supreme Court of the United States in the *Kansas Liquor cases*, quite recently decided, of *Mugler v. State of Kansas* and *State v. Ziebold*, 8 Sup. Ct. Rep. 273; 36 Alb. L. J. 525, but as reported in the public prints the highest court in the land has unanimously declared that this right of protection — this police power — extends so far that the Legislature of a State may prohibit the manufacture of liquor for the maker's own use as a beverage. If in its judgment this would tend to defeat its efforts to guard the community against this evil. The prohibition of the manufacture or sale of liquor does not deprive the owner of his property; it is not taking it without due process of law; it is not an exercise of the right of eminent domain, by which the owner can be deprived of his property only upon the condition of compensation. A nuisance merely is abated, and the citizen forbidden to do that which is injurious to the community. It is insisted however that the law now under considera-

tion is unconstitutional, because of its sweeping character; that it not only forbids the sale of liquor by retail or as a beverage, but for religious or medicinal purposes. Even if it were true that under it a physician of Lincoln county could not prescribe it as a medicine, or admitting that its proper constructions forbids the sale in toto, and not merely as a beverage, yet the appellant is not in a position to call in question its constitutionality upon this ground. He is asking that it be declared unconstitutional because it prevents him from obtaining the privilege of selling liquor by retail or as a beverage. Prescriptions are not filled in bar-rooms, nor is the communion table supplied from such places. We must look at things as they are, not as they might be, in considering questions involving the exercise of the police power. It is unnecessary to decide whether the law-making power, in its exercise, may forbid the sale of an article for innocent, proper and even useful purposes, upon the ground that it will be productive of deceit, and in effect defeat its effort to protect the health, morals and peace of the community from the ills arising from other uses of the article, since the appellant cannot be heard to say that the law is invalid and unconstitutional upon a ground which in no way affects his rights. It was said in the case of *Com. v. Wright*, 79 Ky. 22: "Only those who are prejudiced by an unconstitutional law can complain of it." Mr. Cooley, who is probably the most distinguished writer of the present day upon constitutional power and its limitations, enforces this view; and in the case of *Sullivan v. Berry's Adm'r*, 83 Ky. 196, it was fully considered and reaffirmed upon a review of numerous authorities. *Jones v. Black*, 48 Ala. 540; *Williamson v. Carlton*, 51 Me. 449; *Dejarnett v. Haynes*, 23 Miss. 600; *Turnpike Corp. v. County of Norfolk*, 6 Allen, 853. The appellant only asks that he be allowed "to retail" liquor by opening a bar-room in a hotel. He has no interest, so far as the record discloses, in the sale of it for medicinal or religious purposes. He makes no such question. The right he asks cannot be considered as fairly involving it; and the court has neither the inclination nor the right, in this character of a case, to go out of its way in search of such a question, or to consider it at the instance of one who has no right to ask it, because it does not affect his rights, and is not involved in the consideration of the privileges sought by him. *Ken. Ct. of App.*, Dec. 10, 1887. *Ex parte Burnside*. Opinion by Holt, J.

**DAMAGES—GOODS TO BE MANUFACTURED—REFUSAL TO ACCEPT.**—The court, on the trial of a suit against defendants for breach of contract in refusing to inspect and accept lumber manufactured for them, instructed the jury to award the contract price as damages, if they found for plaintiff, less necessary expenses for loading, freight, etc., if delivery had been required, while defendants claimed the difference between the contract price and the market value as the proper rule. *Held*, that the measure of damages for articles manufactured to order, their value consisting chiefly in labor and skill, was correctly stated by the trial court. For the lumber sawed, [but which the defendants refused to have inspected at the mill, and refused to accept, there is want of uniformity in the rulings of different courts. As a general rule, in actions by the vendor against the vendee, for the non-acceptance of property sold or contracted for, the measure of damages is the difference between the price agreed upon, and the market value of the property at the time and place of the delivery. The vendor may resell at the time and place, or within a reasonable time, and the price at the resale will be taken as determining the market value. *Rickey v. Tenbroeck*, 63 Mo. 564; *Northrup v. Cook*, 39 id. 208. Some cases hold that there can be no recovery of the contract price of articles to be manufactured or produced until the

vendee has accepted the property, and this on the ground, it is said, that the title will not vest in the vendee against his will, and that the title must vest in him before he can be made liable for the contract price. Of this class is the case of *Rider v. Kelley*, 32 Vt. 271. On the other hand, many authorities and text-books assert quite broadly the proposition that the vendor, having tendered the goods and done all that the contract required him to do, may treat them as the property of the vendee, hold them for him and subject to his order, and recover the contract price. 3 Pars. Cont. (5th ed.), 209; Field Dam., § 239; Sedg. Dam. (6th ed.), 337. This rule in its broad sense has not met the approval of some courts, nor are we prepared to say it should be applied in cases of sales of ordinary goods, wares and merchandise. This case does not call for the expression of an opinion upon that question. Where however the subject-matter of the contract is a specific article to be manufactured by the vendor for the vendee, and the vendor has completed his contract and performed all that the contract requires him to do, it is but just and fair that his damages, in case of a refusal of the vendee to accept the article, should be the contract price. The vendor will of course in such case hold the property for the vendee. And so it has been held in a number of cases. As some of them we cite *Shawhan v. Van Nest*, 25 Ohio St. 490; *Ballentine v. Robinson*, 46 Penn. St. 177; *Smith v. Wheeler*, 7 Or. 49. In the first of these cases the article manufactured was a carriage; in the others, machinery. In the class of cases supposed there is often no market value for the manufactured article. The rule will be less disastrous to the purchaser than a sale in an open market. Here the lumber to be manufactured was of specified sizes, and designed for a particular use. It was necessary to cut the logs for the particular bill, and they were to be of specified timber only. It is shown that the standing timber was of no greater value than twenty-five cents per thousand feet, so that the value of the manufactured lumber consisted almost wholly of work and skill. To say that one may go to a distant mill, order a special bill of lumber, make breach of the contract, and then say to the mill man, "You must measure your damages by the market price of such lumber 200 miles from the mill," is manifestly unjust, and the law does not require us to so hold. And this we say, though the lumber was to be delivered in St. Louis, and though the defendants offered to show that there was a market value to such lumber in that place. It is to be remembered that the lumber was to be inspected at the mill, and that implies an acceptance then, so far as quality is concerned. The rule of damages before stated, as applicable to articles to be thereafter manufactured, namely, the contract price, less cost of production, should be applied in this case. It is true, the lumber was not tendered in St. Louis; but it was to be inspected at the mill before shipped. The plaintiff was not called upon to incur the cost of transportation until inspected, until the question as to quality was settled. If the defendants refused to have the lumber inspected, and refused to accept, receive and pay for the same, then plaintiff was not in default. An absolute refusal to have the lumber inspected, and to receive the same, dispensed with the tender at St. Louis. A tender under such circumstances would have been a costly, as well as an idle ceremony, which the law does not require. *Johnson v. Powell*, 9 Ind. 586; *Diechmann v. Diechmann*, 49 Mo. 107; *Westlake v. St. Louis*, 77 id. 49; *Canada v. Wick*, 100 N. Y. 127. Of course, cost of loading on the cars and transportation to St. Louis should be included as part of the cost of production, to be deducted from contract price. Mo. Sup. Ct., Dec. 19, 1887. *Black River Lumber Co. v. Warner*. Opinion by Black, J.

**INSURANCE—LIFE—BY CREDITOR—WAGERING POLICY.**—Where the disproportion between the amount of a policy taken out by a creditor on the life of his debtor, and the debt thereby secured is very great, as where the insurance is \$3,000 and the debt is \$100, it is the duty of the court to declare the transaction a wager as matter of law. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law. It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother Paxson, in *Grant's Adm'r's v. Kline*, 19 Week. Notes Cas. 260, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule. It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but as is said in *Corson's Appeal*, 13 Penn. St. 436, 445: "In all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as against public policy." But in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction. Penn. Sup. Ct., Oct. 3, 1887. *Cooper v. Shaeffer*. Opinion by Sterrett, J.

**MARRIAGE—CURTESY—HOW LOST—GIFT.**—A husband settled certain bonds and other personalty upon his wife. She purchased a house and lot, which were paid for wholly out of the property so settled upon her. Held, that upon the death of the wife, the husband took no estate by curtesy, as it would operate to defeat the gift to the wife. Daniel Dugger, in 1866, was insolvent, heavily in debt, and upon the eve of bankruptcy. He assigned all that he had to a trustee to secure his creditors, and he settled certain personalty upon his wife in consideration of her joining in the deed of trust, and relinquished her contingent right of dower. Then he turned over to Sidney Smith, as agent for his wife, certain bonds and other evidences of debt, to which he had marital rights as her husband, partly in his hands, to be collected by Sydney Smith for Mrs. Dugger, and the proceeds to be used in the purchase and payment of the purchase-money of the house and lot for Mrs. Dugger, when it should be sold by the trustee. Even if Dugger had reduced these bonds into possession by actually collecting the money due on them, and had turned over the money to Sydney Smith for the benefit of Mrs. Dugger, the gift or settlement thus executed would have been valid against Dugger himself, and against the appellees, who are subsequent purchasers with notice. The only persons who could assail it were existing in 1866, 67, and they acquiesced. A gift by a husband to wife is construed to be for her separate use. *Leake v. Benson*, 29 Grat. 156; *Garland v. Pamplin*, 32 id. 314. The gift or settlement made by Dugger to Sydney Smith for Mrs. Dugger created, *ipso facto*, a separate estate in her. 2 Minor Inst. 353, (318); *Irvine v. Greever*, 32 Grat. 419; 1 Bish. Mar. Wom., § 833. A separate estate, created by the gift, conveyance, or

settlement by the husband to or for his wife, whether directly or through a trustee, presumptively excludes the estate by courtesy of the husband. *Irvine v. Greever*, 82 Gr. 419; *Riglar v. Cloud*, 14 Penn. St. 361. When Dugger made the settlement upon his wife, a child was already born of the marriage, and his right to courtesy assured. He cannot have intended to reserve any estate in himself, as that would defeat the very object of the settlement; hence his creditors cannot claim it under the deeds of trust.—*Va. Sup. Ct. App.*, Dec. 1 1887. *Dugger's Children v. Dugger*. Opinion by Fauntleroy, J.

**MASTER AND SERVANT—LEAVING SERVICE WITHOUT NOTICE—STIPULATION TO FORFEIT WAGES DUE.**—A clause in a contract of employment by which the servant agrees to give two weeks' notice of his intention to quit, and that if he fails so to do, "whatever may be due at the time of leaving is an indebtedness to the company, to be considered as liquidated damages for such failure," is void. One view of the merits of the defense is expressed by Scott, J., in *Baay v. Ambrose*, 28 Mo. 39. We quote from 1 Suth. Dam. 479: "They mistake the object and temper of our system of jurisprudence who, while maintaining that men in making all contracts have a right to stipulate for liquidated damages regardless of the disproportion to the sum resulting from a breach of the contract, insist that it would be hard if men were not permitted to make their own bargains. No system of laws would command our respect, or secure willing obedience, which did not to some extent provide against the mischief resulting from improvidence, carelessness, inexperience and other expectations on one side, and skill, avarice and a gross violation of the principles of honesty on the other. The folly of one making a wild and reckless stipulation will not justify oppression in the other. A just man, when he sees one in a situation in which he is prepared to make a contract which must grind and oppress him, will not take advantage of his state of mind, and enrich himself by his folly and want of experience. It has been remarked that in reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act, the real object of the parties being the performance of the act, that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party." As we have seen, the services were rendered by a minor, we may justly infer the father was in a situation to make a contract which might grind and oppress him. We may also conclude that he has engaged to suffer a loss disproportionate to the injury to the other party. Nay more, we may say he has agreed to suffer a loss where no injury has resulted to the other party, as here is claimed. The refusal to pay is purely because it is so provided in the bond. There is nothing to show how long the child had labored to create the debt sued for. If the contract is enforceable at all, it is so for a failure of an hour as well as the two entire weeks. If the company had been indulged for twelve months in making payments, all could be taken for the two weeks, or any fractional part thereof, on failure to give notice and continue to work. On this subject Mr. Sutherland (vol. 1, p. 510) says: "The damages which may result from a mechanic quitting work contrary to his contract are uncertain, but any stipulation purporting to fix the amount he shall forfeit or pay in such an event will not be treated as stipulated, where the contract of him required, that if the employee quit without giving thirty days' notice, he should forfeit all wages due him at the time of leaving." Campbell, J., said: "We have no difficulty in holding that the in-

jury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay day might be forfeited should be agreed upon, and should not be an unreasonable or oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected. But the facts set forth in this record do not, we think, bring the case within any such rule. The forfeiture under the contract covers all wages due at the time of leaving. This is open to the objection that the employer may have been in arrears, and thus enable to profit by his own wrong. No such forfeiture could be enforced against wages as such which the workman was to have paid to him before he committed any breach of his duty." The latter case is as the one before us, and contains our opinion of the case governing it. The rulings are simple utterances of common honesty, practical good sense and fair dealing. *Tenn. Sup. Ct.*, Dec. 17, 1887. *Schimpf v. Tennessee Manuf'g Co.* Opinion by Turney, C. J.

**MUNICIPAL CORPORATIONS—PROCLAMATION OF MAYOR—AUTHORITY OF OFFICER TO KILL DOGS.**—Where the mayor of a city of the second class directs the city marshal to post notices requiring the owners of dogs in said city to keep said dogs muzzled, and directs that all dogs found running at large without muzzles shall be killed, but no ordinance of said city has been passed authorizing such regulation, *held* that said notice does not give the city marshal authority to kill dogs found running at large in violation of said notice. The notice published by the marshal, under the direction of the mayor, was not such a regulation as could be enforced. A direction of this character, and a notice of this kind, would not justify the marshal in the killing of plaintiff's dog. Such regulation can only be made valid by an ordinance of the city. Power is given the mayor and council to pass reasonable regulations in relation to restraining or prohibiting dogs from running at large, and to tax the same. This is held to be a proper and legitimate subject for an ordinance; but before this power can be invoked or enforced the city council must have passed an ordinance in relation thereto. *Sup. Ct. Kans.*, Feb. 11, 1888. *Stebbins v. Mayer*. Opinion by Clogston, C.

**NEGLIGENCE—DEFECT IN BRIDGE—CONTRIBUTORY NEGLIGENCE.**—Plaintiff, knowing that a certain plank in a bridge was defective, chanced to step upon it in crossing the bridge, and was injured by the plank giving way with him. *Held*, in an action for damages, that his previous knowledge of the defect in the plank in nowise compromised him, and that the bridge company could not avoid the responsibility arising from its own neglect by charging the plaintiff with knowledge of that negligence. *Penn. Sup. Ct.*, Nov. 7, 1887. *Monongahela Bridge Co. v. Bevard*. Opinion per Curiam.

## CORRESPONDENCE.

JUSTICE TO MR. DOS PASSOS.

Editor of the Albany Law Journal:

In the last issue of the ALBANY LAW JOURNAL is an article from a correspondent in New York, signing himself Demot Ennot, wherein very severe personal comments are made upon the official conduct of Mr.

Assistant District Attorney Dos Passos in the recent trial for conspiracy of Squire and Flynn in the New York Oyer and Terminer.

The article does Mr. Dos Passos great injustice. He had prepared the case for trial with indefatigable industry, and had constructed a trial brief which I looked over. It was a careful analysis of the facts at his command, and a complete history of the law relating to conspiracy. But good as it was, Mr. Dos Passos was so seriously disappointed by the rulings of the court on the trial, that it was of no avail.

I think it right that these facts should be known, because of the suggestion that Mr. Dos Passos, who was charged with the work of preparing the case, had not made an intelligent preparation of it.

Yours very truly,

DELANOEY NICOLL.

NEW YORK, March 14, 1888.

#### TEXT-BOOKS AS AUTHORITY.

*Editor of the Albany Law Journal:*

Your reference to the citation of text-books in court in to-day's LAW JOURNAL reminds me of an incident which occurred a third of a century ago when I was a student at Harvard Law School. A fellow student having in the argument of a moot court case cited from one of Story's text-books with the remark that in that forum, where the great man had so often lectured, his decisions would be accepted as conclusive, his opponent in the moot court case announced that it was not necessary to take issue as to Judge Story's being an authority, but the trouble was that you could make citations from Judge Story's book favorable to any side of any case. Prof. Parsons, in deciding the case before him, referred to this incident and said he might state in explanation that Judge Story was in the habit of saying that he was not only a lecturer upon law and a writer of text-books, but a judge of the highest tribunal in the nation, and that he had no right in his capacity as lecturer or writer to prejudge questions which might come before him as judge. An irreverent student, in putting the marginal notes to this decision of Prof. Parsons, wrote, "Judge Story's reasons for writing poor law books."

Apropos to nothing, but with a desire to perpetuate a good thing, will you let me tell you a little incident which occurred in our Surrogate's Court last December? John E. Burrill and Ex-Surrogate Calvin, on opposite sides of the interminable Stevens will case, had abused each other quite up to the limits of legal propriety. When Judge Noah Davis rose to reply on the same side as Mr. Calvin, he commenced by saying that he would not follow in the line of sharp, personal criticism in which counsel had been engaged. "If nothing else would prevent me," he said, "it would be respect for the grey hairs of my friend, Mr. Burrill;" and then, as he glanced round at the billiard-ball cranium of Mr. B., almost entirely innocent of hair of any kind, he added, "the grey hairs of my friend, wherever they may be."

C.

[This anecdote reminds us of a passage between the late William A. Beach, and Martin I. Townsend of Troy. Beach was a year older than Townsend, but he dyed his hair in those days. In court he referred to the grey-headed Townsend as his senior. "The difference between us," replied Townsend, "is merely colorable."—ED.]

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, March 20, 1888:

Judgment affirmed with costs—Thomas Powell, appellant, v. New York Central and Hudson River Railroad Company, respondent.—Judgment reversed, new trial granted, costs to abide event; unless within twenty days from this entry of this decision the plaintiff stipulates that the recovery of damages be reduced to the sum of \$1,161.45 with interest thereon from December 16, 1884 (that being the date of referee's report), in which case the judgment appealed from is modified accordingly, and as modified affirmed without costs in this court to either party—Henry Adams, respondent, v. Henry A. Bowerman, appellant.—Order denying a rehearing affirmed with costs—In re New York Cable Railway.—Conviction and sentence of Warren for the manslaughter in the second degree of John Dillou, at Mamaroneck, Westchester county, December 13, 1883, affirmed—The People, respondent, v. Richard Warren, appellant.—Order affirmed and judgment absolute for the plaintiff on the stipulation with costs—Isaac Coldwater, respondent, v. Liverpool, London and Globe Insurance Company, appellant.—Judgment affirmed with costs—Isabella T. Myers, appellant, v. Bank of Portsmouth, impleaded, etc., respondent.—Judgment reversed, new trial granted, costs to abide event—Ellen Kelly, appellant, v. New York and Sea Beach Railway Company, respondent.—Judgment affirmed with costs—William King, respondent, v. Clara King, executrix, etc., appellant.—Order affirmed and judgment absolute ordered with costs for plaintiff on the stipulation—Alex. M. White, respondent, v. James E. Dutcher, as sheriff, etc., appellant.—Judgment affirmed with costs—De Witt Hallenbeck, respondent, v. Charles F. Kindred, appellant.—Judgment affirmed with costs—The New Jersey Steamboat Company, appellant, v. Mayor, etc., of New York, respondent.—Judgment reversed, new trial granted, costs to abide event—Rufus R. Davies, respondent, v. Delaware and Hudson Canal Company, appellant.—Judgment reversed, new trial granted, costs to abide event—Jefferson Patten, Jr., and another, respondent, v. Richard Panoosat and another, appellants.—Judgment affirmed with costs—Catherine Zapp, respondent, v. Charles J. Miller, appellant.—Judgment reversed and judgment absolute ordered for plaintiff with costs on the stipulation—William T. Wilson, appellant, v. Charles T. White, respondent.—Order affirmed with costs, without prejudice to any application by the defendant to the Supreme Court for relief founded upon such order and the petition upon which it was based, due notice of such application being given to relator—The People ex rel. George W. Huntley, respondent, v. Edward E. Mills, highway commissioner of the town of Schroon, Essex county, appellant.—Action to recover \$1,154 on a bill of exchange and protest of same, drawn by Guy & Amery on Father Drumgoole, accepted by him and cashed by plaintiff. The bill was drawn and accepted July 31, 1883, payable forty days after date on account of contract when completed and satisfactory. Guy & Amery were contractors to do certain work of painting on respondent's farm at Richmond Valley, S. I. The answer was a general denial and an allegation that Guy & Amery never completed their contract, and that by the terms of the bill defendant Drumgoole is not liable. The case was tried before Mr. Justice Donahue, who dismissed the complaint as against defendant Drumgoole. The General Term, First Department, affirmed this finding, and plaintiff

appealed to this court. Judgment of courts below reversed, new trial granted, costs to abide event—No. 713. The Home Bank of New York, appellant, v. Rev. Father John C. Drumgoole, impleaded with Charles F. Amery and Henry Guy, respondents.

#### NOTES.

**THE BLACK CAP.**—A great deal of nonsense is from time to time talked about the judge's "black cap." It is quite probable that the origin of the custom of assuming the hat while passing sentence of death is due to the originally clerical character of the judges. But it is extraordinary this morbid interest which the public seems to take in the "black cap." We remember during the trial of Jessie MacLachlan at Glasgow, a good many years ago, that some perfidious young reporter on the staff of one of the newspapers, after describing the appearance of the court-room and its occupants on the morning of the last day of the trial, gave a graphic account of the entry of the presiding judge. He said that his looks boded ill for the prisoner's chances of escape, and that he carried the black cap in his hand, which he ominously threw down on the bench before him. The reporter bitterly censured what seemed to him a want of decorum in not concealing the fateful head-gear until required. The real truth of the matter was that the judge (who still happily survives) simply carried the "tricorn" or cocked hat which he had been wearing in his carriage and which formed part of his official costume. Reporters should note in future that no black caps are manufactured specially to be used in the sentencing of prisoners. Those curious on the subject may see a real black cap without waiting for a murder or enduring the inconvenience of a trial, if they can only catch sight of a judge walking in the open air in his robes. It is about as rare as seeing a swan on dry land, but like the latter event, it does occur.—*Journal of Jurisprudence.*

**MR. JUSTICE GRANTHAM ON FLOGGING.**—Referring to inquiries made in the House of Commons with regard to sentences passed by Mr. Justice Grantham, at Liverpool last week, his Lordship in writing to the Attorney-General on the 23rd ult., says: "I am very glad that the question you sent me has been put, as it will bring before the Legislature the present unsatisfactory nature of our criminal discipline and system of punishment. The question is not quite correct as to my saying the statute had been overlooked, but in fact it is true. The facts are these: On recently inquiring of the prison authorities as to the effect of various punishments, I found that the recent frequent application of the 'cat' and short sentences on this circuit had had the most marvellous effect in clearing the streets, and consequently the gaols, of the men who committed robberies with violence, and I was informed by those most competent to form an opinion that it had done more to prevent men of that class from becoming habitual criminals than any punishment ever before inflicted—a man scarcely ever being found in prison a second time, and certainly not for the same offense. At the same time I was informed that there was another class of hardened criminals for whom it was very desirable to adopt a different kind of punishment than that usually inflicted, viz., the habitual criminal who either liked gaol because it brought easier work and was more comfortable than work and the work-house, and so went on committing crimes, or continually committed them because being perhaps well educated, but an incorrigible rogue, he cared nothing for imprisonment

so long as he could live a life of luxury and ease in the intervals of his punishment. I say nothing here of the many men who are undergoing long terms of imprisonment for brutal assaults on their wives (only not having murdered them by accident), or who have committed offenses against young children, and who I believe most people think would be more effectually punished by receiving short sentences and a whipping than long sentences as now. When therefore I saw two men of incorrigible characters as thieves and forgers brought before me, I thought it desirable to draw attention to the disused statute of 7 Geo. IV by giving them short sentences, accompanied by a whipping, instead of a long sentence of penal servitude, which otherwise I must have given from the number of their previous convictions. Hence the sentences referred to. After I had tried and sentenced them, I had during the day three more habitual criminals to try, and one more the next morning, charged with various offenses, possibly of worse characters (one of whom had had four separate terms of seven years penal servitude, making twenty-eight years, besides numerous light and lighter sentences), but whom, from their age or other causes, I could not punish in the same way; and as it seemed scarcely right to inflict a different class of punishment on the first two than on the following three, I had all five up together, and, stating why I altered the sentences on the first two, gave them all the same sentences, thinking, as I had drawn attention to the statute, and had let the criminal class know of the power of judges to inflict whipping, that it would be more just to inflict the same class of punishment on all the offenders, and therefore altered the sentences of the first two to five years' penal servitude, but by so doing putting the country to ten times the expense, and doing no practical good to the prisoners."—*London Law Times.*

Mr. Justice Ferguson was sitting in chamber in the chancery division the other day, and it happened that most of the matters brought before him were of a trivial nature, yet complicated enough to necessitate considerable explanation and argument. Now Mr. Justice Ferguson is one of the most good-natured and long suffering of men. Still even as the proverbial last straw will sometimes fall with fatal effect upon the proverbial camel's back, so occasionally will "just one more" tiresome argument have its effect upon the judge referred to. Thus it was on the day in question. Motion after motion was made, opposed, argued, decided. Each one seemed to be more important than the last, and each counsel more earnest and tireless than the one who preceded him. The day was wearing on, and slowly but surely Judge Ferguson was losing interest in the matter before him, and reverting to a consideration of the ills and unhappiness to which the bench is heir. Finally he put down his pen, threw himself back in his chair, looked contemplatively out of the window for a moment, and then in a far-off, dreamy voice, as though merely meditating and not addressing any one, said slowly: "It really seems—to me—that the matters which come before—this court—occupy the time—of the court—inversely in proportion to their importance. I suppose—if it can be conceived—that an argument could take place—about absolutely—nothing at all—it would last—for ever—and ever. You may go on, sir." It is to be regretted that the dejected manner and almost tearful voice in which this was said cannot be transferred to paper. Possibly it can be imagined, and at all events, his lordship's close logic must excite admiration.—*A Montreal Correspondent.*

If a judge is to be indulged in quoting poetry in a dog case, a law-editor may be pardoned for writing

some on dogs in general, especially as great lawyers have been fond of dogs:

THE HEAD OF THE HOUSE.

[Commended to every lawyer who owns a worthless dog.]

I've read in verses of old Homer,  
Of Ithacus, so long a roamer  
That all his house forgot his face  
Save Argus, dog of shepherd race;  
I've learned how Orange in his tent,  
On Holland's safe deliverance bent,  
From Spain's assassins in the dark,  
Was saved by watchful spaniel's bark:  
And I have heard old poets tell  
Of that three-headed dog of hell  
Whom Hercules found it hard to quell;  
And I have yielded to the spell  
Of Ouida's dog and his young master,  
Their painful lot and sore disaster; \*  
And wept o'er Rab, the peasant's friend,  
And his devoted life and end;  
And laughed at simple Launce, well beaten  
For puddings that his Crab had eaten;  
And glowed o'er Byron's heartfelt lines  
In which a dog immortal shines;  
And gazed on Hogarth's portrait, where  
He puts his pug with solemn air;  
Or the Magician of the North,  
As with his hound he sallies forth;  
Or that renowned Shakesperian scholar †  
Depicted with his dog in collar;  
Or England's famous magistrate ‡  
As "Pincher" in his portrait sate;  
And read how Erskine shocked the nation  
With dog in wig at consultation;  
And thought of monks who chose the word  
And called themselves "Dogs of the Lord;"  
And like De Stael, the more I ken  
Of dogs, the less I think of men.

My little dog has no such claim  
To be set down in rolls of fame;  
He is a trifling homely beast,  
Of no use, or the very least.  
To shake imaginary rat,  
Or bark for hours at china cat;  
To lie at head of stairs and start  
Like animated woolly dart  
Upon a non-existent foe;  
Or on hind legs like monkey go  
To beg for sugar or for bone;  
Never content to be alone;  
To sleep for hours in the sun,  
Rolled up till head and tail are one;  
Usurping all the softest places,  
And keeping them with doggieh graces;  
To sneak between the house maid's feet  
And scour unnoticed on the street;  
Wag indefatigable tail,  
Cajole with piteous human wail;  
To dance with dainty, dandy air  
When nicely parted is his hair;  
And look most ancient and dejected  
When it has been too long neglected:  
To growl with counterfeited rabies;  
To be more trouble than two babies;  
These are the qualities and tricks  
That in my heart his image fix;  
And so in cursory doggerel rhyme  
I celebrate him in his time,  
Nor wait his virtues to rehearse  
In cold obituary verse.

I. B.

STATE BAR ASSOCIATION — ELEVENTH ANNUAL REPORT.

THE Eleventh Annual Report of the New York State Bar Association is just published, and will soon be sent to members by mail.

It contains useful and interesting matter to all practicing lawyers, especially to members of the New York State Bar.

The subject of text-books and reports, and their accumulation; of extra allowance, its evils and anomalies; codification; of counsel to the Legislature; of reform in the organization of courts; of the evils injuring the profession, are all ably and practicably considered in the comprehensive address of President Cooke.

"The Independence and Integrity of the Bar," the subject of Daniel Dougherty's magnificent oration, which was listened to with such intense interest, and which has elicited general comment and commendation from the press in all parts of the nation, forms a very important part of the volume.

The learned and valuable paper upon "Parliamentary Representation in Great Britain," by the Rt. Hon. John W. Mellor, Q. C., read by Mr. Elliott F. Shepard, is an exceedingly rich contribution to the learning of the Association, to the profession, and to Legislators, while it gives a fund of information, instructive and useful, to all American citizens.

The paper on "The Contest Between the Judiciary and Legislature of Rhode Island," by Hon. John Winslow, commends itself to the judiciary, to the Legislature and to all thoughtful readers. It is a scholarly and erudite description of a collision between co-ordinate branches of a popular government, which Hamilton, Madison and Jay pointed out as among the dangers to which the nation would be exposed — the collisions between the different branches of the government. Mr. Winslow carefully and learnedly considers this subject and the cases touching it in the Federal courts, showing that the first constitutional question which Chief Justice Marshall had to consider was the same that troubled the Rhode Island Legislature and Judiciary — the inquiry as to the duty of the court to set aside an act of Congress because of its repugnance to the Federal Constitution. The question arose in the well-known case of *Marbury v. Madison*, 1 Cranch, 138. It occurred again in the case of *McCulloch v. The State of Maryland*, and other cases, all of which, as has been said, Mr. Winslow reviews in a manner that renders the subject of his paper admirably adapted to the present time. The facts related in the paper are exceedingly interesting, and will largely repay a careful reading.

The proceedings on the death of Hon. Charles A. Rapallo, a member of the Association, on the death of Aaron J. Vanderpoel, Charles Hughes, Samuel L. Selden, also members of the Association, are very entertaining, as is the discussion on important subjects touching the profession by the members of the Association.

There are other important departments in this volume not contained in any former editions, which, it is believed, will add to its usefulness.

From our relation to the work, it would, perhaps, be unbecoming for us to refer to the manner in which it has been edited and prepared for the public. If our efforts to improve it shall be regarded in any degree successful, we shall be highly gratified. If its errors are, as we trust they will be, generously overlooked, we shall have much reason for self-congratulation.

L. B. PROCTOR,  
Secretary.

\* "A Dog of Flanders."

† George Steevens.

‡ Eldon.



# The Albany Law Journal.

ALBANY, MARCH 31, 1888.

## CURRENT TOPICS.

THE highest magistrate of the world has laid down the work of this life. At a ripe old age, but in the fullness of all his powers, his natural strength not abated, in devotion to public duty to the last moment, the honored and beloved chief justice of the United States has been suddenly, and almost without warning, called away from the earth, and the judgment seat of the nation shall know him no more. Chief Justice Waite had a character and led a career upon which the biographer may well delight to dwell without reservation or concealment. So far as it is permitted to human nature, he was a spotless and perfectly admirable and balanced being, wise, and good, and kind. In his magisterial capacity he was distinguished by wisdom rather than by great technical learning. He had the large sagacity and sound sense such as characterized our honored Chief Judge Church, which enabled him to measure justice rather than weigh or compare precedents. Comparisons are odious but natural; and therefore it must be said that he was not so great a judge as Marshall — but who save Mansfield ever was? — and that he was not so learned a lawyer as Taney; but in both respects we deem him superior to Chase. He also put the right value on his place. No presidential bee ever buzzed in his bonnet, disturbing the operations of his mind and making his heart sore with the stings of disappointment. He knew that he had the highest post on earth, dispensing justice rather than dividing offices, the oracle of litigants rather than the prey or plaything of politicians. So he transacted the duties of his great office with dignity and calm wisdom. He had the true judicial temperament, courteous, patient, candid, free from arrogance. No wave of passion, or prejudice, or bias, ever swept across his mind, but like the unruffled ocean, deep, pure and strong, it mirrored justice pure and beautiful. At some time we may have a more brilliant chief upon that bench; never one in whom we can more safely repose; never one on whom the public confidence shall be more completely and unwaveringly bestowed. While our chief was a man of dignity, it was the dignity of modesty and simplicity. As a man he was in every point that is open to the human eye admirable, without alloy, excess or deficiency. He had none of the sternness and asceticism of his puritan, regicide ancestor. His heart was warm and sound; his temper kind, easy, tolerant; his wits alert and keen; his manners attractive and affectionate; taking a lively interest in things small as well as great; fond of society, and society fond of him; domestic and happy at his own hearth; his sympathies broad and tender, his neighbor was

the suffering man, though at the farthest pole. We might dwell longer on this most excellent, most admirable and most useful of men, without danger of provoking an antagonistic opinion, for our countrymen unanimously rise up and call him worthy of love and honor. So long as such can be found to occupy the first place in the nation, so long our liberties and our happiness will be secure. The greatest responsibility that can possibly devolve on the president and the Senate is now to find worthy shoulders to wear the mantle of Chief Justice Waite. We pray for a repetition of the happy accident, or perhaps the providential interference, which discovered a comparatively unknown man, to grow into a recognized and beneficent influence.

We have received a communication in regard to the late Flynn trial in New York, which we should probably publish if the writer would send us his name, but not otherwise. The writer says our New York correspondent's name is withheld, and he thinks he ought to have the same privilege. But we know our New York correspondent's name, and would not publish this correspondent's name unless he desired. There is really nothing in it that should make the writer ashamed or afraid to intrust his name to the editor, especially as one of the persons criticised can never get into power again.

In Mr. Walter Besant's amusing novel, "Herr Paulus," designed to expose the humbug of "spiritualism," the hero has got a weak, rich old gentleman under his control by mesmerism, and has compelled him to make over to him some thirty-five thousand pounds while entranced. Another person, suspicious of the intimate relations of the two, goes to a lawyer, who tells him he can do nothing unless he can show undue influence. Now that lawyer was evidently ignorant of the great Home spiritualistic case, and also of the very convenient and beneficial doctrine of constructive fraud, as laid down in the leading case of *Huguemin v. Baseley*, or he would have told the inquirer that the burden would lie on the enchanter to show that the gift of the money was perfectly understood, and reasonable, fair and honest. When people in romance go to lawyers for advice they ought to go to first-class counsel — expense is no object. This equitable doctrine is evidently what Mr. Choate is driving at in the Hilton case about Mrs. Stewart's affairs. The witnesses are, in the most obliging way under his cross-examination showing the greatest degree of intimacy and confidence between an expert lawyer, the manager of her deceased husband's affairs, on the one part, and an excessively rich, old woman on the other. The witnesses evidently think that the more intimate they show the parties the more likely and reasonable it would be deemed for the old woman to confer millions on the astute lawyer. They evidently have not heard of the doctrine of constructive fraud. The last

case of the phase of the doctrine pertinent to this suit is *Worrall's Appeal*, 110 Penn. St. 349. Other recent cases are *Woodbury v. Woodbury*, 141 Mass. 329; S. C., 55 Am. Rep. 479; *Stout v. Smith*, 98 N. Y. 25; S. C., 50 Am. Rep. 632; *Pressley v. Kemp*, 16 S. C. 384; S. C., 42 Am. Rep. 635; see notes, 55 Am. Rep. 482; 54 id. 614; 88 id. 388; 33 id. 736; 25 id. 728. See also *Fisher v. Bishop*, post. The doctrine has been much invoked during the last twenty years, and it is a very strong shield for the inexperienced and feeble against the adroit and designing.

Another great case now going on in the city of New York is the Tilden will case, in which is litigated the validity of a charitable trust. The tendency of the courts during recent years has been toward liberality rather than strictness of construction in such matters, and to go great lengths in approving the lodging of discretion in trustees. The latest case which we have seen is *Howe v. Wilson*, 91 Mo. 45; S. C., 60 Am. Rep. 226, holding that a bequest to divide a remainder among such charitable institutions in the city of St. Louis as "he (the trustee) shall deem worthy," is valid. A note at page 230 of the 60th American Reports gives references to all the important recent cases. See also 84 ALB. LAW JOUR. 120, 299, 377.

At a recent meeting of the Medico-Legal Society of New York ex-Judge Davis said: "First. That if—as all the medical experts there represented concurred in holding—inebriety be a disease, it is the duty of medical men to lead the community at large in the use of proper measures to extirpate the sources of that disease, or reduce them within the narrowest practicable limits, as is already done or attempted in the case of other diseases which afflict the community. That the law treats inebriety, and must treat it precisely like any other disease, that is to say, as no excuse for crime. If in a particular case the effect of inebriety is shown to be such that there was no criminal intent—that is to say, no crime—in such case it is not properly spoken of as an excuse for crime, but as a disproof of the existence of crime." On this an exchange remarks: "His first proposition is evidently the foundation of the prohibition movement that is now assuming such great proportions in this country. His second proposition is a departure from the sound rule laid down by Lord Bacon that 'if a mad man commit a felony he shall not lose his life for it, because his infirmity came by act of God; but if a drunken man commits a felony he shall not be excused, because the imperfection came by his own default.' For this reason the courts unanimously hold that if a man slay another while in a fit of voluntary intoxication amounting to insanity, it is murder, and he must suffer the penalty. Why should not the same rule apply in cases of confirmed inebriety? In both cases there is an absence of criminal intent, and in both cases the infirmity is produced by the

voluntary acts of the accused. The man who persists in his drunkenness and debauchery until he is an inebriate should be held as responsible for his acts as is the man who only indulges in occasional drunkenness. The former is more dangerous to society than the latter, and hence the greater necessity of holding him responsible for his acts. The demands of both justice and public policy require this." There is no satisfactory answer to this reasoning. A man who is a little drunk and commits a homicide shall be hanged; but one who has drunk himself into *delirium tremens* and commits a homicide shall not be punished—this is poor reasoning, and very unsafe for society. For a single act of self-indulgence the individual is held to a strict account, but by a long course of the same self-indulgence he becomes irresponsible to the law. Society has always been too lenient with drunkards, probably because they are so numerous. It would be better to adopt stringent measure to prevent drunkenness, and to make the offender answerable for his vicious persistency. It is a curious anomaly in the law that if one made mad by drink commits a civil tort he is answerable in dollars and cents, but if he takes human life he may go free.

Some pamphlets have been placed on our table which do not relate to the law, and which cannot be connected with it by the greatest stretch of editorial imagination, but of which we are disposed to say a good word. These are the "Lomb Prize Essays on Public Health," issued by the American Public Health Association. Mr. Henry Lomb, a citizen of Rochester, N. Y., has given the society a sum of money to be appropriated in annual prizes on subjects suited to the purposes of the society, and the four pamphlets now at hand are the result of this donation thus far: "Healthy Homes and Foods for the Working Classes"—by Prof. Victor C. Vaughan, M. D., Ann Arbor, Michigan; "The Sanitary Conditions and Necessities of School-Houses and School Life"—by D. F. Lincoln, M. D., Boston, Mass.; "Disinfection and Individual Prophylaxis against Infectious Diseases"—by George M. Sternberg, M. D., major and surgeon U. S. A.; "The Preventable Causes of Disease, Injury and Death in American Manufactories and Workshops, and the best means and appliances for preventing and avoiding them"—By George H. Ireland, Springfield, Mass. Mr. Lomb offers two prizes of five hundred dollars and two hundred dollars, respectively, for essays this year on "Practical Sanitary and Economic Cooking adapted to persons of moderate and small means." (This ought to appeal to the wives of young lawyers.) Glancing over these pamphlets we have been especially interested in the second and fourth, and more especially in the second, for we believe that bad seats and bad ventilation in school-houses are chargeable with a great deal of physical debility in the young. Inquiries may be addressed to the secretary, Dr. Irving A. Watson, Concord, N. H.—not Concord, Mass.!

## NOTES OF CASES.

IN a recent Special Term case before Patterson, J., in the city of New York — *Société Anonyme de la Benedictine Liqueur de l'Abbaye de Fécamp v. Cook & Bunheimer* — it was held that the taking out of a design patent describing certain trade-marks and labels on a bottle, the subject of the patent, does not in its expiration authorize the use of the trade-mark by another if there is any intent on the part of the one so using to induce the public to think that his goods are those of the one originally using the trade-mark. We have been introduced to this case before — 36 ALB. LAW JOUR. 864. The present decision was on a motion to continue an injunction till final hearing. After remarking that the intention of the defendants to imitate the plaintiffs' packages was clearly shown, the court continue: "The whole of the defendants' argument is based upon an asserted legal right to use the bottles, and the labels and designs. This they contend because they purchase in the market empty bottles which have contained the plaintiffs' cordial and are of a peculiar shape, and because the plaintiffs' predecessor in business and assignor had taken out a design patent which expired in 1882, and in consequence of which, it is claimed, the designs became the property of the public, and open to use by whomsoever may choose to adopt them. Assuming that after the expiration of the design patent the defendants acquired a right to use the labels in common with the plaintiff, such right would be confined to an honest and not a fraudulent use. The power of a court of equity to enjoin the use of names, symbols and marks of merchandise, does not depend altogether upon an exclusive right which a plaintiff may be supposed to have in such names, symbols or marks. The power is exercised to prevent fraud, and has been frequently exercised where the defendants have had a clear right to use names, as in the *Day and Martin Blacking* case, 7 Beav. 84, the *Devlin* case, in this court, affirmed 69 N. Y., and in other cases. In this action the fraud consists in the defendants' using these labels and designs upon bottles of a peculiar shape manufactured for or made in imitation of those of the plaintiff, containing a cordial fabricated to resemble that made by the plaintiff, and advertised to be made under circumstances similar to the plaintiffs' cordial, and a name is given to the counterfeited article of supposed monastic origin like that claimed, and proven to be truthfully claimed by the plaintiff. It is the whole combination of incidents carefully arranged, with the label as the most conspicuous and effective of all, that constitutes the fraud and makes out a case of one party attempting to sell his goods as those of another. The legitimate use of the designs by the defendants should not be enjoined, but their use under the circumstances disclosed in this particular action calls for the exercise of the restraining power of the court, and nothing more is intended to be decided than that under the peculiar facts of this case the court has

the power to issue and should maintain an interlocutory injunction. The motion to continue the injunction is granted." The contention of the defendants seem novel. Charles Bulkley Hubbell for plaintiff; Gifford & Brown for defendants.

Cases in which the rights of a railway company and the rights of the public come into conflict not unfrequently lead to a difference of opinion on the bench, and this rule has been well exemplified by the case of *Bunch v. The Great Western Railway Co.*, 55 L. T. Rep. (N. S.) 9; 17 Q. B. Div. 215, in all its stages. The facts were simple. Mrs. Bunch arrived at Paddington at 4.20, intending to go to Bath by the 5 o'clock train. She had with her a portmanteau, a hamper and a Gladstone bag, which were taken by a porter and placed on a trolley. Upon her arrival she told the porter that she wished the Gladstone bag to be put into the carriage with her, and asked if it would be safe with him. He assured her that it would, and that he would guard the luggage and put it in the train. The train had not been drawn up to the platform. She then went to the end of the station to meet her husband, who had come from Moorgate street. Ten minutes later she returned with her husband, and it was found that the Gladstone bag had disappeared. Upon these facts Judge Stonor found that the time of intrusting the luggage to the porter was a reasonable and proper time before the departure of the train; that the luggage was intrusted to the porter for the purposes of the journey, and not for the purposes of deposit; that the porter, in accepting the luggage, was not acting beyond the scope of his employment, and that consequently the company were liable for the loss. In the Divisional Court Mr. Justice Smith agreed with the County Court judge. Mr. Justice Day, on the other hand, differed from him, but the former, as the junior judge, withdrew his judgment, and the decision was reversed. In the Appeal Court the majority, consisting of the master of the rolls and Lord Justice Lindley, held that the judgment of the County Court ought to be restored, Lord Justice Lopes dissenting. The decision of the Appeal Court was affirmed last week by the House of Lords, though not unanimously. The lord chancellor, Lord Herschell and Lord Macnaghten concurred in the view taken by the majority of the Court of Appeal. On the other hand, Lord Bramwell agreed with Lord Justice Lopes. Lord Bramwell put the case for the company as strongly as it could be put, but his extreme views on the general question of the liability of companies in cases of loss or accident detract somewhat from the weight of his judgment. He dismisses the authorities with the remark that they show a generous struggle on the one hand to make powerful companies liable to individuals, and on the other hand an effort for law and justice. We gather from Lord Bramwell's judgment that the proper course would have been for Mrs. Bunch to have deposited her luggage in the cloak-room, but

this would seem to be an intolerable burden to impose upon passengers who arrive a few minutes early for their train. Once it is proved that the time of arrival was a proper and reasonable time before the departure of the train, the fair inference is that the porter, when he accepted the luggage, accepted it for the purposes of the journey, and we fail to see how the liability of the company can be affected either by the existence of the cloak-room system or by the accident that the train was not drawn up to the platform.—*London Law Times*.

Here is a practical answer to Col. Ingersoll's idea that "entertainment" at a tavern includes strong drink. In *Patterson v. Gage*, Colorado Supreme Court, Jan. 27, 1888, it was held that the term "hotel bill," when used in a contract guarantying payment of such a bill, includes board and lodging—items which every common innkeeper is bound to furnish each guest—but excludes billiards, cigars and liquors. The court said: "That a person keeping a house for the entertainment of travellers, with board and lodging, is an hotel keeper, and that as such hotel keeper he is under an obligation to furnish his guests with board and lodging, is well settled in this country. It is clear that such articles as an hotel keeper is under obligation to furnish his guest with, upon request, are proper items to be included in the general term 'hotel bill.' This is so, because the term 'hotel bill' would then be generally applicable. But if the term is extended so as to include items which the hotel keeper is not obligated to furnish, but which he does furnish, as a matter of convenience to his guests, then it can have no general and common meaning, but the hotel bill of one hotel keeper might include board and lodging only, that of another might include board, lodging and liquors, and still another might include board, lodging, liquors, cigars and billiards; and this list of articles might be continued so that such bill could be made to include all articles that the guest might order that are kept for sale by the proprietor of the hotel. It is obvious that the term 'hotel bill,' as used in the undertaking of appellant, must be held to mean what the words mean as used in their general, common, and usual sense. 2 Pars. Cont. 500. These words, used in their general and comprehensive sense, should be held to include, as proper charges in an hotel bill, only such items as would make the term properly applicable to all hotels, and this would confine the items of charges in such bill to such articles as an hotel keeper, by reason of his being an hotel keeper, is bound to furnish his guests upon request. An hotel keeper is not bound to furnish his guests with liquors, cigars or billiards, and therefore the including of such articles in an hotel bill would not be expected or anticipated by one contracting to pay the bill of another. To illustrate: If an attorney, living in Leadville, contract with a client to go to Denver upon business for the client, the attorney to be paid for his

services at a stipulated price per day, and such further sums as the attorney should pay out for railroad fare and hotel bills while engaged in such service, could the client be compelled to pay for the wines, liquors and cigars furnished the attorney by the keepers of the hotels where the attorney stopped? We do not think the words of the contract could be so construed as to make the contract say that it was the intention of the client to bind himself to the payment for such articles, without doing violence to the rule that requires that the language of a contract will be understood in the ordinary, popular sense, unless it relates to some technical subject. Bish. Cont., § 590. The fact that it may be customary, upon the request of a guest, to charge such articles in his bill, instead of requiring him to pay for the same when and where obtained, does not constitute such items a part of his hotel bill proper, in the legal acceptance of that term. 'No usage is admissible to influence the construction of a contract, unless it appears that it is so well settled, so uniformly acted upon, and so long continued as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it. There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstances from which it may be inferred or presumed that they had reference to it.' *Walls v. Bailey*, 49 N. Y. 464-474; *Press Co. v. Stanard*, 44 Mo. 71-82."

**LIBEL—NEWSPAPER CRITICISM OF STAGE PLAY—QUESTION TO BE LEFT TO JURY—"FAIR CRITICISM"—PRIVILEGE.**

ENGLISH COURT OF APPEAL, DEC. 2, 1897.

MERIVALE v. CARSON.\*

Where an action for libel is brought in respect of a comment on a matter of public interest the case is not one of privilege, properly so called, and it is not necessary in order to give a cause of action that actual malice on the part of the defendant should be proved. The question whether the comment is or is not actionable depends upon whether in the opinion of the jury it goes beyond the limits of fair criticism.

**A**PPPEAL by the defendant against the refusal of a Divisional Court (Mathew and Grantham, JJ.) to allow a new trial of the action, or to enter judgment for the defendant.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and his wife were the joint authors of a play called "The Whip Hand." The defendant was the editor of a theatrical newspaper called *The Stage*. Early in May, 1896, the play was performed at a theatre in Liverpool. On May 7 a criticism of the play was published in the defendant's newspaper. The part of the article charged in the statement of claim as libellous was as follows: "'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of

ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limpariatocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable-lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition, and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier." The innuendo suggested was that the article implied that the play was of an immoral tendency.

It was admitted that there was no adulterous wife in the play.

Field, J., in the course of his summing-up to the jury said: "The question is, first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is a fair temperate criticism, and does not bear that meaning, or is not fairly to be read as having that meaning, then your verdict will be for the defendants. \* \* \* It is not for a moment suggested by any one that the defendant is animated by the smallest possible malice toward the plaintiffs. There is no ground for saying so, and no one has said so. \* \* \* The malice which is necessary in this action is one, which if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you, you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that, otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

Cock, Q.C., and W. Blake Odgers, for defendant.

Lockwood, Q.C., and Boxall, for plaintiffs.

LORD ESHER, M. R. This action is brought in respect of an alleged libel contained in a criticism by the defendant upon a play written by the plaintiffs. The first thing to be considered is, what are the questions which in such a case ought to be left to the jury? The first question to be left to them is, what is the meaning of the alleged libel? The jury must look at the criticism and say what in their opinion any reasonable man would understand by it. I am not prepared to say that in coming to their conclusion they would not also have to look at the work criticised. That however is not very material for us to consider now. The proper question was put to the jury in the present case. Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery, without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery, without any objection to it on their part, in other words,

that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression "naughty wife" does not mean "adulterous wife." It would not have that meaning in every case, but the question is whether, looking at the context of the article, it has that meaning. If the court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell v. Spottiswoode*, 3 B. & S. 780, which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment, shows why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But in the case of a criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged. Therefore the second question to be put to the jury is, whether the alleged libel is or is not a libel. The form in which that question should be put is, I think, best expressed by Crompton, J., in *Campbell v. Spottiswoode*, 3 B. & S. at p. 778. He says: "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits, and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think, because he has a *bona fide* belief that he is publishing what is true, that is any answer to an action for libel." He says that upon the answer to the question there stated it depends whether the article upon which the action is brought is or is not a libel. The question is not whether the article is privileged, but whether it is a libel. What is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if for instance the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which if taken alone may seem to limit too much the question

put to the jury. But when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: "If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendants." He gives a very wide limit, and I think rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all. I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz.: that the plaintiffs had written an obscene play, and no fair man could have said that. There was therefore a complete misdescription of the plaintiffs' work, and the inevitable conclusion was that an imputation was cast upon the characters of the authors. Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed.

Another point which has been discussed is this. It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

In my opinion this appeal must be dismissed.

BOWEN, L. J. We must begin with asking ourselves what is the true meaning of the words used in the alleged libel? We have the benefit of the machinery which the law gives—the verdict of a jury—for ascertaining the meaning, and it must now be taken to have been conclusively settled that the writer of the criticism has imputed to the plaintiffs that the story of their play turns in its main incident upon an adulterous wife, and in such a way as not to lead any one to suppose that the plaintiffs objected to the adultery, but on the contrary that they had treated the adultery as a spicy incident in the play without expressing any opinion as to its morality. It has been admitted by the defendant that the play does not in fact contain any adulterous wife, that there is no incident of adultery in it, and therefore it is not open to the suggestion that the plaintiffs have treated adultery lightly in such a way as to tend to immorality. These are the facts.

What then is the law applicable to them? We must see first what is the question which ought to have been left to the jury on this assumption of the meaning of the article, and then whether it was in fact left to them, and whether there was any miscarriage on their part. I take precisely the same view as the master of the rolls with regard to the way in which the word "privilege" ought to be used. The present case is not, strictly speaking, one of "privileged occasion." In a legal sense that term is used with reference to a case in which one or more members of the

public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys—the right of publishing a written criticism upon a literary work which is offered to public criticism.

It is true that a different metaphysical exposition of this common right is to be found in the judgment of Willes, J., in *Henwood v. Harrison*, L. R., 7 C. P. 606. That learned judge and a majority of the Court of Common Pleas seem to have treated this right as a branch of the general law of privilege, and to have found a justification for the use of the word "privilege" in the subject-matter of the criticism, although there is no limit of the number of the persons entitled to make the criticism. With great respect to Willes, J., I agree with the master of the rolls that this is not so good an exposition of the right as that which is given by Blackburn, J., and Crompton, J., in *Campbell v. Spottiswoode*, 3 B. & S. 769. But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one. But among other reasons, why I prefer the view of Blackburn, J., and Crompton, J., is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell v. Spottiswoode*, 3 B. & S. 769 (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of "fair criticism?" The criticism is to be "fair," that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls "fair," and although we cannot find in any decided case an exact and rigid definition of the word "fair," this is because the judges have always preferred to leave the question what is "fair" to the jury. The nearest approach I think to an exact definition of the word "fair" is contained in the judgment of Lord Tenterden, C. J., in *Macleod v. Wakely*, 3 C. & P. at p. 313, where he said, "Whatever is fair and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that under the pretext of criticising the works the defendant takes an opportunity of attacking the character of the author: then it will be a libel." It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell v. Spottiswoode*, 3 B. & S. 769, was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told that if it attacked the private character of the author, it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he

has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond the limits of fair criticism.

Applying the law to the present case, we have to see whether the learned judge misdirected the jury, having regard to their finding as to the true construction of the article. Their construction of the words of the article could not have been affected by what he said to them about the meaning of "fair criticism." The alleged libel stated that the story of the plaintiffs' play turned upon adultery. In a case of manifest misdescription such as this the judge is not bound to go into all the minutes as if the libel had been of a different character, and his summing-up must be read with reference to this fact. I have read through the summing-up of Field, J., and though I do not think his language was altogether exact, yet what possible harm could it have done having regard to the facts of the case? The jury had to deal with a case of positive misdescription, a question not of opinion but of fact. Did not that fall clearly beyond the limits of fair criticism? Could this court since the Judicature Act set aside the verdict of the jury merely because the language of the learned judge was not exactly that which he would have used if he had written his summing-up? Assuming the interpretation the jury put on the meaning of the words to be correct, as we must assume, I entertain no doubt as to the correctness of the remainder of the verdict. And even if the view of the law as to privilege which I do not adopt were the right view, I do not think it would make any difference in the present case, because the misrepresentation being clear, the writer having not merely said that the play had an evil tendency, but having imputed to the authors that it was founded on adultery when there is no adultery at all in it, the jury would have inferred, if the question had been left sufficiently to them, that the writer was actuated by a malicious motive; that is to say, by some motive other than that of a pure expression of a critic's real opinion.

Appeal dismissed.

#### JURISDICTION—FEDERAL COURTS—ADMIRALTY—ACTION FOR DAMAGE TO LOGS.

UNITED STATES DISTRICT COURT, E. D. WISCONSIN,  
JANUARY 17, 1888.

#### CARTIER V. THE F. & P. M. No. 2.\*

The United States District Court has jurisdiction of an action *in rem* against a vessel for damaging a raft of logs while in navigable waters.

**I**N admiralty. Libel for damages.

Markham, Williams & Bright, for libellant.

E. Martner and F. M. Hoyt, for respondent.

DYER, J. This is a suit in admiralty, brought by the libellant, a citizen of Michigan, against the steam vessel *F. & P. M. No. 2*, owned and employed in navigation by the Flint & Pere Marquette Railroad Company, to recover the value of a raft of logs, which on the 18th day of September, 1886, was being towed by a tug from a point on the east shore of Lake Michigan

to Ludington. The libel alleges that the raft or boom of logs was being towed into the harbor of Ludington; that the steamer, in entering the same port, negligently ran into the raft, striking it with such force as to break the boom and scatter the logs; and that in consequence of the collision many of the logs floated out into the lake and were lost. The libel further alleges, and the answer admits, that the steamer was duly enrolled and licensed for the coasting trade, and employed in navigation and commerce upon the lakes within the admiralty jurisdiction of the United States. The defense made by the answer is that the collision occurred through the negligence of the tug which had the logs in tow. A motion is now made by the respondent to dismiss the libel for want of jurisdiction. As the place where the collision happened was upon public navigable waters, no issue arises concerning the question of locality as a ground of jurisdiction. The point presented is whether the raft of logs in question is the subject of maritime jurisdiction, so as to enable the owner to maintain a suit in admiralty against the steamer to recover for the injury and loss sustained.

In the case of *The W. H. Clark*, 5 Biss. 308, Judge Hopkins expressed a serious doubt whether "admiralty jurisdiction could be sustained against a raft of lumber," in a case of collision; and cited *Tome v. Lumber*, Taney, 547, quoting Chief Justice Taney's remarks in that case, that cribs of lumber "are not vehicles intended for the navigation of the sea. They are not recognized as instruments of commerce or navigation by any act of Congress; they are piles of lumber, and nothing more, fastened together and placed upon the water." But in the case of the *W. H. Clark* it was not necessary for Judge Hopkins to decide, and he did not decide, the question whether in a case of collision, a remedy in admiralty could be enforced either in favor of or against a raft of lumber, for the reason that the steamer having the raft in tow was found in fault, and therefore liable for the injury done to the boat collided with. What he said therefore on the subject of jurisdiction, so far as it related to the raft of lumber, was *obiter*.

In *Tome v. Lumber*, *supra*, an attempt was made to maintain a suit in admiralty, for an alleged salvage service in rescuing certain rafts of lumber which had been driven from their anchorage in the Susquehanna river, and were found floating down the stream. It was there held that rafts anchored in a stream are not the subjects of admiralty jurisdiction, where the right of property or possession is alone concerned; that they are piles of lumber, and nothing more, placed upon the water until suitable vehicles are ready to receive and transport them to their destined port; and that any assistance rendered to them, even when in danger of being broken up and swept down the stream, is not a salvage service, in the sense in which that word is used in courts of admiralty. As will be observed, the action was a possessory one, instituted in a court of admiralty by the owners of the lumber, to recover it from a party who was seeking to hold it for salvage service; and it was held that the remedy of the owners to regain possession was an ordinary action of replevin. Clearly the case can have no greater application to the question under consideration than its particular facts and the character of the action warrant.

In the case of *A Raft of Cypress Logs*, 1 Flip. 543, it was held that a libel *in rem* cannot be maintained for services in navigating a raft of logs. That was a case of contract, and it was held that "in actions of contract the agreement sued on must be maritime in its character, and must pertain in some way to the navigation of a vessel having carrying capacity and employed as an instrument of travel, trade or commerce,



though its form, size and means of propulsion are immaterial." *The Gen. Cass*, Brown Adm. 334. As a raft is not a ship or vessel, it was held that the contract of service upon which the suit was based was not a maritime contract, and therefore that a court of admiralty had not jurisdiction of the action. But in deciding the case, Judge Brown was careful to say that it was unnecessary "to consider whether a raft may not, for some purposes, be the subject of admiralty jurisdiction."

*Thackeray v. The Farmer*, Gilp. 524, was also a case of contract, and it was there decided that a contract for the payment of labor on board of a vessel employed in carrying fuel to the city of Philadelphia from the opposite shore of the Delaware river, could not be enforced by a suit *in rem* in the admiralty. It may well be doubted, whether in the present state of the law of admiralty this case would now be accepted as authoritative, even upon the question there decided. It is worthy of notice that it arose when the admiralty jurisdiction was greatly restricted—it fact confined to waters within the ebb and flow of the tide. In any event, the decision of Judge Hopkinson does not, in principle, go to the extent of forbidding jurisdiction in admiralty, in a case which might be supposed, of collision upon the waters of a navigable river, between such a craft as described in that case, and a duly enrolled and licensed ship engaged in ocean commerce.

In *Jones v. The Coal Barges*, 3 Wall. Jr. 53, the subject of dispute was a collision between two coal barges loaded with coal, one of which was floating down the Monongahela river, and ran foul of the other, which was fastened to the shore, but standing out further in the stream than she had a right to be. They were described as open chests or boxes, which were made for transporting coal, were floated by the stream, and sold for lumber at the end of the voyage; and it was held that a remedy *in rem* against one by the owner of the other, for its contracts or torts, could not be enforced in the admiralty. Stress was laid on the fact that these barges were not enrolled and licensed for the coasting trade, under the provisions of the act of February 23, 1845, then in force, which extended the jurisdiction of courts of admiralty to the lakes and other navigable waters.

But admitting that a raft of lumber or logs is not the subject of salvage service, as was held in *Tome v. Lumber*, *supra*, because as is said in some of the cases, "salvage," in the sense in which the term is used in the maritime law can only be claimed for the rescue of a ship or its cargo, or portions of the same; and conceding that the right of possession of such property must be asserted in a common-law action, and not in a suit in admiralty; admitting also the law in relation to contract service to be as stated in the cases cited from 1 Flip. 543, and Gilp. 524—does it follow that the owner of a raft of logs which is in tow of a tug, presumptively duly enrolled and licensed, and which is run into upon navigable waters by a steamer also duly enrolled and licensed and engaged in interstate commerce, may not enforce his remedy in admiralty, either *in rem* against the boat, or *in personam* against the owner? Why may not such remedy be enforced, as well in such case, as against either the steamer or the tug, if the collision had occurred between them?

The jurisdiction of the admiralty in cases of tort depends upon locality. Conk. Adm. 21. This collision occurred upon navigable waters, over which confessedly the admiralty has jurisdiction. As a subject of commerce, the raft or boom of logs was being transported from one port to another in tow of the tug. Its relation to the tug was somewhat in the nature of cargo. Both the raft and the steamer which inflicted

the injury were at the time actually engaged in navigation. The decision in *Jones v. The Coal Barges* turned upon the construction placed on the act of 1845, which confined the jurisdiction of admiralty courts on the lakes and rivers, to "matters of contract and tort in, upon, or concerning steamboats and other vessels of twenty tons burden and upward, enrolled and licensed for the coasting trade." But since that decision the jurisdiction of courts of admiralty has been greatly extended. In the case of *The Eagle*, 8 Wall. 15, it was held that the act of 1845 was inoperative and nugatory, with the exception of the clause therein which gave to either party the right of trial by jury, when requested, and that the District Courts could take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, and bays and rivers navigable from the sea. The 8th subdivision of section 563, Rev. Stat. U. S., declares in substantially the language of the opinion in the case of *The Eagle*, that the District Courts shall have cognizance of civil causes of admiralty and maritime jurisdiction; and section 3, chapter 1, Rev. Stat., defines the word "vessel" as it is used in the statutes, as including "every description of water-craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water."

In *Ex parte Boyer*, 109 U. S. 629, it was decided that a court of admiralty has jurisdiction of a suit *in rem* in a case of collision between two canal boats navigating a canal within the body of the State; and that too, although the libellant's boat was bound from one place in a State to another place in the same State.

In the case of *The Rock Island Bridge*, 6 Wall. 213, a libel was filed against the bridge, for alleged damages done to two steamboats, and it was held that there was no foundation for a proceeding *in rem*, because the bridge was fixed and immovable, like a wharf or real estate, and was therefore not the subject of maritime lien. But Mr. Justice Field says, speaking for the court, that "there is no doubt \* \* \* that the jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters. For the redress of these torts, the courts of admiralty may proceed *in personam*; and when the cause of the injury is a subject of maritime lien, may also proceed *in rem*. Further he says: "A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers and rafts, and upon goods and merchandise carried by them." The case at bar, it will be observed, is one against a steamer, confessedly the subject of a maritime lien.

In *Atlee v. Packet Co.*, 21 Wall. 389, it was held that a court of admiralty had jurisdiction in a suit *in personam* by the owner of a barge against a party who had built a structure in the navigable channel of the Mississippi river, which had been the cause of injury to the barge. See also *Railroad Co. v. Towboat Co.*, 23 How. 209, wherein Mr. Justice Grier said: "The jurisdiction of courts of admiralty in matters of contract depends upon the nature and character of the contract, but in torts it depends entirely upon locality." In this case a railroad company was held liable in a suit in admiralty for an injury done to a vessel by piles which had been driven and left in the bed of a navigable river.

In the case of *The Arkansas*, 17 Fed. Rep. 383, it was decided, in a well-considered opinion by Judge Love, that where a vessel is injured by collision with a structure unlawfully placed in the navigable channel of a river, the party creating the obstruction may be sued for the injury in an action *in personam* in a

proper court of admiralty; but the owners of the vessel cannot in such a case proceed *in rem* against the solid structure, whatever it may be, because there can be no maritime lien upon such a structure, to be enforced in the admiralty by its seizure and sale. Further that where a structure lawfully created in the navigable channel of a river is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court, by action *in personam* against the owners of the vessel, or *in rem* against the vessel. If this be the law—and I have no doubt it is—no reason is perceived why the owner of a raft of logs which in course of transit on navigable waters, may not proceed *in rem* against a boat or vessel which negligently runs into and destroys or injures the rafts.

In *Munts v. Timber*, 15 Fed. Rep. 555, it was decided that a raft of timber is subject to the jurisdiction of the admiralty court in the matter of salvage.

Many other cases might be cited, showing the extension in various directions of the admiralty jurisdiction, since the days of the old tide-water doctrine—cases that include injuries to barges in tow of other vessels, ferry boats, scows, yachts, pleasure boats and other craft which would have had no recognition as "ships or vessels" in the earlier history of admiralty law in this country. But further discussion of the question seems superfluous, as I have no doubt, in the present state of judicial decision on the subject, this court as a court of admiralty has jurisdiction of the controversy set forth in the libel and answer in this case.

#### MORTGAGE—ASSIGNMENT—LOSS—PROOF OF—TITLE.

SUPREME COURT OF ILLINOIS, JAN. 19, 1886.

BARRETT V. HINKLEY.

Plaintiff in an ejectment suit claimed title to the land by an assignment of a note and mortgage to him issued by one as administratrix of the deceased mortgagee, and by one to whom he had pledged them as collateral security. The assignment was lost. *Held*, that as there was no sufficient proof that the assignment was under seal, it did not convey the legal title to the land secured by the mortgage, if the assignors had it.

The administratrix of a deceased mortgagee, and one to whom he had pledged the note and mortgage as collateral security, not claiming the land secured by the mortgage as heirs or devisees of the deceased, and not having any deed to the property from either the mortgagor or mortgagee, have not the legal title in the land.

**A** PPEAL from Superior Court, Cook county. J. E. Gary, J. Watson S. Hinkley, plaintiff, sued George D. Barrett, Adalina S. Barrett and William H. Whitehead, impleaded with others, defendants, in ejectment. Judgment for plaintiff, and the above-mentioned defendants appealed.

*Whitehead & Pickard*, for appellants.

*Wilson & Moore*, for appellee.

MULKEY, J. Watson S. Hinkley, claiming to be the owner in fee of the land in controversy, on the 26th day of February, 1886, brought an action of ejectment in the Superior Court of Cook county against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead and others, to recover the possession thereof. There was a trial of the cause before the court without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed. The evidence tends to show the following state of facts: In 1870 Thomas Kearns was in possession of the

land, claiming to own it in fee-simple. On August 3 of that year he sold and conveyed it to William H. W. Cushman for the sum of \$80,000. Cushman gave him four notes to Kearns for balance of purchase-money—one for \$12,500, maturing in thirty days; three for \$16,875 each, maturing respectively in two, three and four years after date—and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878 Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death however he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned by a separate instrument in writing the mortgage and note to the appellee, Watson S. Hinkley. This is in substance the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached therefore depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, at the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the court's rulings in this respect. They however go further, and insist that even conceding the facts to be as claimed by appellee himself, they are not sufficient in law to sustain the action. As the judgment below will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned. We propose to state as briefly as may be some of the reasons which have led us to the conclusion reached. In doing so, it is perhaps proper to call attention at the outset to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee-simple. To do this he is bound to show in himself a fee-simple title at law, as contradistinguished from an equitable fee. *Fisher v. Elaman*, 68 Ill. 78; *Wales v. Bogue*, 81 id. 464; *Fleming v. Carter*, 70 id. 286; *Dawson v. Hayden*, 87 id. 52. Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title however seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase, a separate writing was given to me—a full assignment. \* \* \* It was a very explicit assignment, or full assignment, of the note and mortgage, and the land, the property, and all the right and title to the land." It will be observed the instrument is throughout characterized as an assignment only, which does not, like the term "deed," or "specialty," signify an instrument under seal. A mere written assignment, founded upon a

valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal, from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows that, even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum, or either of them, it could not have passed to the appellee by that instrument, and if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is of course based upon the fundamental principle that an instrument *inter partes*, in order to pass the legal title to real property, must be under seal. But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. *Nemo plus iuris ad alium transferre potest quam ipse habet*. That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff is demonstrable by the plainest principle of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it by way of mortgage to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the States of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry, it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear that appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do, or attempt to do; indeed he does not claim through them, nor either of them. Not only so: neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee; nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to the appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, what effect then did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the rules and principles which prevail in courts of equity or of law are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 id. 213; *Chickering v. Raymond*, 15 id. 362.

As to the mortgage, it is well settled that it could not be assigned like negotiable paper, so as to pass the legal title in the instrument, or clothe the assignee with an immunity of an innocent holder, except under certain circumstances which do not apply here. *Railway Co. v. Loewenthal*, 93 Ill. 433; *Hamilton v. Lubukee*, 51 id. 415; *Olds v. Cummings*, 31 id. 188; *McIntyre v. Yates*, 104 id. 491; *Fortier v. Darst*, 31 id. 212.

But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. 2 Washb. Real Prop. 115, and authorities there cited. Yet the assignors, in the case in hand, not having the legal title, as we have just seen, could not by any form of instrument, transmit it to another. If however the rules and principles which obtain in courts of equity are to be applied, we would say, that by virtue of the assignment, the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is perhaps no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined, and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the States of the Union, including our own, in which the common-law system prevails. In *Carroll v. Ballance*, 28 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor, to recover the mortgaged premises, this court thus states the English rule on the subject: "In England, and in many of the American States, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition [citing *Coots v. Mortg.* 339; *Blainey v. Pearce*, 2 Greenl. Ev. 133; *Brown v. Cram*, 1 N. H. 169; *Hobart v. Sanborn*, 13 id. 226; *Paper Mills v. Ames*, 8 Metc. 1]. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt."

Again in *Nelson v. Pinegar*, 30 Ill. 481, which was a bill by mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee as against the mortgagor and all claiming under him. He had the *jus in re*, as well as *ad rem*, and being so, is entitled to all the rights and remedies which the law gives to such an owner." So in *Oldham v. Pfeiffer*, 84 Ill. 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law the owner of the fee, having the *jus in re* as well as the *jus ad*

rem." In *Finlon v. Clark*, 118 Ill. 32, the same doctrine is announced, and the cases above cited are referred to with approval. *Taylor v. Adams*, 115 Ill. 570. Courts of equity however from a very early period took a widely different view of the matter. They looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage, as in the nature of a penalty, and as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land on equitable terms at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction, rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mortgagee was simply a lien and incumbrance upon the land rather than an estate in it. In short the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity.

These two systems grew up side by side, and were maintained for centuries without conflict or even friction between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was of course necessary to make his title available in a court of law. In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions in the courts of this country; resulting chiefly from a failure to keep in mind the distinction between courts of law and equity, and the rules and principles applicable to them respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of law. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the States, and the failure of the courts and authors to note those changes in their expositions of the law of such States. Perhaps another fruitful source of confusion on this subject is the fact that in many of the States the common-law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time, and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the action in theory is one at law, it is nevertheless subject to be defeated by a purely equitable defense. Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has in many of these States entirely superseded the legal one. Thus in New York it is said, in the case of *Trustees, etc., v. Wheeler*, 61 N. Y. 88, "that a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon; the mortgagor retaining both the legal and equitable owner of the fee." Following this doctrine to its logi-

cal results, it is held by the courts of that State that ejectment under the Code will not be at the suit of the mortgagee against the owner of the equity of redemption. *Murray v. Walker*, 81 N. Y. 399. In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee before foreclosure, without an assignment of the debt, is in law a nullity. *Jackson v. Curtis*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 231; *Jackson v. Willard*, 4 Johns. 41. And this court seems to have recognized the same rule as obtaining in this State, in *Delano v. Bennett*, 90 Ill. 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental that if one *qui jure*, having the legal title to land, intentionally delivers to another a deed therefor, containing apt words of conveyance, the title at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. *Sanger v. Bancroft*, 12 Gray, 367; *Barnard v. Eaton*, 2 Cush. 304; *Jackson v. Willard*, 4 Johns. 40. It is true the interest which passes is of no appreciable value to the grantee. Thus in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In *Walt's Actions and Defenses* (vol. 4, p. 565) the rule is thus stated: "By the common law a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, *Pomeroy*, in his work on *Equity Jurisprudence* (vol. 3, p. 150), in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death intestate it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator." We have already seen that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper. But on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even of a third party, a deed with apt words of conveyance; and the fact that it is in form an assignment will make no difference. 2 Washb. Real Prop. 115, 116. Such an assignee, if owner of the mortgage indebtedness, might no doubt maintain ejectment in his own name for his own use. Or the action might be brought in his name for the use of a third party owning the indebtedness. *Kilgour v. Gockley*, 83 Ill. 109. So in this case, if the action had been brought in the name of *Kearns'* heirs for the use of *Hinkley*, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this State precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable

theory of a mortgage has, in process of time, made in this State, as in others, material encroachments upon the legal theory which are now fully recognized in courts of law. Thus it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. *Hall v. Lance*, 25 Ill. 277; *Emory v. Keighan*, 88 id. 482. As a result of this doctrine, it follows that in ejectment by the mortgagor against a third party, the defendant cannot defeat the action by showing an outstanding title in the mortgagee. *Hall v. Lance*, *supra*. So too courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. *Pollock v. Matson*, 41 Ill. 516; *Harris v. Mills*, 28 id. 44; *Gibson v. Rees*, 50 id. 383. Hence the rule is well established at law, as it is in equity, that the debt is the principal thing, and the mortgage an incident. So also while it is indispensable in all cases to a recovery in ejectment that the plaintiff show in himself the legal title to the property as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title he may under all circumstances maintain the action, and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests; that is, as a means of coercing payment. If the mortgagee therefore should for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him, at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well-settled principle that one having a mere naked legal title to land in which he has no interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein, with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of Kearns, who had the legal title, had brought ejectment against him, the action clearly could not have been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. *Cottrell v. Adams*, 2 Biss. 351-353; 9 Myers Fed. Dec. 240. The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See also *Speer v. Haddock*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**ATTACHMENT—PUBLICATION OF SUMMONS—APPEARANCE—DISCONTINUANCE.**—An attachment is not void, when in the proceedings a publication of summons was ordered commenced, pending which the defendant entered an appearance, and consented that further publication cease, and judgment be entered

against him. Feb. 10, 1888. *Tuller v. Beck*; *Pierce v. Beck*. Opinion by Finch, J.

**CANALS—NEGLIGENCE IN MANAGEMENT—LIABILITY OF STATE—CONTRIBUTORY NEGLIGENCE.**—The State built a swing-bridge upon its own land to carry a tow-path across a channel connecting a State canal with an adjunct thereof for the use of persons navigating the canals. The bridge was frequently required to be swung open to allow the passage of boats. A ferry company had for some years used a landing place on the premises of the State near the bridge, though it did not appear that it had received permission to do so, and people had been accustomed to use the bridge in going to and from the ferry. The ferry company also had a bridge across the channel. While proceeding to the ferry, in the evening, intestate walked from the abutment into the channel and was drowned, the bridge having been pushed from its place by the pressure of a canal boat. By Laws of 1870, chap. 321, the State is liable for negligence in the management of the canals where the facts would establish a liability against an individual. *Held*, that the State owed no duty to the public to keep the bridge in repair, and plaintiff could not recover. In *Nicholson v. Railway Co.*, 41 N. Y. 529, it was said that "negligence consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty to the injury of another. It is essential in the latter case to establish that the defendant owed at that time some specific, clear, legal duty to the plaintiff or the party injured." The remarks of Judge Earl in the same case are quite pertinent to the question here. He says: "It cannot be doubted from the evidence that he (the deceased) had an implied license to cross at that point, and hence that he was lawfully there. He was not there by invitation of the defendant, nor in the business of the defendant, but for his own purpose, on his way home. While he was lawfully there, he had no right, as against the defendant, to be there. It could at any time have revoked the license, and then he could not have crossed at that point without being a trespasser. The cars were lawfully upon the branch track, and the defendant had the right to have them there. The defendant owed the intestate no active duty. It owed him no duty whatever, except such as every citizen owes another. It had no right intentionally to injure him, and would be liable if it needlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him, either intentionally or carelessly, but it did not owe him the duty of active vigilance to see that he was not injured while upon its land merely by permission, for his own convenience." The learned judge refers to and comments upon the cases of *Gautret v. Egerton*, L. R., 2 C. P. 371; *Southcoote v. Stanley*, 1 Hurl. & N. 246; *Hounsell v. Smyth*, 97 E. C. L. 729, and *Smith v. Docks Co.*, L. R., 3 C. P. 326, which are particularly applicable to the question under discussion here. It was said by Judge Andrews, in *Larimore v. Iron Co.*, 101 N. Y. 394, that "there is no negligence, in a legal sense, which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons and not as to others, depending upon peculiar relations and circumstances." The State had erected a bridge which was sufficient and safe, so far as appears, for the purposes for which it was intended. It had upon this occasion left it, at the close of the day, in the situation in which it had been usual and customary to leave it; and it had been displaced, leaving the situation dangerous to careless and inattentive persons, by the wrongful act of a stranger. We can see in this no violation of duty on the part of the

State. It owed no duty to the public to build this bridge, to keep it in repair, or to rebuild it in the event of its destruction. It could keep it up or let it decay, at its own pleasure, and made itself liable to no one in either event, except perhaps to persons navigating its canals by its invitation. The whole claim of the appellant rests upon the assumption that the State owed a duty to all persons using its tow-path for their own purposes, whether with or without license or permission, to keep it in such repair as to make passage over it safe and secure at all times, both day and night. We do not think that such a claim is tenable. The State had simply built a tow-path and bridge upon its own land for the use of persons navigating its canals. It had raised no structure which was not necessary for this purpose, and the purpose of the bridge was obvious, from its location and connection with the tow-path, to all persons who came in its vicinity. No enticement or allurements to people generally to pass over the bridge was held out, except such as any bridge upon private lands holds out; and no one had a right to suppose, from the mere existence of a tow-path bridge, that the State undertook the duty of keeping it in place at all times for the use of the general public. Indeed the statutes of the State make it a misdemeanor for citizens, other than those navigating the canals, to use its tow-path for the passage over them of horses, cattle, or other live animals (1 Rev. Stat., [7th ed.] 697, § 181), and every citizen had notice that the State was jealous of the use of its canal property, except for the purposes of canal navigation. What obligations the ferry company assumed by building its ferry-house on state lands, and the sidewalk from it to the bridge over the channel, it is unnecessary to discuss, but it is quite certain that it did not thereby impose any duty on the State toward the public using such ferry to facilitate or render safe the passage to it. The consideration of this branch of the case may be concluded by an extract from the opinion of Judge Andrews in *Larmore v. Iron Co.*, *supra*, which is directly in point upon the question involved here: "The duty of keeping premises in a safe condition, even as against a mere licensee, may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger. The case of running a locomotive without warning over a path across the railroad, which had been generally used by the public without objection, furnishes an example. *Barry v. Railroad Co.*, 92 N. Y. 289; *Beek v. Carter*, 68 id. 283. The cases referred to proceed upon definite and intelligible grounds, the justice of which cannot reasonably be controverted. But in the case before us there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous; the plaintiff was a mere licensee; the negligence, if any, was passive and not active—of omission and not of commission." In attempting to cross a stream in the evening, by means of a swing-bridge, intestate fell into the stream and was drowned, the bridge having been pushed from its position by a boat so that it was connected with the path by but four feet of its width. The evidence tended to show that there was a light on the bridge, and five or six others within from 50 to 150 feet. The bridge was frequently opened in this manner, as well as for the passage of boats. Intestate had frequently crossed the bridge, and was familiar with the surroundings. *Held*, that the evidence tended to support the charge of contributory negligence, Jan. 17, 1888. *Splitstorf v. State*. Opinion by Ruger, C. J.

**CARRIERS—COMMON CARRIERS OF GOODS—DESTRUCTION OF PROPERTY BY FIRE—NEGLIGENCE—QUESTION FOR JURY.**—(1) In an action against a railroad company for property destroyed by fire while in a car alongside of a warehouse which was burned, the evidence of plaintiff tended to show that the warehouse was fired by sparks from an east-bound train. Defendant gave no evidence in regard to the east-bound engine, but showed that the engine on a west-bound train, which passed the warehouse about the same time, was in perfect condition, and would not emit sparks. *Held*, that the case should have been left to the jury, as they might reasonably infer that the fire was due to the defective condition of the east-bound engine. (2) The evidence showed that the freight-house was a wooden building, standing close to the track, with a shingle roof, covered with moss; that the roof had frequently before this occasion taken fire from sparks from passing engines, which was known to defendant, and that a high wind was blowing at the time, and the car containing plaintiff's goods was left standing directly in the path of the flames. *Held*, that the case should have been left to the jury to determine whether defendant exercised proper care in leaving the car exposed to the hazard. Jan. 17, 1888. *Tanner v. New York Cent. & H. R. R. Co.* Opinion by Andrews, J.

**—OF GOODS—LOSS—LIMITATION IN CONTRACT—BURDEN OF PROOF—STATUTE PROHIBITING LIMITATIONS—EXTRA-TERRITORIAL EFFECT—STIPULATED SUBROGATION TO INSURANCE—RIGHTS OF INSURER.**—(1) Where cotton is shipped under a bill of lading exempting the carrier from responsibility for loss or damage from "fire, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants," and the cotton is destroyed by fire, the burden is upon the plaintiff to establish that the fire was occasioned and the cotton destroyed, by the carrier's fraud or gross negligence. *Lamb v. Railroad Co.*, 46 N. Y. 271; *Cochran v. Dinmore*, 49 id. 249; *Insurance Co. v. Railroad Co.*, 72 id. 90. (2) A South Carolina statute, providing that no special contract shall "limit or affect the liability at common law of any railroad company within this State, for or in respect of any goods to be carried and conveyed by them," has no application to a corporation organized under the laws of another State, and such a corporation may lawfully make a contract in South Carolina, limiting its liability for goods delivered to it in another State for transportation over its road in such State. (3) The bill of lading provided that in case of loss or damage during transportation, whereby any legal liability should be incurred, the company incurring such liability "shall have the benefit of any insurance which may have been effected upon or on account of said cotton." The cotton was insured, and on its destruction by fire, while on defendant's wharf, the insurance company paid the loss to the owners, and took an assignment of their claim against defendant. *Held*, that there was no subrogation, and by the payment to the assured the defendant was, under the terms of the bill of lading, relieved from any liability. It is true that by a general rule of equity, where goods are totally lost by perils insured against, the insurer, upon payment of the loss, becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss; and the insurer has this right of subrogation without any express stipulation to that effect in the policy. It grows out of the very nature of the contract of insurance as a contract of indemnity. *Insurance Co. v. Railway Co.*, 73 N. Y. 399; *Insurance Co. v. Transportation Co.*, 117 U. S. 812. But this right of subroga-



tion is a derivative one, and comes solely from the assured, and can only be enforced in his right. If the assured has no right which he can transfer to the insurer, then the insurer can have no subrogation, and cannot take the place of the assured for the purpose of enforcing the liability of the wrong-doer for the loss. Here by the express contract between the assured owners and the railroad company, it was to have the benefit of the insurance, and thus it was entitled to the insurance for its indemnity; and when the insurance company paid the entire loss sustained by the fire to the assured, by the very terms of the contract it relieved the defendant of any liability therefor. If the insurance company had not paid the loss to the assured, upon payment of the loss by the defendant it would have been entitled to be subrogated to the rights of the assured, and to the full benefit of the policy which the assured had taken. A further discussion of this point is unnecessary, as it is fully covered by the decision in *Insurance Co. v. Railway Co.*, *supra*, where the precise question was involved. Feb. 10, 1888. *Platt v. Richmond, Y. R. & C. R. Co.* Opinion by Earl, J.

**CORPORATIONS — MANUFACTURING COMPANIES — FAILURE TO FILE ANNUAL REPORT — PERSONAL LIABILITY OF TRUSTEES — JUDGMENT FOR COSTS.**—The New York General Manufacturing Act of 1848, § 12, as amended by the Laws of 1875, chap. 510, provides that every such company shall, within twenty days from the first day of January in each year, \* \* \* make a report of its assets and liabilities; \* \* \* and if any such company shall fail so to do, all the trustees shall be held jointly and severally liable for the debts then existing, and for all that shall be contracted before such report is made. *Held*, that a judgment for costs against a company who has violated the provisions of this section is a debt for which a trustee may be rendered personally liable. It is true it was not a debt existing antecedently to the judgment; but it was a debt created by the judgment itself, and as it was a debt against the corporation which it was bound to pay, it could be enforced against the defendant. It may be that the judgment is not conclusive as against the defendant, and it is undoubtedly open to him to show that the recovery was either collusive or fraudulent. But it is a debt created by the judgment itself. It is proved by the production of the judgment, and that is at least *prima facie* evidence of its existence. It is unlike the case of *Miller v. White*, 60 N. Y. 137, where the judgment was upon a debt antecedently existing, in which case it was held that the judgment was neither conclusive nor *prima facie* evidence of the debt, and that it was the duty of the plaintiff to prove and establish his debt independently of the judgment. The reason upon which that decision is based can have no application to a case like this, where there was no liability on the part of the company to pay the costs antecedently to or independently of the judgment. We have carefully examined all the authorities to which our attention is called, and we find none of them in conflict with the views here expressed. We have not overlooked the clause which follows the words "debts of the company then existing," to-wit, "and for all that shall be contracted before such report shall be made." The claim on the part of the defendant that these words limit the meaning of the former words to such debts of a corporation as are voluntarily contracted, we do not deem to be well founded. The word "contracted" here means the same as "incurred," and includes every debt for which the corporation becomes bound. There is no apparent reason for any discrimination as to the kind of debts, and we do not think any was intended. Jan. 24, 1888. *Allen v. Clark.* Opinion by Earl, J.

**COSTS—REVERSAL OF ORDER DIRECTING PAYMENT—JURISDICTION OF APPELLATE COURT.**—Upon a reversal of an order awarding costs to defendant's attorney, the appellate court may direct a return of the costs paid under the order, where the attorney still has the money in his possession, and has promised to repay it, although the payment to him was made by the plaintiff's attorney, and not by the plaintiff himself. It has been the uniform practice of the courts to execute summary jurisdiction over the conduct of parties and attorneys in actions pending in court, and enforce obedience to orders and directions made by it in the interest of fair dealing and honesty, to protect the rights of all parties or persons whose rights have been affected by the litigation. Both parties and attorneys, who through the aid of the court have come into possession of property or money during a litigation, which subsequent proceedings in the action show was either wrongfully acquired or unjustly retained, may be compelled to restore it to the rightful owner, by order and attachment to enforce such restoration. It was held in *Langley v. Warner*, 3 N. Y. 327, that where moneys were collected by execution from a party to an action, and were paid over to the attorney of the party recovering the judgment, who had agreed with such attorney that he might retain and apply such moneys upon a previous indebtedness of the party to him, and such application of the money had been made, that no action arose against the attorney in favor of the party from whom such moneys were collected, although the judgment upon which they were received was subsequently reversed. It was said that the title to the moneys collected had vested in the client, and that he had in good faith paid them out to his attorney, and although the party remained liable to restore them, the attorney could not be subjected to an action therefor. But that is far from being this case. Here the attorney has received moneys under an erroneous order, and still has them in his hands. Not only that, but he has several times promised to repay them. It would be a reproach to the law if the court, knowing that one of its officers had money in his hands which had been erroneously taken from a party to the action, could not compel such officer to restore them to the rightful owner. In the case of *Wilmerdings v. Fowler*, as reported in 14 Abb. Pr. (N. S.) 249, and subsequently upon reargument and rehearing, in 15 id. 86, and 55 N. Y. 641, it was held, as shown by the head-note in 55 N. Y., that "when an attorney, without fraud, collects money, as attorney, and pays it over to his client, although the one paying it shows that he is entitled to have it refunded, an order will not be granted requiring the attorney personally to refund it, but in such case the fact of payment over should be clearly shown." This case fairly implies that if the money had been obtained by the fraud of the attorney, an order would be made by the court requiring the attorney to repay it regardless of the fact whether he had paid it to his client or not, and that most clearly he would be required to repay it if he had the money in his hands, and had not paid it over. Jan. 17, 1888. *Forstman v. Schulting.* Opinion by Ruger, C. J.

**CRIMINAL LAW—BURGLARY—"BUILDING"—VAULT IN CEMETERY.**—A stone vault in a cemetery, used for the interment of dead bodies, though wholly above ground, is not a "building," or "other erection or inclosure," within the meaning of the Penal Code of New York, §§ 498, 504, defining the crime of burglary in the third degree. As was stated by Andrews, J., in *Rodgers v. People*, 86 N. Y. 360, "Burglary, at common law, is an offense against the habitations of men." It may also be stated that the crime of burglary, even at common law, extends to the felonious breaking and



entering a church. 3 Inst. 64; 1 Hale P. C. 556; 1 Hawk. P. C., chap. 38, § 17; 2 Russ. Crimes, 1 (vol. 3, 4th ed.); Reg. v. Baker, 3 Cox Crim. Cas. 581; 2 Whart. Crim. Law, § 1556. Lord Coke was of the opinion that the crime could be committed in regard to a church, because as he said, it was a mansion-house of the omnipotent God. Lord Hale said that was only Lord Coke's quaint way of putting it, and that burglary at common law could be committed by breaking and entering, not only a mansion-house, but a church, as a church, and without speaking of it as the mansion-house of God. It will be seen upon examination that there were two exceptions at common law to the general rule that burglary consisted in breaking into a mansion-house; the word "mansion" being synonymous in that respect with dwelling-house. Those two exceptions were—first, in regard to a church; and second, in regard to breaking through the walls or gates of a town. It was however primarily an offense committed against a man's house—his dwelling—and in the night-time. Section 504 says: "The term 'building' as used in this chapter, includes a railway car, vessel, booth, tent, shop, or other erection or inclosure." There is contained in the section of the Code one alteration in the definition of the crime, as it is made burglary to break and enter a building with intent to commit a crime, instead of, as in the old statute, with an intent to commit a larceny or felony. As section 504 does not say that the term "building" shall only include such structures as are therein named, it is argued that any thing which can possibly be regarded as a building, under the broadest and most liberal signification of that term, is included therein, or at least within the expression added at the end of the section, "or other erection or inclosure." If this be sound, a most sweeping enlargement of the generally accepted idea of the nature of the crime of burglary is accomplished in a statute which has been regarded more in the light of a codification of the body of the criminal law than as materially altering and enlarging its scope and nature. We do not believe, in this instance, that any such result was contemplated by the Legislature. That section simply says that the term "building" includes a "railroad car, vessel, booth, tent, shop," etc., and leaves out the words "in which any goods, merchandise or valuable thing shall be kept for use, sale or deposit." This omission we do not regard as very material as enlarging in any way the definition of the crime, for the specific words used imply substantially the same meaning which is to be gathered from the use of the words which are omitted, and which is probably the cause of their omission. The meaning of the term "building" other than as including therein the structures specifically mentioned in the statute is still left, as we think, to be gathered precisely in the same way as it would have been if section 504 had not been passed. Taking the law in regard to burglary, from the earliest period of the common law where the crime is referred to down to the present time, we feel quite confident that not one case can be found where breaking and entering such a structure as the one in question has been held to come within that crime. We come to the belief that it is really nothing more than a grave above ground. The witness speaks of these various compartments as graves. They are intended solely for the interment of dead bodies, and the structure itself can be put to no other possible use, without altering its nature and purpose. The small room, as it is termed, in the front portion of the structure, between the outside wall and the place for the deposit of the coffins, is used for nothing. No service of a religious nature could be carried on there, and language could not be tortured into calling that place a church or a place for religious worship. If in-

stead of being placed above ground, this structure had been placed in a foundation deep enough to receive it, and then used for the purpose of burying the dead, and that only, could there be any question that it was not the subject of burglary, even although sufficient of the structure were above the ground, to enable one to reach it through a door and steps? We think not; and we do not think it becomes a building within the statute in regard to burglary any more because it is placed above the ground, when its sole purpose is that it shall be used as furnishing graves for the burial of the dead. It is claimed that the words "or other erection or inclosure" would include it. They undoubtedly would if the widest meaning of those words is to be taken as within the meaning of the Legislature, and if whatever could, under other circumstances, and for other purposes, be called an "erection" or "inclosure" is to be regarded as the subject of burglary. We do not attach any such meaning to those words when used in this connection; and we think it quite plain that the Legislature never intended any such meaning. A farm lot, or a vacant city lot, might be inclosed with a fence, and inside that fence there would be an inclosure. Can it be supposed possible that the Legislature intended that burglary might be committed by breaking and entering such an inclosure? In one sense, and in the widest, any thing that is inclosed is an inclosure, and the thing which inclosed it would be the thing the breaking of which and entering the inclosure would be burglary. A bronze statue in a public square is an erection, and if it be of colossal size, may be broken and entered. Can any one suppose that burglary would be predicated of such an act? These are extreme cases, but they are nevertheless within the possible meaning of those terms, when such meaning is not to be arrived at and limited by an examination of the context. It is plain that some limitation must be made to the meaning of those words other than their possible capacity when standing alone. The rule which usually obtains in cases of this kind is that where general words follow specific words designating certain special things, the general words are to be limited to cases of the same general nature as those which are specified. The rule is familiar, and needs not the citation of many authorities. *Re Hermance*, 71 N. Y. 481; *People v. Railway Co.*, 84 id. 565; *Insurance Co. v. Hamilton*, 12 App. Cas. 484. Applying a rule which is so well established, both in England and in this country, to the case in hand, we think that the phrase "other erection or inclosure" is to be interpreted as including things of a similar nature to those already described by the specific words found in the statute. If this be so, then under the phrase in question, the erection or inclosure included in burglary in the third degree was to be of that character which mankind used for the purpose of sheltering property, or for the purpose of transporting the same, or the purpose of trade or commercial intercourse. Jan. 17, 1888. *People v. Richards*. Opinion by Peckham, J.

**FRAUD — CONSTRUCTIVE — UNDUE INFLUENCE.**—Plaintiff's son, about to abscond, executed to him a conveyance to secure liabilities incurred by his father for him. Defendant, a justice of the peace, who had often acted as plaintiff's conveyancer, was employed in the transaction. At the time, plaintiff, a farmer, was nearly seventy years old. Immediately thereafter defendant, by continued threats to have the conveyance set aside as in fraud of creditors, induced plaintiff, who was distressed by his son's failure, to execute a conveyance securing defendants, his son's other creditors. Plaintiff was not personally liable to pay such creditors, and the value of the property conveyed to him by his son was less than his actual liabilities incurred in his behalf. *Held*, that the con-

veyance to his son's creditors was void, as executed under undue pressure. It is said in 2 Pomeroy's Equity Jurisprudence, § 951: "Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. Where there is no such fiduciary relation, the confidence and influence must be proved by satisfactory extrinsic evidence. The rules of equity, and the remedies which it bestows, are exactly the same in each of these two cases. The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed." It was said by Lord Cranworth in *Smith v. Kay*, 7 H. L. Cas. 771: "There is no branch of the jurisdiction of the court of chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependent. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are best instances;" but as said by Lord Eldon in *Gibson v. Jeyes*, 6 Ves. 268, it is "the great rule applying to trustees, attorneys, or any one else." It will be seen that the rule is not limited to cases of attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but it holds good wherever fiduciary relations exist, and there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. *Freelove v. Cole*, 41 Barb. 318, affirmed 41 N. Y. 619; *Ford v. Harrington*, 16 id. 285. When this relation is shown to exist it imposes the burden of proof upon the person taking securities, or making contracts injuring to his benefit, to show that the transaction is just and fair, and that he has derived no unfair advantage from his fiduciary relation. *Mason v. Ring*, 2 Abb. Pr. (N. S.) 322. Cases holding that contracts obtained under circumstances which amount to legal constraint only, or threats of doing that which the party threatening had a legal right to do, are not controlling or even important in considering the case made by the proof in this action. One who had, by reason of his supposed ability and integrity, been employed by another as a confidential adviser to transact the business of obtaining security from an insolvent debtor, and who draws the transfer of property for that purpose, occupies a position of trust toward his employer which in good faith and common honesty should preclude him from taking advantage of his situation, and using the information thus acquired to the detriment or disadvantage of such employer. Jan. 17, 1888. *Fisher v. Bishop*. Opinion by Ruger, C. J.

**MARRIAGE — DIVORCE — PROOF OF DESERTION — REVIEW ON APPEAL — FOREIGN DECREE — NON-RESIDENT DEFENDANT — EVIDENCE — WITNESS — IMPEACHMENT — CALLING DEFENDANT AS WITNESS.** — (1) In an action for separation and alimony, where the testimony shows a previous separation and a settled determination of the parties to live apart, the question whether the result sprang from an abandonment of the wife by the husband or of the husband by the wife is purely one of fact for the trial court, and will not be reviewed on appeal. (2) For the purpose of obtaining a divorce defendant moved into Illinois, leaving his wife in New York, where they had been married, and in Illinois obtained a judgment of divorce. When it was rendered, and during the pendency of the suit, the defendant was domiciled in New York, was not served with process, did not appear in the action, and had no actual notice of its existence. *Held*, that the divorce obtained in Illinois was without jurisdiction and void

as to the then defendant, and not a defense to an action for separation and alimony brought by the wife in New York. The cases of *People v. Baker*, 76 N. Y. 78, and *O'Dea v. O'Dea*, 101 id. 23, are decisive upon this point. (3) In such a case evidence to show that defendant was not a resident of Illinois when he obtained his decree of divorce was properly admitted. *Kerr v. Kerr*, 41 N. Y. 71. (4) Plaintiff, in an action for separation and alimony, called her husband, the defendant, as a witness, who testified that he did not abandon his wife, and sought in good faith a restoration of their marital relations. *Held*, that plaintiff was at liberty to dispute specific facts sworn to by him, and the trial court had the right to confront his statement of his mental conclusion with all the facts and circumstances of his conduct. He was both a hostile and a deeply interested witness, and all his testimony was a proper subject of consideration, with freedom to believe or doubt and reject. This doctrine we have quite recently asserted in *Becker v. Koch*, 104 N. Y. 394. The question there was one of fraudulent intent and respected the purpose of the witness, and his statement of honesty and innocence was uncontradicted, except by the logic of facts and circumstances and the force of natural inferences. In like manner, here it was competent to confront the statement of the witness—adverse in interest, hostile in feeling, married to a new wife, and fretted by the old entanglement, and deeply interested in maintaining his own view of the quarrel—with the facts occurring at the time and the inferences founded upon them; and so the question remained one of fact, and whatever we might ourselves think, we are not at liberty to distrust or review the result. Jan. 17, 1888. *Cross v. Cross*. Opinion by Finch, J.

**MASTER AND SERVANT—WHEN RELATION EXISTS—PROVINCE OF JURY.**—The plaintiff was sent to the defendants' dock with a horse, which had been hired by a person doing the trucking on the dock for the defendants. While there with the horse he was ordered to go to work by defendants' foreman, and was injured by the first truck he used. *Held*, that the question as to the existence of the relationship of master and servant between the parties was a mixed question of law and fact, to be solved with the aid of a jury. Jan. 17, 1888. *Brophy v. Bartlett*. Opinion by Finch, J.

**MORTGAGE—PAYMENT AND DISCHARGE—RIGHTS OF BENEFICIARIES.**—A mortgage was executed to J. to secure a sum, the interest on which was to be paid to S. for life, and after her death, the principal to be paid in part to J., and the remainder to be invested for the benefit of certain minor children, and to be paid to them respectively when they arrived at age. *Held*, that a payment to J. after the death of S., and after the children had attained majority, of the whole amount of the mortgage was unauthorized, and a discharge executed by J. on such payment would be set aside at the suit of the beneficiaries. Jan. 17, 1888. *Waterman v. Webster*. Opinion by Danforth, J.

**MUNICIPAL CORPORATION—CONTROL OF STREETS—REGULATION OF RAILROAD TRACKS.**—Under the Laws of New York of 1828, chap. 141, the defendant corporation was authorized to build a turnpike over certain premises, and by the Laws of New York of 1862, chap. 233, it was further authorized to construct railroad tracks along said turnpike. By the Laws of New York of 1870, chap. 139, the north boundary of plaintiff city was extended to include a portion of the turnpike and railroad, and in 1884, by proceedings under its charter, the city acquired title to the premises in question for the purpose of a public street. *Held*, that the city became vested with the control of the premises in question as one of its public streets, and had

power to compel the defendant to place its tracks even with the surface of the street, and in such portion of the street as would leave a roadway on each side thereof for the passage of vehicles. Jan. 17, 1888. *City of Albany v. Waterkill Turnpike & R. Co.* Opinion by Danforth, J.; Earl and Peckham, JJ., not voting.

**NUISANCE—BY CORPORATION—RIGHT OF STOCKHOLDER TO COMPLAIN—ACQUIESCENCE.**—(1) A stockholder and director in a corporation may maintain an action to abate a mill-pond, alleged to be a nuisance, maintained by the corporation. (2) The plaintiff entered no protest against the erection of buildings nor gave notice that the use of the pond would prove injurious to him, and the defendant did not rely on his silence. Plaintiff also waited some time before bringing his action, doing nothing beyond complaining that the drawing down of the water in the pond was injurious. *Held*, not such an acquiescence as to bar the relief sought. All that can be said is that he did not make objection or protest against their erection, and that he did not give notice that the operation of the dam, for the uses of the factory, would prove detrimental or injurious to him. But what is still more important, it does not appear that the defendants took any action whatever in reliance upon the silence or acquiescence of the plaintiff. In *Radenhurst v. Coate*, 6 Grant Ch. 139, a similar allegation of acquiescence was made against the plaintiff, who sought to restrain a nuisance caused by the business of a soap and candle manufactory carried on near the plaintiff's dwelling-house; and in that case *Spragge, V. C.*, said: "Putting it most strongly for the defendant that the evidence will warrant, there was an acquiescence for several years in the defendant's carrying on his business as he did carry it on, but nothing more. It is a plain common-law right to have the free use of the air, in its natural, unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar that right within a shorter period there must be such encouragement or other act by the party afterward complaining as to make it a fraud in him to object." These observations are quite applicable to this case. There is no finding here and no inference that the defendant ever assented to or acquiesced in the use of the pond in such a way as to produce the nuisance of which he now complains. Feb. 10, 1888. *Leonard v. Spencer*. Opinion by Earl, J.

**PARTNERSHIP—WHAT CONSTITUTES—USURY—AGREEMENT—CONSIDERATION.**—An agreement between A. and B. stipulated that A. should use B.'s name in the firm of A. & Co., bankers; that B. was not to participate in profits or losses, but to have for his share of the profits 10 per cent per annum on all deposits he might make with said firm; and that A. was to keep B. harmless from all losses, etc. *Held*, that A. & B. were partners. Under such agreement B. was not entitled to 10 per cent per annum on his deposits, unless the profits were enough to pay it, and the trial court properly refused a request to charge on the question of usury. The agreement was not void for want of consideration moving from B., as A.'s undertaking to save him harmless from losses is a contract of indemnity, and not a covenant preventing B.'s liability to creditors of the firm. Jan. 17, 1888. *Clift v. Barrow*. Opinion by Peckham, J.

**RAILROADS—HORSE RAILROADS—INJURIES TO PASSENGERS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY—REVIEW ON APPEAL.**—(1) Plaintiff brought an action against a street railway company for injuries sustained by being thrown from defendant's "down car," on which he was a passenger, between the tracks and against defendant's "up car," then passing, and alleged in his complaint negligence

on the part of defendant's servants in charge of both cars. The facts proven did not show any negligence on the part of the driver of the "up car," but the court nevertheless, over defendant's objection, charged the jury with respect to his conduct. *Held*, prejudicial error, and as the court cannot say upon which alternative the verdict was founded, the negligent conduct of the servants in charge of each car being alleged and charged upon, it must be set aside. (2) When the evidence is conflicting as to the facts, showing negligence of the carrier, as also the contributory negligence of the passenger, both questions are properly submitted to the jury, and the appellate court is bound by its findings. Feb. 7, 1888. *Black v. Brooklyn City R. Co.* Opinion by Danforth, J.

**SHIP AND SHIPPING—CHARTER-PARTY—CONSTRUCTION OF CONTRACT.**—A clause in a charter-party, "Charterers to approve the ventilation," does not leave the subject of ventilation of a ship to the absolute, unreasonable and arbitrary decision of the charterer, but it becomes a question for the jury to determine from the evidence, whether the ship is properly ventilated for the purposes for which it was chartered, and a failure to submit such question to the jury, where evidence is offered tending to show proper ventilation, is error. The doctrine laid down in the charge is not in accord with that which has been announced by this court in several cases, the latest in February, 1886. See *Boiler Co. v. Garden*, 101 N. Y. 387, and cases cited in the opinion of Danforth, J.; also *Nolan v. Whitney*, 88 id. 648; *Bank v. Mayor*, etc., 63 id. 336. Feb. 7, 1888. *Russell v. Allerton*. Opinion by Peckham, J.

**TENANCY IN COMMON—CONTRACT—CONSTRUCTION—SALE—CONDEMNATION BY RAILROAD—CONSIDERATION—SEVERAL CONTRACT—BREACH—RIGHT TO SUB-EXTENT OF RECOVERY.**—(1) Three sons made a deed to their mother, of a lot which mother and sons had previously owned as tenants in common, and she thereupon leased the premises to two of the sons for a cash rent, at the same time executing an agreement, which after reciting the execution of the deed and lease, provided that should said lease become terminated before the expiration of the ten years therein named, by the sale of the premises, or if said premises be at any time sold, the mother would account for and pay over to the sons, each one-fourth of all moneys received from the purchase price of said lands and premises over and above \$4,500. *Held*, that the condemnation of a part of the premises by a railroad company, in the exercise of the right of eminent domain, operated as a sale of the land within the meaning of the contract, and that the mother was compelled to account to the sons, although the condemnation was made after the expiration of the lease. (2) The contract was not void for want of consideration, although she may have originally paid the entire purchase price for the premises. (3) The covenant was not joint, but several, and each son may maintain a separate action for his share. (4) The mother, after notice of intention by the railroad company to condemn a part of the land, leased that portion to another son, who placed improvements thereon. *Held*, that the three sons were each entitled to recover from the mother one-fourth of the excess over the cost of the improvements, of the sum awarded the lessee in the condemnation proceedings, in addition to one-fourth of the excess over \$4,250, of the sum awarded and paid to her. Jan. 17, 1888. *Vandermulen v. Vandermulen*; *Doelman v. Same*. Opinion by Andrews, J.

**VENDOR AND VENDEE—DEFECT OF TITLE—ACTION TO RECOVER PURCHASE-MONEY.**—The title offered to the plaintiff came to the defendant through the will of Gideon Tucker, and under proceedings in partition instituted by George W. Tucker as trustee, but to

which action certain persons entitled to the property in remainder were not made parties. It is clear that an estate in trust, mainly for the benefit of the *cestui que trustent*, cannot be set up against them. As to them, the principle contained in the maxim *res inter alios acta nemini deest* applies, and the court below properly held that they would not be concluded by the partition judgments. *Watson v. City of Kingston*, 43 Hun, 368. It follows therefore that the purchaser should not be required to complete his bargain, for there was left at least a reasonable chance that the person so interested might raise a question against his title. *Park v. Armstrong*, 45 N. Y. 248; *Jordan v. Poillon*, 77 id. 518; *Jenkins v. Fahey*, 77 id. 355. He was therefore entitled to recover back the money paid in anticipation of performance by the defendant of the contract to convey. Jan. 17, 1888. *Moore v. Appleby*. Opinion by Danforth, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**DEDICATION—OF STREETS—RIPARIAN RIGHTS—FILLED-IN LAND—RIGHT TO IMPROVE LAND LYING BELOW HIGH-WATER MARK—STATUTES—CONSTRUCTION—CONSTITUTIONAL LAW—TITLES OF LANDS.**—(1) Certain streets having been dedicated as terminating at the Hudson river, the river bed in front of these streets was, by legislative authority, filled in below high-water mark, and the filled-in land, described by metes and bounds, was deeded by the State for a valuable consideration to defendants, who had also succeeded to the title of the original dedicator of the streets. *Held*, that the title to the filled-in land, being derived directly from the State by an absolute deed, was not affected by the dedication, and that the streets terminated at the former high-water mark. (2) An act of New Jersey of March 31, 1869 (Laws of New Jersey, 1869, chap. 386, entitled "An act to enable the united companies to improve lands under water at Kill von Kull and other places," authorizing said companies to reclaim and erect wharves and other improvements in front of any lands owned by them adjoining Kill von Kull, or any other tide-waters of the State, and when so reclaimed and improved, to hold the same as owners thereof, and providing that said companies should file with the Secretary of State a map and description of the lands under water in front of the uplands referred to in the law, applies not only to the water front of land owned by the companies above the original high-water mark, but also to land owned by them adjoining tide-water lying below such high-water mark, which had been previously filled in and reclaimed by them pursuant to legislative authority. (3) Said act does not contravene the Constitution of New Jersey, art. 4, § 7, par. 4, which provides that every law shall embrace but one subject, which shall be embraced in its title, the object of the law being to confirm the companies' title to the lands described and all its provisions being pertinent thereto. Feb. 20, 1888. *City of Hoboken v. Pennsylvania R. Co.* Opinion by Matthews, J.

**PARTNERSHIP—ESTOPPEL OF PARTNER TO IMPEACH FIRM CONTRACT.**—Where a claim is assigned to a third party by a firm which afterward becomes bankrupt, and the assignee in bankruptcy assigns the claim to a member of the firm, such member is estopped from saying that the first assignment is void on the ground that it was in fraud of the firm's creditors, Feb. 20, 1888. *Crawford v. Halsey*. Opinion by Waite, C. J.

**RAILROAD COMPANIES—MUNICIPAL AID BONDS—SUBROGATION—WHEN ALLOWED—VOLUNTEER.**—(1) The town of Middleport having, in pursuance of a

statute of Illinois, voted an appropriation to the Chicago, Danville & Vincennes Railroad Company, to be raised by a tax on the property of the inhabitants of the town, issued bonds, payable with interest to bearer, for a sum large enough to include interest and the discount for which they could be sold and delivered them to the railroad company, and they were accepted by that company, and sold and delivered to plaintiff. *Held*, that the purchase of these bonds by plaintiff was no payment of the appropriation voted by the town to the railroad company. (2) That the bonds having been held to be void in a suit between the plaintiff and the town, this did not operate as a subrogation of the plaintiff to the right of the company, if any such existed, to enforce the collection of the appropriation voted by the town. (3) The doctrine of subrogation in equity requires (1) that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. The doctrine of subrogation is derived from the civil law, and "it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another. \* \* \* It takes place for the benefit of a person, who being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one, who being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another. *Sheld. Subr.*, §§ 2, 3. In section 240 it is said: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." This is sustained by a reference to the cases of *Shinn v. Budd*, 14 N. J. Eq. 234; *Sandford v. McLean*, 3 Paige, 117; *Hoover v. Epler*, 52 Penn. St. 522. Chancellor Walworth, in the case of *Sandford v. McLean*, 3 Paige, 122, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished." In the case *Shinn v. Budd*, 14 N. J. Eq. 234, the New Jersey chancellor said: "Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes

place only for his benefit, who being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession." The latest case upon this subject is one from the appellate court of the State of Illinois. *Suppiger v. Garrels*, 20 Bradw. 625. Feb. 6, 1888. *Aetna Life Ins. Co. of Hartford v. Town of Middleport*. Opinion by Miller, J.

### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**MUNICIPAL CORPORATIONS—REGULATION OF SIDEWALKS—SIGNS AND PLACARDS.**—(1) An ordinance of a city provided that no person should place or carry on any sidewalk any show-board, placard or sign for the purpose of there displaying the same. The defendant walked upon a sidewalk in said city, having over his shoulders a piece of oilcloth, which he wore like a vest or coat, on which was printed the following: "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order, L. P. U." Held, that this was a placard or sign, and that bearing it upon his person was carrying it for the purpose of displaying it, and was a violation of the ordinance, the natural tendency of the act of the defendant being to collect a crowd and create disorder. (2) The defendant also contends that the ordinance is unreasonable, and therefore void. The city is authorized "to make all such salutary and needful by-laws" as towns have power to make and establish. Stat. 1850, ch. 184, § 20. Towns have power to "make such necessary orders and by-laws, not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof, as they may judge most conducive to the welfare of the town." Gen. Stat., ch. 18, § 11; Pub. Stat., ch. 27, § 15. The purpose of the ordinance in question is to prevent placing of show-boards and signs upon the sidewalks so as to obstruct them, and also to prevent the carrying of placards and signs for the purpose of displaying them, of which the tendency and effect might be to collect crowds, and thus to interfere with the use of the sidewalks by the public, and lead to disorder. We cannot say that such a provision, applicable to the crowded streets of a populous city, is unreasonable. Mass. Sup. Jud. Ct., Jan. 2, 1888. *Commonwealth v. McCafferty*. Opinion by Morton, C. J.

**SUNDAY—PROHIBITION OF LABOR—BAKERIES.**—(1) Public Statutes of Massachusetts, ch. 96, § 2, forbidding the keeping open one's shop on the Lord's day, or doing "any manner of labor, business or work, except works of necessity or charity," as amended by Statutes of 1886, ch. 82, which provided that "this section shall not apply to sales by bakers, between the hours \* \* \*, of bread and other articles of food usually dealt in by them," does not include in the exception of the amendment all persons who deal in the products of bakeries. (2) A person who keeps a shop for the purpose of selling groceries, fancy articles, bread, pastry and milk, but who does not make, or cause to be made, the bread and pastry which he sells, but buys it from time to time from others, is not a baker in any sense; and the fact that he has a small stove in the rear of his shop, in which his wife sometimes bakes a few cookies and ginger-snaps, which he places in the show-case, and sells with the bread and pastry, is not of such importance as to warrant the jury in finding that he is a baker. A baker is one whose occupation is to bake bread and other articles of food. The statute which we are considering may be presumed to have been founded upon the desirabil-

ity and propriety of permitting freshly cooked food to be obtained on the Lord's day, as well from the shop of the manufacturer as from the kitchen of the householder. That the interval may be short between the preparation of the food and the appearance of it on the table of the consumer, the baker is permitted to do his work, and deliver his viands, on the Lord's day. But this reason does not apply to sales of provisions which do not require preparation by the dealer for the immediate use of the purchaser. We cannot believe that the Legislature intended to include in the exception of the amendment all persons who deal in the products of bakeries. Such a construction of the statute would allow a large proportion of the grocers and provision dealers of the Commonwealth to open their shops every Lord's day. Mass. Sup. Jud. Ct., Jan. 3, 1888. *Commonwealth v. Crowley*. Opinion by Knowlton, J.

### CORRESPONDENCE.

**SERVICE OF PROCESS ON INFANTS ABOVE FOURTEEN.**  
*Editor of the Albany Law Journal:*

A decision of the General Term of the Supreme Court, First Department, made in January last, will render many titles to real estate defective.

The decision referred to is in the case of *Moulton v. Moulton*, and is to the effect that the court acquires no jurisdiction over an infant defendant of the age of fourteen years and upward, unless a copy of the summons in the action (in addition, it would seem, to service of the summons on the infant) be delivered in behalf of the infant defendant to a person previously designated by order of the court to receive such service. The decision rests upon the provision of section 427 of the Code of Civil Procedure.

Section 428 of the Code provides how personal service of a summons shall be made upon a natural person within the State. It is divided into four subdivisions. The first, second and third relate to an infant under fourteen years, to an incompetent person, and to a sheriff respectively. Subdivision 4 is as follows: "In any other case to the defendant in person."

It seems to have been understood by conveyancers generally that service of the summons upon an infant over the age of fourteen years was sufficient to give the court jurisdiction as subdivision 4 above referred to covers "any other case."

There are many titles to valuable real estate in this city derived through partition and foreclosure suits in which there are infant defendants over the age of fourteen years, where the summons has been served on such infant defendants only. All such titles are now defective, and legislative aid may become necessary in order to make them marketable.

It seems also to have been understood that section 427, above referred to, would have no effect unless the court in its discretion, with or without application therefor, made an order requiring a copy of the summons to be delivered, in behalf of the infant defendant, to a person designated in the order. The case of *Moulton v. Moulton* seems to establish the rule that the attention of the court should be called to the fact that there was an infant defendant over fourteen years, so that an order could be made dispensing with the delivery of a copy of the summons before the service, under subdivision 4 of section 428, would become effectual to give the court jurisdiction over the infant.

Can it be that this was the intention of the codifiers?

NEW YORK, March 21, 1888.

J.

**STATUTE OF LIMITATIONS—CODE OF CIV. PROC., § 375.**  
*Editor of the Albany Law Journal:*

Recently I had occasion to examine section 375, Code Civ. Proc., which extends the time in which to

commence an action by excluding the period of certain disabilities. I confess I was at first much confused as to the period or the manner in which the limitation would be prolonged. The case of *Howell v. Leavitt*, 96 N. Y. 617, is directly in point, and though clear enough to decide the case in issue, it does not deserve credit for perspicuity in laying down the general rule. Thus it says, on page 623: "Any unexpired part of the period of time fixed by the general rule of limitation belongs to the party entitled to sue, after the disability has ended, and so much added time as will not extend the original limit beyond ten years more after the end of the disability."

If the meaning of this is clear to you at first reading then I must be obtuse. But from a study of this and other cases, I understand the general rule to be as embodied in the following, counting all time from the date the cause of action arises:

First. A party always has twenty years in which to sue.

Second. A party never has less than ten years plus the period of disability.

Third. If said period is equal to or less than ten years, he has twenty years plus said period.

Fourth. If said period exceeds ten years, he has twenty years plus such excess.

Yours truly,

ONEONTA, March 21, 1888.

ALVA SEYBOLT.

#### STATE BAR ASSOCIATION — ELEVENTH ANNUAL REPORT.

THE Eleventh Annual Report of the New York State Bar Association is just published, and will soon be sent to members by mail.

It contains useful and interesting matter to all practicing lawyers, especially to members of the New York State Bar.

The subject of text-books and reports, and their accumulation; of extra allowance, its evils and anomalies; codification; of counsel to the Legislature; of reform in the organization of courts; of the evils injuring the profession, are all ably and practicably considered in the comprehensive address of President Cooke.

"The Independence and Integrity of the Bar," the subject of Daniel Dougherty's magnificent oration, which was listened to with such intense interest, and which has elicited general comment and commendation from the press in all parts of the nation, forms a very important part of the volume.

The learned and valuable paper upon "Parliamentary Representation in Great Britain," by the Rt. Hon. John W. Mellor, Q. C., read by Mr. Elliott F. Shepard, is an exceedingly rich contribution to the learning of the Association, to the profession, and to Legislators, while it gives a fund of information, instructive and useful, to all American citizens.

The paper on "The Contest Between the Judiciary and Legislature of Rhode Island," by Hon. John Winslow, commends itself to the judiciary, to the Legislature and to all thoughtful readers. It is a scholarly and erudite description of a collision between co-ordinate branches of a popular government, which Hamilton, Madison and Jay pointed out as among the dangers to which the nation would be exposed — the collisions between the different branches of the government. Mr. Winslow carefully and learnedly considers this subject and the cases touching it in the Federal courts, showing that the first constitutional question which Chief Justice Marshall had to consider was the same that troubled the Rhode Island Legislature and Judiciary — the inquiry as to the duty of the court to set aside an act of Congress because of its repugnance to the Federal

Constitution. The question arose in the well-known case of *Marbury v. Madison*, 1 Cranch, 158. It occurred again in the case of *McCulloch v. The State of Maryland*, and other cases, all of which, as has been said, Mr. Winslow reviews in a manner that renders the subject of his paper admirably adapted to the present time. The facts related in the paper are exceedingly interesting, and will largely repay a careful reading.

The proceedings on the death of Hon. Charles A. Rapallo, a member of the Association, on the death of Aaron J. Vanderpoel, Charles Hughes, Samuel L. Selden, also members of the Association, are very impressive, and the discussion on important subjects touching the profession by the members of the Association are interesting.

There are other important departments in this volume not contained in any former editions, which, it is believed, will add to its usefulness.

From our relation to the work, it would, perhaps, be unbecoming for us to refer to the manner in which it has been edited and prepared for the public. If our efforts to improve it shall be regarded in any degree successful, we shall be highly gratified. If its errors are, as we trust they will be, generously overlooked, we shall have much reason for self-congratulation.

L. B. PROCTOR.

Secretary.

NOTE.—Unavoidable circumstances have caused a slight delay in sending our report to members of the Association.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Friday, March 23, 1888:

Judgment affirmed with costs—Alfred Cooke, respondent, v. Robert A. Appleton, Jr., and others, appellants.—Judgment affirmed with costs—Northampton National Bank, respondent, v. Lucien H. Niles, appellant.—Judgment affirmed with costs—Rosel Barnes, appellant, v. Dewey L. Barnes, respondent.—Dismissed under subdivision 3 of section 191 of the Code of Civil Procedure for want of proper certificate with costs—John Lowery, respondent, v. John O. Shenar and another.—Judgment affirmed with costs—Richard H. Lee, respondent, v. Eugene A. Homer, appellant.—Judgment affirmed with costs—Mary Dallamari, respondent, v. Joseph H. Wilcox, appellant.

Ordered: That this court take a recess from this date to Monday, the 9th day of April, 1888, at 10 o'clock A. M., at the capitol, in the city of Albany, then to proceed with the call of the present calendar.

Motion days will be April 10th and 24th.

#### NOTES.

Chief Justice Waite had a very pleasant vein of humor. He once spoke to us, in a letter, of the most gigantic of his associates as "my big brother." In respect to the Texas Court of Appeals' criticism of the decision of the United States Supreme Court in the *Drummer's* case, he wrote: "The Texas decision carries me back to my early days on the court, when a register in bankruptcy declined to follow one of my circuit opinions. As years have gone by, I have been led to suspect that others thought the Register was right." He also had a good opinion of this journal. He wrote us a few months ago: "I read the ALBANY LAW JOURNAL every chance I get, and always with interest. It is one of my regular occupations to go down into the Law Library at the end of a term, and look over all the numbers of the writer. I am sure to find profit in it."

# The Albany Law Journal.

ALBANY, APRIL 7, 1888.

## CURRENT TOPICS.

WE are very sorry to see Mr. "Easychair" Curtis casting in his lot with the blackguard editors. He says in *Harper's Magazine* for April: "In its comments upon trials and judicial decisions undoubtedly the newspaper sometimes abuses its opportunities and its power. But the abuses and wrongs in the administration of law which it prevents are infinitely greater than those of which it is guilty. \* \* \* Mr. Dougherty says that the press of New York, by its conduct in the Sharp trial, inflicted 'the first great blow ever struck in America at the pure administration of justice.' What the press did in the Sharp trial was to keep clearly before the public mind the actual facts, and to insist that a man undeniably guilty should not go unwhipped of justice by any trick or mere technicality of the law. The chair repeats what it said in February, that the forms of law must be carefully observed, and that judges are not to be denounced by observing them. But it said also, and repeats, that when strict observance of them tends to a plain miscarriage of justice, it is high time to revise the forms. Now the course of the press fixed this very truth in the public mind. There was no reasonable doubt or question of Sharp's guilt. Nobody, so far as we know, held that he was not guilty. The press was in no sense whatever hounding an innocent man or imperilling a man whose guilt was doubtful. It was insisting only that a guilty man should not escape by stretching the forms of legal procedure. The chair does not say that they were stretched, but the course of the press made stretching less probable. That in some instances it assailed judges unreasonably is undeniable. But under the circumstances it was almost a pardonable excess. \* \* \* The history of the Sharp case puts the legal profession upon the defense much more than the press. The judges indeed who insisted upon an honest observance of the forms of judicial procedure should have been resolutely sustained. But when it was known that money had corrupted aldermen, and apparently corrupted lawyers, and would leave no other opportunity of corruption untried, it was hardly a great blow struck at the pure administration of justice to take good care that juries and judges should know that they stood in the full light of public scrutiny. If the task was overdone and personal character was unjustly assailed, the abuse was less than the prostitution of legal skill and the possible perversion of judicial forms to a miscarriage of justice. The general result of the course of the press in the Sharp case was undoubtedly a great public service. It disclosed abuses in the legal profession which will be less frequent hereafter.

It taught lawyers that there is another account besides their bank account which must be considered in the practice of their profession. It taught men who believe — not certainly without reason — that they can buy legislation, and franchises, and lawyers, and juries, that there is a press which cannot be bought, and which will turn the light of public contempt upon the names and characters of briber and bribed. It taught the public that the forms of judicial procedure may be skillfully perverted to promote crime by facilitating the escape of criminals. \* \* \* The press doubtless is a good deal of a sinner. But a high-minded and accomplished lawyer might wisely remind his brethren of the abuses of the legal profession which occasion what may seem to him the abuses of the newspapers. The public conviction of the general uprightness of the courts, and the quick instinct of the English-speaking races to defend the independence of the judiciary, may be trusted to restrain and condemn unjust assaults upon them. But when that public conviction and instinct are not outraged by assaults, but lend an ear inclined to believe — the time has come not to denounce the press, but to scrutinize the profession." The amount of all this is that everybody knows that Sharp was guilty; therefore he ought not to enjoy the ordinary presumption of innocence, nor the ordinary forms of a fair trial; the newspapers ought to be commended for urging this idea upon the community, the judges and the jury, pending the trial; and ought not to be censured for false, base, and irrelevant imputations upon the characters of the judges who sat in review. We are very sorry to observe Mr. Curtis writing such poor stuff as this. He would much better restrict his graceful and pleasing pen to his ordinary Chloe and Daphne business of the *Addisonian* period. We go as far as Mr. Curtis can go in commending the press for dragging great malefactors to light, but the press has no right to browbeat, threaten and defame the officers of justice. The *World*, for example, did a great public service in tracking the murderers of the Maine cashier and restoring the good name of that cruelly defamed and faithful officer. But suppose the *World*, during the trial, had followed its daily progress, and threatened the jury with public odium if they should dare to acquit, and after the trial had libelled judges who had granted stays of proceedings, prying into their private matters and history, and accusing them of being corruptly influenced? Would Mr. Curtis defend that too? Probably not, and yet he might as well as to defend this, for although the early course of the newspapers in the one case was as laudable as in the other, yet the subsequent conduct in the one could have been no worse than in the other. But what has Mr. Curtis to say to the result? The highest court of the State have declared that Sharp's trial was grossly unfair in every point complained of, and every lawyer who has examined the case knows that there was not enough evidence to hang a dog on. A more pitiful and preposterous break-down of justice



was never known. Now what great public service has the press wrought in seeking to sustain this conviction, so erroneous and unjust? "The forms of legal procedure" were not "stretched" except in procuring the conviction. They did not need to be "stretched" to free Sharp on appeal. His discharge was as inevitable as the sitting of the court, and every lawyer knew it, but a certain legal reputation had to be protected for election purposes, until election proved reprobation. The plain fact is that certain editors ought to have been put in jail for gross contempt of court, but there is not much use in trying to keep some newspaper men decent when they have axes to grind. It is probably better to treat the writers with contempt than to punish them for contempt. But we hope not again to see Mr. Curtis, who is our beau ideal of an honest and intelligent journalist, lending the aid of his admired pen and his immaculate reputation to the defense of the blackguards of the New York city press. Rural blackguards please copy.

A respected Canada brother writes us: "An effort is about to be made to abolish a restriction which at present exists in the Province of Quebec, preventing parties to a suit from testifying on their own behalf. I should be pleased to know your opinion as to the advisability of the proposed change, and also your estimate of the views of the profession generally on the subject." We should as soon have expected to have our correspondent writing for our opinion as to the advisability of using ether to allay pain in surgical operations, or whether there is any thing of merit in the science of geology, or whether judges can well sit without wigs — or to put it as strongly as possible — whether we are in favor of codification! We did not know that this question was any longer asked. It has been settled in this State for thirty years, and we do not suppose that a single voice would be heard in our profession in favor of a return to the old practice. Possibly we are misled. Possibly there may here and there be a fossil who believes in total depravity, and that the modern rule tends to increase perjury — some ante-diluvian who opposed the Code of Procedure, and who has years ago shed his intellectual knee-pans. But we doubt that even Mr. Evarts, Mr. Coudert or Judge Noah Davis, who think the Code of Procedure a "calamity," would be so hardy as to contend that if they had lawsuits of their own they ought to be excluded as witnesses because of their innate and heaven-implanted tendency toward perjury when they have personal interests at stake. This particular matter was the pet reform of our youth, in favor of which we did our very first legal writing. We have watched it here and in other communities, and believe we are in no danger of contradiction in saying that wherever the old rule has been abolished it has given universal satisfaction, and that no considerable number would favor a return to it. The abrogation of the silly old doctrine has shortened

trials, elicited truth, and promoted justice. Let not the Canadians any longer cherish the notion that it is wise to exclude as witnesses the only two persons on earth who know all about the matter in controversy.

Some one sends us three bills introduced in the Assembly by Mr. Herrmann. One providing that an instrument recorded for more than two years shall not be impeached or impaired by reason of any defect in the acknowledgment or proof, and may be read in evidence without further proof. We see no objection to this. It may be wise to enact a short statute of limitations for the repose of such acts. Also a bill to amend section three hundred and three of the Code of Civil Procedure, relating to the production of books and papers in actions, providing that the court may compel a party to give the opposite party or his agent an inspection and permission to take drawings or photographs of any chattel in his possession or control, the subject of or involved in the action. This seems well enough, guarded by the judicial discretion. But does Mr. Herrmann think that "chattel" includes books and papers? It does literally, but we should prefer to say "books, or papers, or other chattels of any kind whatsoever," if that is what he wants. Also a bill to restrict dower to lands of which the husband died seized. This we heartily approve of, inasmuch as we cannot abolish dower and substitute a more certain, convenient, and effectual provision for the wife's security. But we doubt that Mr. Herrmann can bring this about. Dower is a sort of sacred ark — clumsy but venerable — against which modern legislators are not apt to allow a hand to be raised.

A reader has suggested that we ought to include Whittington among the great men who loved cats. We think not. That cat story is a myth. But we ought to have included Sir Isaac Newton, who loved dogs and cats, and Sam Johnson, who used to buy oysters for "Hodge, his cat." Our own Judge Earl, in *Mullaly v. People*, 86 N. Y. 365, holding that a dog is "personal property," the subject of larceny, observed: "The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature, and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange, and thus probably changed the current of modern history (3 Motley's Dutch Republic, 398); and the faithful St. Bernards, which after a storm has swept over the crests and sides of the Alps start out in search of lost travellers, the claim that the nature of a dog is essentially base and that he should be left a prey to every vagabond that chooses to steal him, will not now receive ready assent. In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, ex-

exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential. \* \* \* Those ancient law-givers thought it not unfit that a person should die for stealing a tame hawk or falcon. \* \* \* Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service," etc. We are grieved to notice that Folger, C. J., dissented. He loved horses, but we believe he did not own a dog. A North Carolina correspondent writes: "Apropos the Ohio dog case, and your own classical 'doggerel,' the Supreme Court of this State held in the case of *State v. Holder*, 81 N. C. 527; S. C., 81 Am. Rep. 517, that a dog was not property at common law, and we had no statute making it such, hence an indictment for the larceny of a dog would not lie. But we have a statute, passed since this decision was handed down, which declares a dog property when listed by his owner for taxation." Among the admirers of our dog verses is Mr. Barker, of Maine.

#### NOTES OF CASES.

**I**N *Hotel Association of Omaha v. Walters*, Nebraska Supreme Court, Feb. 8, 1888, the owner of a hotel had constructed an area way below the sidewalk about twelve feet deep, for an elevator to lower baggage to the basement of the hotel, and as a guard, had placed a rail of gas-pipe about seven feet six inches in length by from two to three inches in diameter in iron posts about two feet above the edge of the sidewalk, so arranged as to be taken out when baggage was to be raised or lowered by the elevator. The fastenings at one end of the rail had become loose and unsafe, of which the proprietor had notice. One W., not a guest, but a patron of the hotel saloon, on leaving the same, in conversation with a friend leaned against the rail in question, which gave way and precipitated him partly into the area way below, causing him severe injuries. Held, that the hotel company was liable therefor. The court said: "In *Congreve v. Morgan*, 18 N. Y. 79, an action was brought to recover damages for personal injuries sustained by a young child by reason of being precipitated into an area under the sidewalk in front of the defendant's premises. The plaintiff lived with his father in the second story of the building, over the store, and the plaintiff's father, by permission of the defendant, had placed some of his goods in the area, but used it only temporarily, and paid no rent therefor. The defendant was the owner of the building, but did not occupy any portion of it. The area extended under the street, and was covered by flag-stone. The flag-stone was set by a contractor, who contracted to do all the work in a workman-like and substantial manner, and to furnish good and sufficient materials therefor. A verdict was rendered in favor of the plaintiff in the court below, and the question came before the

Court of Appeals, where Strong, J., delivered an opinion as follows: 'The verdict of the jury involves the finding that the stone covering the area was unsuitable and unsafe for that purpose, wherefore it broke, and the plaintiff received the injury in question. The area was under the surface of the public street, and was maintained for the benefit of the property of the defendant, and the stone was placed over it under contract with the defendant for the completion of the defendant's building in pursuance of the contract. No license from the city for the area was proved. It certainly is just that persons, who without special authority make or continue a covered excavation in a public street or highway for a private purpose should be responsible for all injuries to individuals resulting from the street or highway being thereby unsafe for its appropriate use, there being no negligence by the parties injured, and I entertain no doubt that a liability to that extent is imposed upon them by law. \* \* \* The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it, and whoever, without special authority, materially obstructs it, or renders it hazardous by doing any thing upon, above or below the surface, is guilty of a nuisance, and as in all other cases of a public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful. It is as much a wrong to impair the safety of a street by undermining it as by placing objects upon it. There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the lands within the limits of the easement is in a municipal corporation or in him by whom the act complained of was done. In either case the act of injuring the easement is illegal.' See also *Congreve v. Morgan*, 18 N. Y. 84; *Dygart v. Schenck*, 23 Wend. 446. And even where there is authority from the city to make the excavation, it is to be done with proper precautions to prevent accidents to travellers. *Robbins v. Chicago*, 4 Wall. 657-679. Where an excavation is made so near a public thoroughfare that a person passing along may be precipitated into it, it is the duty of the occupant of the premises to provide suitable guards to prevent such injuries. *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Bishop v. Trustees*, 1 El. & El. 697; *Hardcastle v. Railway Co.*, 4 Hurl. & N. 67; *Wilkinson v. Fairrie*, 32 Law J. Exch. 73; *Brinks v. Railroad Co.*, 22 Law J. Q. B. 26; *Hounsell v. Smyth*, 29 Law J. C. P. 203; *Wettor v. Dunk*, 4 Fost. & F. 298; *Indermaur v. Dames*, L. R., 1 C. P. 274. And this rule is particularly applicable near a large hotel, thronged with travellers, and on a public street like Thirteenth street. The proprietors were well aware that persons frequenting the hotel were in the habit of leaning against or sitting on the rail in question, and they were guilty of gross negligence in leaving it thus insecure. Considerable objection has been made that Walters was

not a patron of the hotel, and therefore had no right upon the grounds, and for that reason cannot recover. It is sufficient to say that he was a patron of at least one department of the hotel — the saloon — and therefore the objections of the plaintiff in error do not apply. But even had he been a stranger it is probable that upon the facts proved the plaintiff below would have been entitled to recover." See notes, 26 Am. Rep. 562; 34 id. 233; *Haughey v. Hart*, 62 Iowa, 96; S. C., 49 Am. Rep. 138; *Bransom's Admr. v. Laboot*, 81 Ky. 638; S. C., 50 Am. Rep. 193; *Croogan v. Schield*, 53 Conn. 186; S. C., 55 Am. Rep. 88; *Calder v. Smalley*, 66 Iowa, 219; S. C., 55 Am. Rep. 270; *Schilling v. Abernethy*, 112 Penn. St. 437; S. C., 56 Am. Rep. 320.

In *McCormack v. Perry*, 47 Hun, —, upon the trial of this action, brought to recover damages for a malicious prosecution of the plaintiff upon a charge made by the defendant that the plaintiff had opened a sealed letter wilfully and without authority, contrary to the provisions of section 642 of the Penal Code, it appeared that the plaintiff indorsed a draft owned by him in blank and placed the same in an ordinary envelope, and after sealing it wrote on the face of the envelope the following words: "Captain McCormack (the plaintiff), take this to the First National Bank and bring me \$400, and half a dozen blank checks, and oblige W. N. Perry," and delivered it to another person, who at his request delivered it to plaintiff on board the steamboat, who on reading the directions on the envelope took out the draft and in the presence of others read it, and then replaced it and put the envelope in his pocket. *Held*, that the plaintiff was not guilty of the offense of violating either of the provisions of section 642 of the Penal Code, as charged by the defendant. That the package opened by the plaintiff was not, within the sense and meaning of the statute, a sealed letter. The court said: "On the trial it was held, as matter of law, that the plaintiff was not guilty of the offense of violating either of the provisions of section 642 of the Penal Code, as charged by the defendant in the criminal proceedings initiated by him before the committing magistrate. To this the defendant excepted. This ruling must have influenced the jury in reaching the conclusion that the defendant did not have probable cause for believing that the plaintiff was guilty of the offense charged in the criminal proceedings. The facts upon which the ruling was made were undisputed, and the question became one of law for the court to determine. It seems very plain that the package opened by the plaintiff was not, within the sense and meaning of the statute, a sealed letter. The only writing was on the outside of the sealed envelope, and the contents of the same were in the nature of instructions from the defendant to the plaintiff directing him what to do with the contents of the envelope. If the writing may be regarded as instructions from the defendant to the bank, with the intention that

it should follow the same in the use to be made by it of the draft, then it was an open and unsealed letter, and does not come within either the letter or spirit of the statute. Independent of the writing, the sealed envelope was nothing but a package containing a valuable piece of property. The case is quite the same as if the writing had been on a card attached to a pocketbook containing bank bills, or to a bag containing coin or bullion. The ruling was correct."

In *Knallakan v. Beck*, 47 Hun, 47, in an action to recover wages for services by the plaintiff as a carriage and sleigh maker, it was alleged in the complaint that by an agreement between the parties the plaintiff was to receive four dollars a week and board. The defendant claimed that by such agreement the plaintiff was to receive only two dollars a week and board. After evidence to sustain both these contentions, *held*, that evidence was admissible, on the part of the plaintiff, to prove the fair market value of such services at that place. The court said: "If the complaint had averred 'that the services were worth the agreed price' *Cornish v. Graff*, 36 Hun, 164, would be exactly in point. The complaint was framed in a justice's court, and must be liberally construed. It does aver that 'said balance of \$106 is justly due and owing plaintiff from defendant.' That allegation could not be true unless the agreement was as plaintiff claimed it to be. The trial judge in his ruling as well as in his charge received and dealt with the evidence of the value of plaintiff's services as bearing upon the probability of the truth of the plaintiff's position that the agreement was for four dollars per week, and not as defendant stated it, at two dollars per week. For such purposes *Cornish v. Graff*, *supra*, seems to be an authority, and *Sturgis v. Hendricks*, 51 N. Y. 635, seems also to be in point. When there is such a conflict of the parties as their evidence presented, it is said by Abbott's Trial Evidence, page 868, the usual price is competent as bearing upon the probable truth of the allegation or rate agreed. *Trimble v. Stillwell*, 4 E. Smith, 512, cited by appellant, does not aid him, as in that case the special contract was admitted by the pleadings, and the court therefore held the parties were confined to the contract price, and could not resort to evidence of the value of the labor."

#### CARRIERS OF GOODS—LIMITING LIABILITY FOR LOSS BY CONNECTING LINES.

SUPREME COURT OF TENNESSEE, FEBRUARY 12, 1888.

##### BLOCK V. MERCHANTS' DESPATCH TRANSP. CO.

A transportation company cannot relieve itself from liability for loss of goods accepted by it for transportation by a stipulation in the bill of lading that in case of loss the railroad shall be responsible in whose actual custody the goods are at the time of such happening, the railroad company being merely its agent.

**E**RROR to Circuit Court, Davidson county; Frank T. Reed, Judge.

*Rice & Bell*, for plaintiff in error.

*Smith & Allison*, for defendant in error.

CALDWELL, J. This action was brought in the Circuit Court of Davidson county by Block Bros. against the Merchants' Despatch Transportation Company as a common carrier, to recover the value of a certain case of merchandise. Verdict and judgment were for the plaintiffs, and the defendant has appealed in error. The goods were received by the defendant in the city of New York under contract to deliver to the plaintiffs at Clarksville, Tennessee, for a stipulated sum. They were transported to Louisville, Kentucky, over several lines of railroad, in a car belonging to the defendant, and at that point they were delivered to the Louisville & Nashville Railroad Company for transportation to point of destination. The goods were never delivered at Clarksville, but were lost by the Louisville & Nashville company in some manner, and at some time and place not shown. The shipment was made under the following receipt and bill of lading:

"NEW YORK, March 18, 1882.

"Rec'd from E. S. Taffray & Co., in apparent good order, the following package marked as in the margin, viz.: 282. Block Bros., Clarksville, Tenn. One case Mdse. Bill of lading from New York to Clarksville, of first-class goods; 96 cts. per 100 lbs. To be forwarded to Clarksville under the following conditions: It being expressly understood and agreed that in consideration of issuing this through bill of lading and guaranteeing a through rate the Merchants' Despatch Transportation Company reserves the right to forward said goods by any railroad line between point of shipment and destination. \* \* \* It is further stipulated and agreed that in case of any loss, detriment or damage done or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the happening thereof. \* \* \*

[Signed]

MCGEAGEN, Agent."

The contention of the defendant in the court below was that these stipulations in the bill of lading relieved it from liability for the loss of plaintiffs' goods; and the trial judge's charge with respect thereto is now assailed as erroneous. The court charged that the latter of these stipulations was "rendered void" by the former; that by the former reserving to the defendant "the right to forward said goods by any railroad line between point of shipment and destination," the defendant made such railroad line its agents, and that "the law, on grounds of public policy, would not allow it to stipulate exemption from liability for the consequences of the negligence of its agents or their failure to do their duty." This instruction properly treats the defendant as a common carrier. The duties which it undertakes and which it holds itself out to the public as willing to undertake and perform give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question. We cite a few of these cases: *Transportation Co. v. Cornforth*, 3 Colo. 280; S. C., 25 Am. Rep. 757; *Robinson v. Transp. Co.*, 45 Iowa, 470; *Stewart v. Transp. Co.*, 47 Id. 229; *Wilde v. Transp. Co.*, id. 247; *Bancroft v. Transp. Co.*, id. 262; *Transp. Co. v. Bolles*, 80 Ill. 473; *Transp. Co. v. Leysor*, 89 Ill. 43; *Transp. Co. v. Joesting*, id. 152. The writers say that dispatch companies are common carriers, and class them with express companies because of the many points of similarity in their business, and the fact that they alike generally use the vehicles of others in the transportation of

freight. No law is more familiar in England or America than that which binds the common carrier to safely deliver to the consignee goods intrusted to it for transportation, unless prevented from so doing by the act of God or public enemy. But in the last half of a century it has become equally well settled that the common-law liability of a common carrier may be limited in its extent by express contract for that purpose. This right of the carrier to limit its responsibility has been recognized by the Supreme Court of the United States since the decision by that court, in 1847, of the case of *Navigation Co. v. Bank*, 6 How. 244, and so far as we are informed it is now upheld in every State in the Union. To be valid however the limitation must in all cases be reasonable; and to be reasonable, it must not stipulate for exemption from liability for the consequences of the negligence of the carrier, its servants or agents. *Railroad Co. v. Lockwood*, 17 Wall. 357-384; *Coward v. Railroad Co.*, 16 Lea, 225; *Dillard v. Railroad Co.*, 2 id. 288; *Marr v. Telegraph Co.*, 1 Pottle, 529.

In the case before us the defendant insists that by the stipulation in the bill of lading it is relieved from responsibility for the loss of plaintiffs' goods. We have already seen that the defendant in the bill of lading first reserved to itself the right of selecting the particular line of railroad over which it should transport the goods, and left the shippers or owners no choice or discretion in that matter. This discretion the trial judge told the jury constituted such railroad lines, when selected, the agents of the defendant. Following this is the other stipulation that the company alone upon whose line the goods might be lost or injured should be liable therefor. This the trial judge told the jury was invalid because it exempted the defendant from liability for the negligence of those agents. If the first of these two propositions laid down by the trial judge be true, the other would be sure to follow: that is to say, if the railroad lines over which the goods were transported were the agents of the defendant, then its stipulation against its responsibility for the negligence of those agents would be invalid. For it has been seen that a common carrier cannot lawfully contract against the consequences of its own negligence, and upon familiar principles it can no more contract against the consequences of the negligence of its agents, because their negligence is in law its negligence.

The contract of shipment was made by the defendant in its own behalf for the whole route, and not on behalf of others or for a part of the route only. For a specified sum, to be paid to it for the whole service, the defendant promised through transportation from New York to Clarksville, receiving the goods in its own name at point of shipment and binding itself to deliver them at point of destination. It did not own or claim to own a single line of railroad, though several were to be used in the performance of its contract. It was compelled to rely upon others for the carriage of its freight, and for its own benefit and not for the benefit of the shippers or consignees, it reserved to itself the selection of the lines it would use; the reservation necessarily embracing the privilege on the part of the defendant making its own arrangements as to terms with such lines, and carrying with it the duty of paying them for their services. Such we regard as a proper interpretation of the bill of lading down to and including the first stipulation. It shows the railroad lines engaged in the transportation of the goods sued for to have acted for the defendant and justifies the instruction that those lines were in this litigation to be treated as the agents of the defendant. The facts disclosed in the proof before the jury are entirely in harmony with this interpretation of the bill of lading and justify the conclusion of law.

The goods were conveyed to Louisville in defendant's own car, and Louisville is by one of defendant's witnesses called the terminus of the line; but the manifest meaning of the witness and the truth of the matter is simply that defendant's car was transported to Louisville over railroad lines owned and operated by others with whom it had contracted, and that its car stopped at that point. At Louisville the defendant engaged the Louisville & Nashville Railroad Company to convey the goods thence to their destination to complete its contract for it. This engagement, as to others, the defendant made on its own behalf, upon its own responsibility, and in full recognition of its undertaking and duty to deliver the goods at Clarksville. The nature of this engagement and its appreciation of the import of this duty is best shown by the language of defendant's agent and witness. He says: "Defendant had to forward these goods as any other shipper, and it had to pay whatever the Louisville & Nashville Railroad Company would charge, even if it had been the entire amount received from the shippers."

Dispatch companies and express companies have, since the earliest years of their existence, endeavored to put themselves without the rules applicable to common carriers, and to shield themselves against responsibility for the acts and omissions of other carriers whose conveyances they habitually use in the performance of their own contracts. Their efforts in this direction have been uniformly unsuccessful, because regarded by the courts as contrary to public policy. "It has been attempted," says Mr. Lawson, "on the part of express, forwarding and dispatch companies to evade the responsibility of common carriers on the ground that they are not the owners of the vehicles employed in the transportation; but this pretense has not been permitted in the courts. The names which they assume are regarded as immaterial; the duties which they undertake being the criterion of their liability. They are therefore held to the responsibility of common carriers, both when they are and when they are not interested in the conveyances by which the goods are transported. If an express company engaged to transport goods sends them by a railroad company employed by it to perform the service, the railroad company becomes the agent of the express company, and the latter is liable to the consignor for its acts." Lawson Cont., § 233. Mr. Hutchinson, speaking on the same subject, says: "Because of this peculiarity in the employment of the means of conveyance afforded by others, the contention has been made by these companies that they were not common carriers, but transacted their business in the character of forwarders, and were not therefore liable for losses occurring from the negligence of those whom they thus employed. But this claim to exemption from the ordinary liabilities of common carriers has not been sustained by the courts. Those subsidiary means of transportation have been held to be the mere agencies employed by such companies, for whose acts they are strictly responsible; and the carrier whose vehicle is thus used becomes likewise liable, upon principles of agency, to the owner of the goods, according to the terms of his contract with his employer." Hutch. Carr., § 70. The latter author, in the language just quoted, has reference to express companies; but in the second section following he says the same rules are applicable to dispatch companies, in the same manner and for the same reasons. Then he says: "Other carriers, under the name of dispatch companies, fast freight lines, and the like, have also come into existence, and conduct their business upon the same principle as express companies, that is, by the employment of the means of transportation furnished them by others, and to which for some reasons the same rigid

rule of responsibility as common carriers is applied." Hutch. Carr., § 72. One of the earlier leading cases on this subject was decided by the Supreme Court of Massachusetts in 1867. The defendants there were express companies. Chief Justice Bigelow, in delivering the opinion of the court, said: "But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is that persons exercising the employment of express carriers or messengers, over railroad and by steamboat, cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to the contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that a common law, in the absence of any express stipulation, the contract with an owner or consignee of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfillment of their undertaking is prevented by the act of God or the public enemy. This indeed is the whole contract, whether the goods are to be carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust which can be executed only by the contracting party himself, or under his supervision by agents and means of transportation directly and absolutely within his control. \* \* \* The truth is that the particular mode or agency by which the services are to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him." *Buckland v. Express Co.*, 97 Mass. 126-130.

Some ten years later Justice Strong delivered a very instructive opinion on the same general subject. He said: "The exception or restriction to the common-law liability introduced into the bills of lading by the defendants, so far as it is necessary to consider it, is that the express companies are not liable in any manner or to any extent for any loss or damage or detention of such package or its contents or any portion thereof, occasioned by fire. The language is very broad; but it must be construed reasonably, and if possible, consistently with the law. If construed literally, the exception extends to all loss by fire, no matter how occasioned—whether occurring accidentally or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation though assented

to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement when such failure has been caused by their own misconduct or that of their servants and agents. But the Circuit Court ruled the exception did extend to negligence beyond the carriers' own line, and that of the servants and agents appointed by them and under their control—that it extended to losses by fire resulting from carelessness of a railroad company employed by them in the service which they undertook to carry the packages; and the reason assigned for the ruling was that the railroad company and its employees were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody—either of the express company or of the shippers or consignors of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employees. It is true the defendants had also no control over the company or its servants, but they were its employees; presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him and not to one who neither employs it nor pays it, nor has any right to interfere with it. If then the Louisville & Nashville Railroad Company was acting for these defendants, and performing a service for them when transporting the packages they had undertaken to convey, as we think must be conceded, it would seem it must be considered their agent. And why is not the reason of the rule that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Co. v. Lockwood*, 17 Wall. 357? The foundation of the rule is that it tends to the greater security of consignors who always deal with such carriers at disadvantage. It tends to induce greater care and watchfulness in those to whom the owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors and makes common carriers more unreliable. This is equally true whether the contract before exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically he has; but most frequently, when the negligence of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible be-

cause he has put the servant in a place where the wrong could be done. It is quite as important to the consignor that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be. For these reasons we think it not advisable to construe the exceptions in the defendants' bill of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed." *Bank v. Express Co.*, 93 U. S. 181-183.

This latter decision, which we regard eminently sound in reason and in law, lays down the doctrine that controls the case before us. There the undertaking of the express companies was to carry certain money from New Orleans, Louisiana, to Louisville, Kentucky, and deliver it to a certain broker in the latter city. The express messenger placed the packages of money in an iron safe, and the latter in the express car, for transportation to destination. Thus situated the money was transported over different lines of railroad, and while being carried over the Louisville & Nashville Company's line a trestle gave way in the night-time, precipitating the express car, which was then burned, together with the money. The express messenger who accompanied the money was rendered insensible by the fall and continued so until the destruction was complete. Thereafter the broker sued the express companies in the United States Circuit Court for the loss of the money. To these suits the express companies interposed the stipulation against liability for the loss caused by fire contained in their bills of lading as a complete defense. The court charged the jury that such stipulation relieved the defendants from the loss, if they and their messenger were without fault or neglect; and further that it was not material to inquire whether or not the accident resulted from the negligence of the railroad company and its agents. In other words, the instruction was that the defendants were liable for the consequences of their own negligence only, and not for a loss brought about by the negligence of the railroad company. That instruction was disapproved, and the contrary doctrine announced in the language we have quoted somewhat at length. There the contract was for through transportation in which the defendants were obliged to use the vehicles and railroad lines of others; so it is here. There the defendants made their own employment of the railroad companies, and paid them for their services; so it is here. There the defendants produced a special contract, and by reason of it claimed that they were not liable for a loss proceeding from the negligence of the railroad company; and so it is in the case before us. There the railroad company was held to be the agent of the defendants, and for the consequences of its negligence they were adjudged to be liable. We so hold and adjudge here. A similar question was made before the Supreme Court of Illinois in 1879. Goods intrusted to an express company for transportation were destroyed by fire while in transit upon a railroad. The court said: "But admitting the conditions in the receipt were understandingly assented to by the shippers, and became a binding contract between the parties, still defendants would be liable for the full value of the goods if the loss was owing to the negligence on the part of the railroad company. An express company choosing such a corporation to do its business will be chargeable to the same extent for the negligence of the agent employed as if the contract was primarily with such agent on the well-recognized principle that for culpable defects in carriages used by common carriers the law makes the carrier responsible." *Boscovitz v. Express Co.*, 93 Ill. 523; 8 U. S. 34 Am. Rep. 197. To the same

effect is *Christenson v. Express Co.*, 15 Minn. 270 (Gil. 208.) See also *Transp. Co. v. Oil Co.*, 63 Penn. St. 14.

It is to be observed that all these decisions from which we have made quotations were made in cases against express companies whose messengers accompany their freight, and not in cases against dispatch companies which have no such messenger; but the doctrine therein announced, as we understand it, is not made to depend in any sense upon the presence of the messenger. The holding is that the express company is responsible for the negligence of the other carrier upon whose line the loss or damage may occur, not because the messenger is with the goods at the time, but because the other carrier is the agent of the express company. Express companies and dispatch companies alike use the conveyances of others in the performance of their respective contracts with their respective customers; and they have precisely the same relation to those whose conveyances they so use. It is in this view that we regard those decisions applicable in this case; and it is for this reason just stated that the text-writers class express companies and dispatch companies together. This is not like the case of a shipment over several connecting lines of railroad when the company first receiving the goods makes the contract for itself and others, and stipulates that liability shall fall alone upon the particular line in whose custody the goods may be when loss, if any, may be suffered. There the company first receiving the goods is in fact and by the contract a common carrier for only a part of the route—to the end of its own line. Here the defendant is in fact and by the contract a common carrier for the whole route from point of shipment to destination. There that company limits itself to the faithful performance of duty as a common carrier, only while the goods may remain upon its line and until delivered to the one next succeeding. To that extent and for that distance, but no further, does it hold itself out to the consignor as a common carrier. For the balance of the route it acts only as agent of the other lines. Here the defendant holds itself out to the consignors as a common carrier for the whole route, and in its own name and for itself as principal and not as agent of any one, contracts to furnish the necessary means of transportation upon every part of the entire journey. The duty of transportation is divided into several parts and each company stands as an independent carrier, bound only for safe carriage over its own line and prompt delivery to the next in succession, or to the consignees; but it is released from liability only while the goods may be in custody of other lines. Here the defendant undertakes the whole transportation upon its own responsibility; and owning no railroad itself for any part of the route, it employs such lines of others as it sees fit to use. In making the contract with the consignors it acts for itself alone; and in making the necessary subcontracts with such railroad lines as it chooses to employ for assistance in the performance of its undertaking with the consignor, it again acts for itself and no one else. And though it thus assumes for itself the duty of through transportation and selects its own agencies, it nevertheless attempts to exempt itself absolutely from all accountability for any loss that may occur during any part of the entire transit.

Here the company first receiving the goods and making the contract for itself and other companies, leaves each answerable under the law for any loss upon its own line, the same as if no special contract were made; and stipulates only for exemption from liability for loss upon other lines—a liability which it could not in any event be compelled to assume against its will. Here the defendant leaves itself accountable for no loss whatever which may happen on any part of

the journey; but by throwing the whole burden upon the railroad lines, its agents, it seeks to relieve itself absolutely from even a possibility on its own part for any loss on any line. If loss be occasioned upon the first line or upon the last line, or upon any intermediate line, the result is the same to the defendant—it has positive exemption from accountability in each and every instance if its stipulation be sustained. It assumes the duty and receives the compensation of a common carrier, but tries to throw off all responsibility attaching to that relation and character. There the contract is reasonable and therefore lawful; here it is unreasonable and therefore unlawful.

Manifestly no one of several connecting lines of railroad would be permitted to contract against accountability for a loss upon its own line; and for the same obvious reasons this defendant, which makes such lines its agents and its own for the purposes of this transportation as between it and the owner of the goods, should not be allowed to protect itself behind the stipulation presented in this case; otherwise all common carriers in the law which use the conveyances of others in the transportation of their freight and performance of their contracts with their customers may, by agreement, completely annihilate their common-carrier liability and revolutionize the wholesome rule of law hitherto prevailing upon that subject.

Owing to the vast scope and importance of the subject, the courts and text writers have devoted much time and space to the discussion of the power and right of connecting railroad companies to limit and extend their common-law liability as common carriers within and beyond the *termini* of their respective lines. All authorities are now agreed, we believe, in holding that the first of a number of successive companies rendering service in the carriage of freight between distant points, may so bind itself to deliver goods beyond the terminus of its own line as to become responsible for their safe carriage through the entire journey. But with respect to what is necessary to constitute such a contract the English and American authorities are quite inharmonious. The English rule is that the receipt of goods marked for a given point without a positive limitation of responsibility affords *prima facie* evidence of an undertaking on the part of the carrier to safely transport them to their destination, whether within or beyond the limits of its own line; while in America most of the courts regard each company as liable in the common-carrier capacity only for the extent of its own line, unless there be a special contract to the contrary. The latter may be stated to be the American rule, though some of the States, Tennessee among the number, have adopted the English rule as more consonant with sound reason and public policy. *Schouler Bailm.* (ed. 1887), §§ 593-598, inclusive; *Lawson Cont.*, §§ 235-240 inclusive; *Redf. Carr.*, §§ 190-197; *Hutch. Carr.*, §§ 145-149, 151, 152; *Railroad Co. v. Campbell*, 7 *Heisk.* 253; *Railroad Co. v. Rogers*, 6 *id.* 143; *Railroad Co. v. McElwee*, *id.* 208; *Railroad Co. v. Weaver*, 9 *Lea*, 38. It is likewise well settled that a common carrier is not bound in law to transport goods beyond its terminus, and that it may therefore lawfully stipulate that it shall not be liable for loss after the goods have passed beyond the limits of its own line and upon the line of another. *Schouler Bailm.*, § 603; *Lawson Cont.*, § 236; *Railroad Co. v. Brunley*, 5 *Lea*, 401; *Dillard v. Railroad Co.*, 2 *id.* 288; *Railroad Co. v. Holloway*, 9 *Baxt.* 188; *Railroad Co. v. Campbell*, 7 *Heisk.* 257. But it is readily seen that this case is not controlled by either of those doctrines. It is not the case of a limitation of liability to the line of the contracting carrier, nor of an extension of responsibility beyond the limits of that line; on the contrary, it is



the case of a carrier for the whole route, attempting to relieve itself from liability upon any part thereof because it has no conveyances of its own and is compelled to use those of others in the performance of its contract of shipment. Declining to lend our assistance or approval to such an effort, we hold that the defendant, notwithstanding its stipulation, is responsible for the consequences of the negligence, if any, of the railroad companies which it employed in the transportation of the goods sued for, such companies being to all intents and purposes its servants or agents, as between it and the plaintiff. There is no positive proof that the loss resulted from the negligence of any one. But such proof is not necessary to entitle plaintiff to a recovery; for "when goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he was not responsible." *Lawson* Cont., § 245; *Hutch Carr.*, § 769; *Schouler Bailm.*, § 439; *Railroad Co. v. Holloway*, 9 Baxt. 188; *Dillard v. Railroad Co.*, 2 Lea, 296; *Transp. Co. v. Oil Co.*, 68 Penn. St. 14.

The defendant assigns as additional error the action of the court below in giving to the jury certain instructions and in refusing certain requests for instructions with respect to what was necessary to constitute the bill of lading a contract between the parties. Referring to the bill of lading and the stipulation therein which we have already quoted and considered, his honor, the trial judge, to the jury said: "It is not a contract between the parties unless you find that there is evidence establishing that plaintiffs agreed to that stipulation. Before the stipulation in the bill of lading would be binding on the plaintiffs, it would be necessary for the defendant to show that plaintiffs' attention had been called to it, and that they expressly or impliedly assented to it; the fact that they accepted the bill of lading from the defendant, kept possession of it without objection and introduced it in evidence, would not be sufficient in my opinion."

This charge is in accord with the uniform holding of the Supreme Court of Illinois, which requires the carrier to show affirmatively that the restrictions of liability claimed by it were in fact known and assented to by the shipper (*Boscovette v. Express Co.*, 93 Ill. 523; *Field v. Railroad Co.*, 71 Ill. 458; *Express Co. v. Haynes*, 42 id. 89); but it is contrary to the great weight of American and English decisions, which hold that the fair and honest acceptance of a bill of lading without dissent raises a presumption that all limitations contained therein were brought to the knowledge of the shipper and agreed to by him. 3 Wood Ry. Law, note 2, pp. 1577, 1578; *Lawson* Cont., § 102; *Hutch Carr.*, § 239; *Schouler Bailm.*, §§ 464, 466; *Railroad v. Brumley*, 5 Lea, 404; *Dillard v. Railroad Co.*, 2 id. 294. The requests for instructions were in substantial conformity to the rule as announced by this court in the last two cases mentioned. This action of the court in giving the jury improper instruction upon the one hand and in refusing to give proper instruction upon the other, would ordinarily be fatal and afford ground for reversal; but it is not so in this case, because the error is immaterial. The matter in hand was the stipulation through which the defendant sought to protect itself against liability. It has already been seen that the court was right in telling the jury that such stipulation, though contained in the contract, was invalid because unreasonable and against public policy. Therefore any error with reference to what was necessary to make it a contract was clearly immaterial. Being immaterial, a reversal cannot be predicated upon it. *Myers v. Bank*, 3 Head, 331; *Red-*

*mond v. Bowles*, 5 Sneed, 547; *Patterson v. Head*, 1 Lea, 664.

Affirmed.

Folkes, J., dissenting.

### MARRIAGE—NECESSARIES OF WIFE LIVING APART FROM HUSBAND IN ADULTERY CONNIVED AT BY HIM.

ENGLISH COURT OF APPEAL, JAN. 28, 1888.

WILSON v. GLOSSOP.\*

A husband is liable for necessities supplied to his wife, whom he has expelled for adultery committed by his connivance.

**A**CTION for maintenance of a wife. The head-note shows the point. The plaintiff had judgment below.

*Moorsom*, Q. C., for defendant.

*Herbert Reed*, for plaintiff.

LORD Esher, M. R. In this case the plaintiff is to be taken to be in the position of a stranger who has supplied things necessary for the maintenance of a married woman living apart from her husband. There were proceedings in the Divorce Court at his suit for a dissolution of marriage on the ground of the wife's adultery, and the jury found that she had committed adultery, but that her husband had connived at it. On this state of facts the Divisional Court decided that he was bound to pay for the sustenance of his wife, and gave judgment for the plaintiff. The defendant has appealed.

When a man marries he is bound to keep and maintain his wife, unless she has committed adultery, and further he is bound in honor to protect her from infamy. This man has done the reverse. The argument for him to exonerate him from liability to maintain his wife would, if it is sound, establish that if he had forced his wife to prostitution, and lived on the proceeds of her shame, he might still, whenever he pleased so to do, turn her out of doors for that very adultery, and declare that he was no longer liable for her maintenance. Nothing would induce me to declare that such was the law except a superior authority which would bind me. I do not care to consider whether the wife can under these circumstances claim restitution of conjugal rights. That a husband, even after his wife has committed adultery, should turn her out without means of support is harsh, but to say that a man who has been an accomplice can do so is degrading. There is not, and there could not be, a symptom of authority in support of such a proposition. The judgment of the court below was therefore right, and this appeal is dismissed.

Fry, L. J. If a husband turns away his wife without means of support for any cause not in law justifying such an action, she carries with her the right to pledge his credit for necessities. The question then is whether the adultery of the wife with the connivance of her husband is such a justification. On this point there is no direct authority. In my opinion, to say that such circumstances justify the husband in turning his wife out of doors would be morally and socially wrong. The husband's act being thus without justification, she carried with her the right to pledge his credit for necessities. That right she has exercised, and he is liable in this action.

Lopes, L. J. The facts of this case are not in dispute, and can be shortly stated. The wife of the de-

\* 20 Queen's Bench Division, 354.

defendant committed adultery with his connivance. The husband subsequently turned her out of doors. She had no means of support, and she was supplied with necessaries for her maintenance by the plaintiff, who now seeks to make the defendant liable for the money so expended.

During cohabitation there is a presumption, though a rebuttable one, arising from the circumstances of cohabitation, that the wife is, in certain cases, the agent of her husband, and entitled to pledge his credit. But when the wife is living apart from her husband at the time of making the contract the presumption is the other way, and it lies on the creditor to show that the wife is living apart from her husband under such circumstances as give her an implied authority to bind him. If she is turned away by her husband without any justifiable cause, and without the means of supplying herself with necessaries, the husband is bound by any contract she makes for necessities suitable to her degree and estate. Bayley, J., *Montague v. Benedict*, 3 B. & C. 635; 2 Sm. L. C. (9th ed.) 504. Again in *Eastland v. Burchell*, 3 Q. B. D. 432, Lush, J., says: "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere."

Apply the law so laid down to the present case. A husband who has connived at the adultery of his wife turns her out of doors without the means of providing herself with necessaries—does he not wrongfully compel his wife to leave his home? What right has he to complain of that to which he has been a willing party? And what justification is there for his turning his wife out of doors without the means of supplying herself with necessities?

*Harris v. Morris*, 4 Esp. 41, relied on in the court below, seems to proceed on the ground that the husband's liability revives if he takes the adulteress back into his house, and that if he turns her out again, he does so with credit for necessaries. This case does not seem to assist in the decision of the one now before the court. Lord Kenyon seems to found his judgment on the fact that she was *sponsa retracta*.

I think the judgment of the court below was right, and that the appeal should be dismissed.

Appeal dismissed.

#### NEGLIGENCE—CONTRACTOR—INJURY BY HIS SERVANT TO EMPLOYER'S SERVANT.

ENGLISH COURT OF APPEAL, JAN. 16, 1888.

##### THRUSSELL V. HANDYSIDE.

The plaintiff, a workman at work in a place appointed by his employer, was injured by the negligence of the servants of the defendant, a contractor with the same employer. The defendant's work was of a character dangerous to persons working in the plaintiff's place, and plaintiff knew it. *Held*, that a finding for the plaintiff should be supported.

**A**CTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

*Montague Lush*, for defendants.

*Tatlock*, for plaintiff.

\* 20 Queen's Bench Division, 359.

**HAWKINS, J.** This action was brought to recover damages for personal injury, which the plaintiff alleged to have been caused by the negligence of defendants or their servants. The case was remitted to the Westminster County Court, under section 10 of the County Courts Act, 1867, and was tried before the judge of that court and a jury. A verdict was found for the plaintiff for £200 damages, and a motion is now made to set aside that verdict and enter judgment for the defendants, on the grounds that no duty was imposed upon the defendants to protect the plaintiff from dangers which he might encounter in the course of his work, that the plaintiff contributed to the accident by his own negligence, and that the plaintiff took upon himself the risk incidental to his employment, so that the maxim "*Volenti non fit injuria*" applies.

I am of opinion that the defendants' appeal must be dismissed.

The circumstances were these: Some time before the accident a large building in Kensington, called Olympia, was in course of being prepared for certain public entertainments. The contractors for the iron work were the defendants; the contractors for the wood work were Messrs. Lucas. For a considerable time before the day of the accident the defendants' riveters had been engaged in riveting plates, and in order to do this work, and to hoist the plates, a large stage had been erected, which was called a gantry. While this stage was in existence no accident had happened. Rivets did fall, but the stage stopped them and prevented them from falling to the ground, which was about 100 feet below. About a week before the accident there was a considerable pressure of work, as it was important to get the building ready in time for the Christmas holidays, and Messrs. Lucas, who were doing the carpenters' work, required that the stage should be removed, and after this had been done the defendants' riveters worked on a small stage slung from the roof. Several times during the next week bolts or rivets fell, and one of the bolts which fell was red hot. The people who worked below complained to the defendants' foreman, but no precautions were taken. The staging was not large enough to arrest things that fell, and there was nothing to prevent bolts, rivets and tools from falling to the ground. It was proved that precautions might have been taken, as by stretching a tarpaulin below the stage on which the riveters worked. In consequence of no such precautions being taken, a bolt or drift fell on the plaintiff's head, and inflicted serious injury. The plaintiff was in the employment of Messrs. Lucas, and Messrs. Lucas' contract had nothing to do with the defendants. The plaintiff, when he was injured, was sawing wood, not directly under the stage from which the drift fell, but about twelve feet out of the perpendicular line. No doubt the plaintiff knew that bolts did sometimes fall, and that they were dangerous; this is shown by the very fact of his complaining. But no steps were taken to prevent the danger, although the defendants' men knew that the work which they were doing was dangerous, even if they themselves used care, and they knew that precautions might be taken. The question is, whether on these facts the plaintiff is entitled to recover.

The jury came to the following conclusions: They were asked whether the accident arose through any negligence on the part of the defendants, whether if it did, there was any contributory negligence on the part of the plaintiff, and whether the plaintiff voluntarily incurred the risk. They found the defendants guilty of negligence in want of taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and the plaintiff

did not voluntarily incur the risk, and they gave a verdict for the plaintiff for 200*l*.

Mr. Lush in his very able argument contended, in the first place, that no duty was imposed upon the defendants which could make them responsible for the injury suffered by the plaintiff, even assuming the existence of negligence on the part of the defendants or their servants; secondly, that the plaintiff by his own negligence contributed to the accident; and thirdly, that even if there was no contributory negligence on the part of the plaintiff, still the maxim "*Volenti non fit injuria*" applied to the case.

My view is this: The rule applicable to this case—I do not say to all cases, for each case must depend on all its circumstances—is that where a man is employed to do certain work, and knows that the work which he is doing is dangerous to others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under an obligation to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care, and taking precautions to prevent accidents arising from the work in which he is engaged. The rule is thus stated by Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503, at page 509: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." That, in my opinion, is a correct statement of the law. In the present case the defendants' workmen were engaged in dangerous work, for whether through negligence or accident, it was likely that the bolts and rivets would fall. It was obvious to every one that there was danger, and therefore it is clear that the defendants' workmen were subject to a duty to use reasonable precautions; of this I have no doubt.

The next question is whether there was any evidence for the jury of negligence on the part of the defendants or their servants; I think there was. It is impossible to read the County Court judge's notes without coming to the conclusion that the defendants' servants knew that there was danger of bolts falling on the men who were working below. I think the circumstances show abundant evidence of negligence.

But this does not determine the case, for the plaintiff may fall on one of two grounds, either that he contributed to the accident by his own negligence, or that the case comes within the maxim "*Volenti non fit injuria*."

As to the first of these grounds I cannot find any evidence which proves negligence on the part of the plaintiff.

The only remaining question is whether the plaintiff took the risk upon himself, so that the maxim "*Volenti non fit injuria*" applies. That question, as is shown by the judgments in *Yarmouth v. France*, 19 Q. B. D. 647, was for the jury. The plaintiff was altogether unconnected with the defendants or their workmen, but was an independent workman employed by Messrs. Lucas, and it is difficult to say, where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim "*Volenti non fit injuria*" applies. It is true that he knows of the danger, but he does not willfully incur it. "*Scienti*," as was pointed out in *Thomas v. Quartermaine*, 18 Q. B. D. 682, and in *Yarmouth v. France*, 19 id. 659, is not equivalent to "*volenti*." It cannot be said, where a

man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he willfully incurs any risk which he may encounter in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there; his poverty, not his will, consented to incur the danger.

But it is said that there are two cases which support the defendants' contention on this point. The first of these cases is *Thomas v. Quartermaine*, 17 Q. B. D. 414; affirmed, 18 id. 685. It is sufficient to say that the facts there were totally different from those of the present case, for there the plaintiff was serving his master with a full knowledge of the state of the premises on which he was employed.

The other case is *Yarmouth v. France*, 19 Q. B. D. 647, decided by the judges of the Court of Appeal, sitting as a Divisional Court, where Lord Esher, M. R., stated the rule as follows: "It seems to me to amount to this: that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim '*Volenti non fit injuria*.' If so, that is a question of fact. \* \* \* I see nothing in the decision in *Thomas v. Quartermaine*, 18 Q. B. D. 685, to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." 19 Q. B. D. 657. In the same case Lindley, L. J., said: "If in any case it can be shown as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it; nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it, or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred." 19 Q. B. D. 661.

The case of *Woodley v. Metropolitan District Ry. Co.*, 2 Ex. D. 384, was relied on by Mr. Lush as an authority in favor of the defendants, and at first sight it looks somewhat like the present case, but when the facts of the two cases are compared there is a clear distinction. The plaintiff in that case was in the employment of a contractor, and was injured by a passing train while he was working in a tunnel on the Metropolitan District Railway, and he brought an action against the railway company. It was proved that there was a very small space between the wall of the tunnel and the passing train, but still the space was enough, if a workman was careful, to enable him to stand in safety while a train passed. It is true that

the jury found that there was negligence on the part of the company in not having taken precautions for the protection of the workman, but the plaintiff having it in his power to protect himself, and knowing that the danger existed, the majority of the Court of Appeal held that he was not entitled to recover. He was injured, not owing to an inevitable cause, but owing to a danger, which by the use of proper care he might have avoided. In the present case the plaintiff could not have avoided the danger, unless he had disobeyed the orders of his employers, and incurred the risk of dismissal.

*Wiggett v. Fox*, 11 Ex. 832, has no bearing on the present case. There the plaintiff's husband was killed by the negligence of a workman in the employment of the defendants, he himself being the servant of a sub-contractor who was employed by the defendants, and the court held that the two men were in the position of fellow-workmen, and there was an implied contract on the part of the deceased to undertake the risk of the negligence of the other workman. That decision has no application to the present case.

*Collis v. Seiden*, L. R., 3 C. P. 495, was a decision on demurrer, and the judgment proceeded on the ground that the declaration set forth no circumstances from which a duty could arise for the breach of which the defendant could be liable to the plaintiff. That again cannot apply here.

The recent case of *Membury v. Great Western Ry. Co.* (not yet reported), in which a verdict in favor of the plaintiff was upheld by a Divisional Court, is almost identical in principle with the present case.

For these reasons, I am of the opinion that the question was for the jury, and they have found that the defendants were guilty of negligence in not taking proper precautions, that there was no contributory negligence on the part of the plaintiff, and that he did not voluntarily incur the risk. This verdict must therefore be supported, and the appeal will be dismissed.

GRANTHAM, J. I am of the same opinion. I think a simple statement of the facts is sufficient to show that the jury have given a right verdict. The plaintiff's work was not dangerous to himself or to others, while the work on which the defendants' workmen were employed were clearly proved to be extremely dangerous to those who were engaged in work below, and it is impossible to come to any other conclusion than that the defendants were bound to take precautions to obviate that danger. The decision in *Thomas v. Quartermaine*, 18 Q. B. D. 685, is not in point, for the question in that case arose between master and servant. In the present case, if it had been impossible for the defendants to take precautions against the danger, it might perhaps have been suggested that the plaintiff was bound to take his chance, but the evidence shows that the facts were the other way.

Appeal dismissed.

#### COPYRIGHT IN JUDICIAL OPINIONS.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF NEW YORK, JANUARY, 1888.

STATE OF CONNECTICUT V. WILLIAM GOULD, JR.

Chapter 35 of the Laws of Connecticut for 1882 (Pub. Stat., p. 137), though it gave the contractors for publishing the Reports of the opinions of the Supreme Court of Errors of that State the exclusive right to publish the Reports of such opinions as prepared by the State reporter, did not prohibit the publication from the numbers of such Reports of the opinions of the court by any other person or

corporation, provided the head-notes, statements of facts or other work of the reporter are not used. *Gould v. Banks*, 53 Conn. 415, distinguished.

**B**ILL by the State of Connecticut to restrain defendants from publishing opinions of the Supreme Court of Errors of the State. Complainant moves on bill and answer for an *ad interim* injunction. Chapter 35 of the Laws of Connecticut in 1882 (Pub. Stat. 1882, p. 137) enacted as follows:

"SECTION 1. The judges of the Supreme Court of Errors shall from time to time appoint a reporter of its judicial decisions, who shall receive a salary of three thousand dollars, with one thousand dollars additional thereto during the occupancy of the office by the present reporter.

"§ 2. After the forty-eighth volume, now in press, the Reports shall be published by the State under the supervision of the comptroller, who shall cause the several volumes to be stereotyped and to be copyrighted in the name of the secretary, for the benefit of the people of the State.

"§ 3. The Reports so prepared and published shall be furnished by the comptroller to the citizens of this State at a stated price, to be paid by the comptroller and the library committee. The comptroller shall send one copy of each volume of Reports published under his supervision, to the town clerk of each town for the use of the people of the town, one copy to each county law library association, and one copy to each college library in this State."

Under this statute the State had contracted with Banks Brothers for the publication, in Reports to be published in numbers, to be completed in volumes, of the opinions of the court, and that Banks & Brothers should have the exclusive right of publication.

Defendants had concededly taken the opinions, but not the head-notes, statements of facts, or any thing prepared by the reporter, from the numbers as issued by Banks & Brothers, and published them in the *Eastern Reporter*, published by them, and concededly intended to continue to do so. Complainants moved for an injunction to restrain the publication of the numbers and volumes of the *Eastern Reporter* containing such opinions, and to restrain them from so publishing such opinions from future numbers of the Connecticut Reports.

*Anderson & Man*, for complainants.

*Nathaniel C. Moak*, for defendants.

WALLACE, J. The act of the General Assembly of the State of Connecticut (approved March 22, 1882), creating the office of reporter of the judicial decisions of the Supreme Court of Errors, fixing his salary, and directing those decisions to be published in volumes, under the supervision of the comptroller, and the several volumes copyrighted for the benefit of the people of the State, does not forbid expressly or by implication the publication of the opinions of the court, separately or collectively, by any person who chooses to use them, but by reasonable construction restricts the exclusive right of publication to the Reports compiled and edited by the officer who is to receive a salary for the work. The statute undoubtedly contemplates that the Reports which are to be published will be prepared for publication in the usual and convenient form of law reports, containing an index and appropriate *syllabi* accompanying the opinions, which as the work of the reporter would be the unquestioned and familiar subject of copyright. If it had been the object of the statute to prevent the publication of the judicial decisions of the court, or to regulate the mode of promulgating them, so that they should have no publicity except in the designated form of official reports, that intention could have

been easily manifested by apt language, so as to remove all doubt; and in view of the serious question often debated, but never authoritatively decided by the courts of this country, whether such opinions can be copyrighted by the State, it would seem that the statute would have been so framed as to leave no doubt of the legislative will if such an intention had been entertained. The opinion has been expressed in several adjudications, by judges whose opinions are entitled to the highest respect, that the judicial decisions of the courts are not the subject of copyright, but should be regarded as public property, to be freely published by any one who may choose to publish them. This view has been taken upon considerations of public policy, which it is said demand, in a country where every person is presumed and required to know the law, that the fullest and earliest opportunity of access to the expositions of the judicial tribunals should be afforded to all. No statute should be interpreted, unless the language used admits of no other interpretation, to press beyond the certain confines of legislative power (*United States v. Coombs*, 12 Pet. 72), and in obedience to this rule the courts have almost uniformly interpreted statutes closely resembling the present so as to restrict the copyright to the completed volume. *Davidson v. Wheelock*, 27 Fed. Rep. 61; *Banks v. West Publishing Co.*, id. 50; *Banks v. Manchester*, 23 id. 143; *Nash v. Lathrop*, 142 Mass. 29.

The case of *Gould v. Banks*, 58 Conn. 415, is relied upon by the complainant. The opinion in that case undoubtedly asserts the right of the State to copyright the opinions, and interprets the statute as designed to effectuate that right. The observations upon this point however were unnecessary to the decision of the case before the court, which was whether a *mandamus* should be granted to compel the reporter to furnish copies of the opinions which he was preparing for publication, when the writ would operate to deprive the authorized publishers for the State of the benefit of their contract with the State. This sufficiently appears from the following language of the opinion: "If therefore we should now direct the reporter to furnish copies of the opinions to the petitioners, that they may sell them to the public in advance for their own profit, we should in effect advise the State to a breach of contract."

As the defendants have not pirated any of the matter originally prepared by the reporter, the motion for an injunction is denied.

#### ABSTRACTS OF RECENT DECISIONS.

**CONSTITUTIONAL LAW—INTER-STATE COMMERCE—TAXATION OF TELEGRAPH COMPANIES.**—A tax levied under a statute providing for the taxation of railroad and telegraph companies is not void as repugnant to the Constitution of the United States, which gives Congress power to regulate commerce between the several States. It was this last question that was determined in the negative. In the *Delaware Railroad Tax case*, 18 Wall. 206, an act of the Legislature of Delaware, imposing a tax quite similar to the one now complained of, was held to conflict with the power of Congress to regulate commerce. The court in that case observes: "The State may impose taxes on the corporation, as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assess-

ment or rate of taxation might be adopted than the one prescribed by the Legislature or the State: our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." The question of what constitutes a tax upon foreign or inter-State commerce has frequently come before the Supreme Court for adjudication, and I find no case which sustains the view taken by the defendant in this case. The question is carefully reviewed in the recent cases of *Fargo v. Michigan*, 121 U. S. 230, and *Steamship Co. v. Pennsylvania*, 122 id. 328. Section 40, chapter 13, Pub. Stat. Mass., provides that every corporation embraced in the provision of section 38 shall pay a tax upon its corporate franchise, at a valuation thereof equal to the aggregate value of the shares in its capital stock at a certain rate determined as therein set forth, deducting in the case of railroads and telegraph companies whose lines extend beyond the limits of the Commonwealth such portion of the whole valuation of their capital stock as is proportional to the length of that part of their line lying without the Commonwealth; and also an amount equal to the value as determined by the tax commissioner of their real estate and machinery located and subject to local taxation within the Commonwealth; in case of other corporations, an amount shall be deducted equal to the value of their real estate and machinery subject to local taxation wherever situate. The deductions in the case of corporations generally, of all real estate and machinery wherever situate, and in the case of railroad and telegraph companies whose lines extend beyond the limits of the Commonwealth, of only the real estate and machinery lying within the State, is a question of legislative discretion, and no valid ground has been suggested upon which this court for this reason has a right to declare a tax so levied invalid, in whole or in part. U. S. Cir. Ct. Dist. Mass., Nov. 28, 1887. *Attorney-General v. Western Union Tel. Co.* Opinion by Colt, J.

— TITLES OF LAWS — SPECIAL PRIVILEGES. — A statute entitled "An act making it a misdemeanor to carry on barbering on Sunday" provides that "it shall be a misdemeanor for any one engaged in the business of a barber to shave, shampoo, cut hair, or keep open their bath-rooms on Sunday." *Held*, unconstitutional. The act is obnoxious to the Constitution of Tennessee, art. 2, § 17, which orders that "no bill shall become a law which embraces more than one subject, to be expressed in the title." (1) We think the act obnoxious to the objection of non-conformity to the Constitution. We are unable to understand that "barbering" and bathing, or barber-shop and bath-house, are either synonymous or convertible terms. The subject in the title is "barbering." The subjects in the body of the act are "barbering and bath-rooms." There is nothing in the proof that in anywise tends to make a barber-shop a bath-room, or show that the term "barbering" includes it. While it may be, as argued—but of which there is no proof—that a bath-room is a common attachment to a barber-shop in cities, it is not commonly true of towns and villages. When we see two things so distinct in their uses, we are constrained to hold them to be two subjects, in the absence of the proof of custom making them several parts of one head, and together constituting one whole, and therefore properly "one subject" for legislation. In our towns and villages we know that frequently post-offices are kept in stores, law-offices, the offices of physicians, drug establishments, shoe-shops, etc.; that we often see one man a druggist, a dry-goods merchant, a seller of agricultural implements, a news-dealer, and retailer of liquors, cigars, etc. Now suppose the Legislature shall see proper to enact a law entitled "An act to make it a

misdeemeanor to retail liquors on Sunday," and in the body of the act should declare it a misdemeanor for any one to engage in the business of tipping, to retail any liquors, drugs, boots, shoes, dry-goods, agricultural implements, newspapers, periodicals, pamphlets or cigars, etc., on Sunday—could it be said, because it was the custom for one man to pursue the several businesses, that therefore all came under the head of, and made the one subject, "retailing?" Certainly not. Then if the multiplicity in the supposed case would destroy the legislation, the duality of the act in question is equally fatal in its constitutional validity. While it is the rule of courts to solve all doubts in favor of the constitutionality of legislative acts, this case does not fall within that rule, as it is also a duty to recognize and observe the popular signification of, and distinction in names. This act is levelled at the act of "barbering on Sunday," which means the act of "one whose occupation is to shave the beard, and cut and dress the hair of others" (Webst. Dict.), and cannot be construed to include bath-rooms, which are "apartments for bathing." (2) By section 8, article 11, Const., it is ordained: "The Legislature shall have no power to pass any law for the benefit of individuals inconsistent with the general law of the land, nor to pass any law granting to an individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law." This act, if operative, is for the benefit of all individuals (barbers excepted) who may see fit to keep and use bath-rooms for profit. We know that all of the best hotels have bath-rooms for the use of guests; that they receive pay for baths, and permit them on Sunday; that in many cases a barber has his shop and bath-rooms under the roof, and in parts of the building, in which the hotel and bath-rooms are kept, occupied and used. So if the act is to be enforced as the law, it will apply alone to barbers, with its penalties and punishments; while the innkeeper may with impunity use and keep open his bath-rooms on the same floor, and equally public. Under the act every other individual than one engaged in barbering may establish and keep open on Sunday any number of bath-rooms, and may even buy or rent those now used by the proscribed barber, in or out of the hotel building, continue its use as a bath-room, and keep it open as such on Sunday. The act falls strictly within the ordinance in its tacit but distinct and unequivocal reservation of rights, privileges, immunities and exemptions to all classes of individuals except those "engaged in the business of barbering;" and upon this, as well as upon the first ground it is void. Tenn. Sup. Ct., Jan. 17, 1888. *Raglo v. State*. Opinion by Turney, C. J.

—INTOXICATING LIQUORS—STATUTE PROHIBITING SALE.—A statute forbidding the manufacture or sale of intoxicating liquors is not unconstitutional because of the omission to make a distinction between a sale within and a sale without the State. We deem it perfectly well settled by the decisions of the Supreme Court of the United States that the several States have power to restrict and even to prohibit altogether the sale of intoxicating liquors for use as a beverage within their borders, and consequently of course to prohibit the keeping of them for sale to the same extent. *Cooley Const. Lim.* 582, 583, and cases cited. *Mugler v. State*, 36 Alb. L. J. 525. The power to do this has been denominated a "police power"—a power not delegated to the general government, but remaining to the States, to enable them to regulate for their own welfare, as they understand their welfare, their internal or domestic concerns. The power is signally exercised in legisla-

tion designed to promote popular education, to protect the public health and morals, to punish and prevent crime, to alleviate and prevent pauperism, and especially to diminish and prevent the demoralization and impoverishment, and the numberless vices and miseries which are the sure concomitants and consequences of a free traffic in intoxicating liquors by restraining or prohibiting it. The power was exhaustively discussed and considered in the Supreme Court of the United States in the License cases, 5 How. 504, with particular reference to the exercise in legislation for the restraint of the liquor traffic; and while the justices did not fully agree in the reasons given by them for decision, they did agree in fully affirming the authority of the States within their own borders. Chief Justice Taney and Justices Catron and Nelson rested their judgment distinctly on the ground that the power of the State to pass restrictive laws in the matter was complete, notwithstanding the laws might indirectly interfere with interstate commerce, so long as they did not come in conflict with any law or regulations of Congress; and some of the other justices, enough to make a majority of the court, unless we misunderstand their opinions, concurred with them, though they preferred to take their stand upon a still deeper and broader ground of State rights. If this doctrine of Chief Justice Taney and Justices Catron and Nelson be correct, and is still adhered to by the Supreme Court of the United States the defendant's contention, of course, cannot prevail, for it is not pretended that there is any Federal regulation of interstate commerce with which the provisions under which he is complained of comes into conflict. But not to put too much reliance on this view, we will proceed to the broader consideration of the question. As we have seen, there can be no doubt of the power of the States to prohibit altogether the sale of intoxicating liquors within their border, and yet it is perfectly evident that such a proposition does obstruct the freedom and lessen the extent of commerce among the States. For example, a manufacturer of intoxicating liquors of another State could not send the product of his manufactory to a prohibitory State, and sell it there. He could not even receive orders for his liquors from such a State and fill them if a delivery in such State were necessary to be a complete compliance with the orders. Nor could a person living in another State go into such a State and purchase intoxicating liquors there to carry home with him, though it might be very advantageous for him to do so if he were not prevented by the law. In the License cases, 5 How. 504, a law of New Hampshire, under which a sale in that State of gin imported from Boston was punished, was held not to be void for interfering with the power of Congress to regulate commerce among the States, though the gin was sold in the cask in which it was imported. In the same case, in reply to the argument that the restrictive legislation tended to lessen importation, Mr. Justice McLean said that "a law of the State is not rendered unconstitutional by an incidental reduction of importation; and especially not when the State regulation has a salutary tendency on society and is founded on the highest moral considerations." And he further remarked: "When in the appropriate exercise of their Federal and State powers, contingently and incidentally, their lines of action run into each other, if the State power be necessary to the preservation of the morals or safety of the community, it must be maintained." The doctrine of the justices who took the broader view, if we rightly understand their opinions, was that if a State law, passed in good faith, for the suppression of intemperance, or of the traffic in intoxicating liquors, it could not be condemned as unconstitutional because it might incidentally among its

effects hamper the freedom or lessen the extent of interstate commerce. *State v. Peckham*, 3 R. I. 289. In its practical operation the enactment can have but little effect on interstate commerce. And the more unlimited the prohibition is the more effective it is likely to be; for if intoxicating liquors can be lawfully kept in the State for the purpose of sale elsewhere, the fact that they can be so kept is liable to be availed of as a blind or feint under which to cover a keeping of them for sale in this State. The State borders would afford a favorable ground for the practice of such an evasion or circumvention of the law. Moreover, if the traffic be an evil, can the State permit itself to be the starting point from which the evil shall proceed into other States, without some loss of the moral prestige and power which it must preserve in order to secure for its laws that popular homage and respect without which they cannot be effectually enforced. Certainly the State would have full power to follow its own judgment, and to legislate as it has done in this matter unless it thereby encroaches unwarrantably upon the power of Congress; and in that regard we find it difficult to see how a law which forbids the keeping of intoxicating liquors in one State for sale in another interferes with interstate commerce any more than a law which forbids the sale of such liquors in one State which have been imported from another; and yet as we have seen, a law of the latter description has been held to be a proper exercise of the police power of the States by the Supreme Court of the United States. *Supr. Ct. R. I.*, Jan. 7, 1888. *State v. Fitzpatrick*. Opinion by Durfee, C. J.

**CONTRACT—VALIDITY—PUBLIC POLICY—"CORNER" ON MARKET—RIGHTS OF PARTIES—RECOVERY OF OVERPAYMENT.**—A statute provides for a penalty against any one cornering the market on certain commodities, or attempting to do so, and that all contracts for that purpose shall be void. Plaintiff and defendant had entered into a speculation to corner the wheat market, which was successful. After the close of the deal, plaintiff's share of the profit was left with defendant, who by plaintiff's request afterward invested it in a lard deal. In settling their losses defendant fraudulently overstated the amount of money furnished by him, and understated that furnished by plaintiff, who relying on this statement, made a large overpayment. *Held*, that he was entitled to recover it from defendant. When we said in *Melchoir v. McCarty*, 31 Wis. 262, that "all contracts which are repugnant to justice or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void; and that if a party claiming a right to recover a debt is obliged to trace his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contract as the foundation for his right of recovery"—we stated the rule as strongly as any court has stated it. To that rule this court has rigorously adhered. The rule is elementary, and we are not aware of any adjudication which has denied or shaken it. Numerous cases sustaining it will be found in the brief of the learned counsel for McGeoch. It is unnecessary to cite them here, but reference to them will be made in the report of the case. Thus far we are in entire accord with McGeoch, his counsel, and the learned county judge. We have no doubt the County Court ruled correctly that the wheat deal of 1882 and the lard deal of 1883 were illegal transactions under the statutes of the State of Illinois. They were also illegal at the common law as against public policy. However the nature of the wheat deal of 1882 seems to be of little importance in the case. Wells' share in the profits of that deal was left in the hands of McGeoch, and by

him invested in the lard deal, by consent and direction of Wells. Had McGeoch paid the \$139,000 to Wells, and had Wells subsequently returned it, or a like amount, to McGeoch, to be invested in the lard deal, it would not be claimed, we think, by any one, that the illegality of the wheat deal would alone protect McGeoch from accounting to Wells for the money. We think the transaction which actually took place is in legal effect the exact equivalent to the one supposed. If it be true, as the County Court held, that in order to establish his demand against McGeoch, Wells was obliged to trace his claim through such illegal transactions, the County Court was right in dismissing the complaint. We are clearly of the opinion however that the ruling of the County Court in this behalf is erroneous. The *gravamen* of this action is the fraud of McGeoch in misrepresenting to Wells the amount of their respective investments in the lard deal. Although in form the demand of the complaint is that the account of the transactions in that deal should be surcharged and corrected, yet in substance and effect the action is to recover damages suffered by Wells by reason of the fraud of McGeoch. The lard transaction is only involved incidentally in the case. It is resorted to only for the purpose of ascertaining whether the representations made by McGeoch were true or false. There is no rule of law which prohibits a resort to an illegal contract for a purpose so purely incidental. The case is within the principle laid down in *Kiewert v. Rindskopf*, 46 Wis. 481. In the opinion by Mr. Justice Orton it is there said: "The *gravamen* of this action is the fraud practiced by the defendant in obtaining the \$2,000 from the plaintiff by falsely representing that this sum was within and a part of the contract with Wight, and that the sum agreed to be paid to Wight was \$3,000, when in fact it was only \$1,000. Where money is so charged to have been obtained by fraudulent representations, the only material questions to be considered are: First. Were such representations intentional, material and false? Second. Did they produce a false impression on the mind? Third. Where they the inducement of the payment? Fourth. Were they relied upon as being true? If these elements are present, they constitute a positive fraud without exception; and the matters to which such fraudulent representations relate, whether legal or illegal, will not lessen the fraud or affect the liability of the guilty party. *Kerr Fraud 78; Smith v. Mariner*, 5 Wis. 551; *Kelly v. Sheldon*, 8 id. 258; *Reynell v. Sprye*, 21 Law J. Ch. 633." There is no serious conflict of authority on this subject. Nearly all the cases involving the question are in harmony with *Kiewert v. Rindskopf*. Many of these cases are cited in the brief of counsel for Wells, and will be preserved in the statement of their argument in the report of the case. All the conditions of a recovery required in *Kiewert v. Rindskopf* are established in this action; hence Wells is entitled to recover. *Wis. Sup. Ct.*, Jan. 10, 1888. *Wells v. McGeoch*. Opinion by Lyon, J.

**ELECTIONS—MAJORITY—ACQUIESCENCE OF THOSE NOT VOTING.**—It has been settled, both in England and in this country, by an almost if not quite unbroken current of judicial decisions from the time of Lord Mansfield to the present day, that when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though in point of fact but a majority of those entitled to vote really do vote. Thus in *Oldknow v. Wainwright*, 2 Burrows, 1017, which was a feigned action to try a right of election to the office of



town clerk of Nottingham, the fourth issue was whether Thomas Seagrave was duly elected by the mayor, aldermen and common council; and there was a special verdict, wherein after setting out the Constitution of the borough, that the voices were all equal voices, the vacancy of the office of town clerk, and a regular summons to elect another, it proceeded as follows: "That the whole number of electors was twenty-five, and that out of that number twenty-one assembled on the 26th of May pursuant to the said summons; that the mayor put Thomas Seagrave in nomination, and that no other person was put in nomination; that nine of the twenty-one voted for him, but twelve of them did not vote at all, but eleven of them protested against any election at that time," etc. Lord Mansfield held: "Whenever electors are present and do not vote at all (as they have done here), they virtually acquiesce in the election made by those who do." Judge Folger, in *People v. Clute*, 50 N. Y. 461, delivering the opinion of the court, says: "It is also the theory and practice of our government that a minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for any one for that office. Those of them who are absent from the polls, in theory and practical results, are assumed to assent to the action of those who go to the polls; and those who go to the polls, and who do not vote for any candidate for any office, are bound by the result of the action of those who do," etc. Conceding this to be true with respect to a special election held for the purpose of submitting a single question to the popular vote, it is insisted on the part of the appellant, that a different principle should prevail in a case like this, where at a general election the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject. Hence as we have already stated, the sole ground upon which it is claimed that the act in question failed to become effective is that at the general election, when the subject was voted on, less than a majority of those who voted for the congressional candidates cast their ballots "for high-license law," and not that a majority of those who voted on this subject did not vote in favor of it. This objection to the adoption of the act is founded exclusively upon the construction which is sought to be placed upon the words of the eighth section—"a majority of the voters of said county"—taken in connection with the evidence furnished by the vote in the congressional caucuses, that there were more voters in the county than the number who voted upon this measure. If this construction, which confines the language to what is alleged to be its literal import without reference to the provisions of the preceding section, is to prevail, it would be, it seems to us, as applicable in the case of a special election, where but one subject is submitted, as it is claimed that it is in the case of a general election, where several subjects or persons are to be voted for, the only difference between the two being in respect to the evidence which may be adduced to ascertain the actual number of the voters of the county. In regard to a general election it is urged that the highest aggregate vote cast furnishes the evidence as to the number of the voters of the county. At a special election it is not improbable that only a minority of the voters well known to be an unmistakable minority may vote. This fact might be susceptible of proof—might be in reality self-evident. Yet in the latter instance those who absent themselves from the polls, and those who being present abstain from voting, are regarded as assenting to the result declared by those who do vote. Upon what principle would it be incompetent to apply the same presumption to those who though attending a general election and voting on other subjects, ab-

stain from voting upon one particular matter like the act in question? The very concession that a minority may elect necessarily implies that there is a large number of voters who do not vote, of whom that minority is merely a fraction. Hence the admission that a majority of those entitled to vote did not vote does not preclude the minority who actually do vote from determining the result by their ballots. This is precisely what was decided in *Oldknow v. Wainwright*, where there were twenty-five entitled to vote, of whom twenty-one were present, and only nine voted, and eleven protested against an election. The special verdict shows how many voters there were, how many were present, and that only a minority voted; and yet it was held that the election by that minority was perfectly valid. The eighth section of the act must be read in conjunction with the seventh section, which we have been considering, and thus read, clearly means not a majority of all the voters of the county voting on some other subject, but a majority of all the voters of the county who vote upon this act. The contrary construction would place these two sections in antagonism, and would cause the eighth to render nugatory the provisions of the seventh section. The conclusion which we have reached is fully supported by the Supreme Court of the United States in *Saint Joseph Tp. v. Rogers*, 16 Wall. 644, where the language "a majority of the legal voters of the township" was held to "require only a majority of the legal voters of the township voting at the election," etc.; and by the same court in *County of Cass v. Johnston*, 95 U. S. 360. In this last-named case all the cases relied upon by the appellant are reviewed, and the majority of the court, through Chief Justice Waite, states the question there presented as follows: "The first question presented for our determination in this case is whether the Township Aid Act of Missouri is repugnant to article 11, § 14, of the Constitution of that State, inasmuch as it authorizes subscriptions by townships to the capital stock of railroad companies whenever two-thirds of the qualified voters of the township voting at an election called for that purpose shall vote in favor of the subscription, while the Constitution prohibits such a subscription, unless two-thirds of the qualified voters of the \* \* \* town, at a regular or special election to be held therein, shall assent thereto." The court quotes with approval the construction placed by the same tribunal in 16 Wall. upon the clause "a majority of the legal voters of a township," and adds: "This we understand to be the established rule as to the effect of elections in the absence of any statutory regulations to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless legislative will to that effect is clearly expressed." Other cases to the same effect might be cited, but it is not deemed necessary to do so. Md. Ct. App., Dec. 16, 1887. *Walker v. Oswald*. Opinion by McSherry, J.

**EVIDENCE—DOCUMENTARY — BOOK ENTRIES — CUSTOM.**— In an action to make defendant a trustee of money alleged to have been paid twice on collateral security, and fraudulently retained, the discount books of defendant's bank showed the discount of the collaterals in question; and a witness, defendant's note clerk, was asked whether he had turned over the securities to the teller, to which he answered, over objections by plaintiff, that from seeing the entries in his handwriting, he thought he did, as that was the custom. Held, that the answer was competent to verify the entries, and prove the invariable custom.

On a certain point, objection was made to the testimony of the witness Chassaing. He was note clerk and general book-keeper in the Citizens' Bank. He testified that his duty was to take charge of the notes and collaterals belonging to the bank, and enter up the discounts in a book kept for that purpose. It was also his custom, as such officer of the bank, when collateral notes matured, to enter them on the teller's blotter, and hand the notes and collateral over to the teller early in the morning of the day of their maturity, to be delivered by the teller to the parties paying the notes. He stated he had examined certain entries in those books. They were in his handwriting. That he had kept the books correctly, and he was satisfied as to their correctness. Those entries related to a transaction with Fitzpatrick in regard to discounting a collateral note in 1873, which matured November 22, of that year. The discount books showed the discount of the notes of Fitzpatrick; and the teller's blotter contained an entry in the handwriting of witness, of date November 22, 1873, of the maturity of Fitzpatrick's collateral notes, and showed that witness had given the collateral notes to the teller on that day. The witness also said that he had no recollection of the transactions mentioned in those entries. Asked then if he had turned over the collaterals to the teller on the day mentioned, he said: "That was the custom." Asked then by the court, if he spoke from his recollection of the fact, or because seeing the entry in the book, he thought that was the way in which the business must of necessity have been done, the witness responded: "I can only say, that from seeing the entry here in my handwriting, that leads me to think that I turned over the collateral with the note." This answer was objected to as incompetent, and error is assigned upon it. Greenleaf says: "In fine, it is presumed, until the contrary is proved, that every man obeys the mandate of the law, and performs all his official and social duties. The like presumption is also drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting." 1 Greenl. Ev., § 40. Elsewhere the same author, continuing to speak on the same subject, says: " \* \* \* This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, mainly, the process of ascertaining one fact from the existence of another." Id. § 48. In the present case, these entries, being made contemporaneously with the act done, were original evidence, part of the *res gestæ*; and though it was necessary to call the party who made them, he being alive, his failure to recollect the transaction does not impair its probative force, he having shown that he kept his books correctly. Id. §§ 115, 120. Another author says: "If the memory of a witness is defective concerning an act which it is of importance to prove, as having occurred at a particular time, or under certain circumstances, it would seem that his custom to do that act at the time, or under the circumstances alleged, should be of weight in raising an inference that the act was then performed, and evidence of the habit ought therefore to be allowed." Lawson Usages & Cust. 78. In *Insurance Co. v. Robinson*, 56 Penn. St. 268, the question was whether notice of an additional insurance had been given. The witness called to prove the giving of the notice could not say whether he had done so in that case, adding: "It was my custom to do so, to avert any future trouble." The trial court allowed this testimony. On appeal, this ruling was affirmed, Strong, J., remarking: "We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was

his habit in similar circumstances. Thus a subscribing witness to a will or a bond, if unable to recollect whether he saw the testator or obligor sign the instrument, or heard it acknowledged, is often permitted to testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests, or hearing that signature acknowledged; and it seems to be persuasive and legitimate supporting evidence." Relative to the language of the witness in response to the question asked by the court, it is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries, and prove his invariable custom. These things being proven, the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagements and his duty. In similar circumstances, the same lenient and liberal presumptions are indulged in favor of persons who occupy no official station as are indulged in behalf of those who act officially. *Lenox v. Harrison*, 88 Mo. 491; *Phil. Ev. (Cow. & Hill, notes)*, p. 604, § 10. Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the "experience of common life." It is simply the process of ascertaining one fact from the existence of another. But there is authority for upholding the ruling of the trial court in receiving the answer of the witness. Thus in *Bank v. Cowan*, 7 Humph. 70, the question was whether the witness, a notary, had protested a note for non-payment, and directed notices to the indorsers. He could not swear that he had a recollection of having done so, but stated that it was his habit to make such entries in his notarial book on the happening of the event in such cases, and that he "believed" that he had done so in the particular instance, because he found in his notarial book the usual entries of protest and notice; and this was held good evidence. The reply of the witness Chassaing is tautologous, in effect, to that of the notary in the case just cited. See also *Ferris v. Thaw*, 72 Mo. 446. Mo. Sup. Ct., Dec. 19, 1887. *Mathias v. O'Neill*. Opinion by Sherwood, J.

**GAMING—SUIT TO RECOVER MONEY LOST—STATUTE.**—A statute provides that any one losing money by betting on a game can recover it by suit within six months, and that if the party losing fails to sue, the prosecuting attorney shall, upon information, bring suit for the benefit of the wife or minor children. Held that the keeper of a gambling-house is liable in a suit for the benefit of the wife, although the actual dealing of the cards in the game when the money was lost was by his employee in his absence. There are no possible circumstances under which it can be lawful to either keep a house or rooms for gambling purposes or to play or bet at or upon any game or wager. Any person therefore who keeps a house or room for such a purpose, and either by himself or through the agency of others plays or bets at or upon any game or wager and wins money or other things of value from others, is a person to whom such money or other thing is lost. It is quite true there can be no agents or partners, technically speaking, in a criminal enterprise or in the commission of a crime. It by no means follows that one may employ another to conduct an unlawful business or criminal undertaking for him and then escape liability under the pretext that persons cannot assume the relationship of agents or partners to each other in the commission of crime. The law solves the difficulty by regarding all as principals. Those who employ and those who are employed in such a business, instead of coming into the relation of principal and agent to each other

simply become confederates in crime, and each is as much liable for the acts of the other as if he had performed the whole himself. *McKee v. State*, 111 Ind. 378. Where a business is lawful, when lawfully conducted, but a particular act in the course of the business is alleged to have been done in violation of law, the person charged may escape liability, if it appears that the unlawful act was the act of an agent, done without the knowledge or consent of the principal, and against his orders and direction. The present is not such a case. Here the principal was bound to know that he could not proceed a step either in person or by an agent without violating the law. It is of no consequence that the alleged employee, who actually dealt the cards and took in the relatrix's money, may be liable also; nor does it help the appellant's case to show, upon authority, that the latter could not have compelled or cannot hereafter compel the agent to account to his principal for the money thus won. In *Doyle v. McIntyre*, 71 Ga. 673, it was held that the owner of the money lost by betting on a horse-race may recover it from the winner, although the latter made the bet with another who was supposed by the winner to be the owner of the money. *Supr. Ct. Ind.*, Dec. 28, 1887. *Conden v. State*. Opinion by Mitchell, J.

**JUROR—BIAS—PARTIALITY TOWARD EXPECTED WITNESS.**—Upon the trial of an action for damages for injuries sustained because of the negligence of the defendant in running him down with one of its street cars, a juror, in answer to questions put by the plaintiff's counsel, testified in substance that his life had been saved by a physician who was expected to and subsequently actually did take the stand as an expert witness in behalf of the defendant, and that he would place more faith in the opinion of that witness than in the opinion of any other doctor who might testify if a difference should arise between them. On his cross-examination by the defendant he testified that he would try to act according to his conscience, and was capable of doing so, and he thought he could take the testimony of the other doctor into consideration. *Held*, that he was properly excluded from the jury. Reliance is placed upon the case of *Hildreth v. City of Troy*, 101 N. Y. 234. That was a negligence suit against the city in which the trial judge held that residents and taxpayers in the municipality were disqualified to act as jurors, and in which the Court of Appeals reversed the judgment on the ground that the qualifications of jurors were prescribed by law, and the court could neither add to them nor detract from them. The present case is quite different. Here there was no attempt to exclude any class of persons, or any person because he belonged to a particular class, but the proposed juror was held to be disqualified simply because it appeared that he was unable to act impartially in the case about to be tried. His statement showed that the juror, when called upon to determine the case, would have been influenced to some extent, at least, not by what he heard and observed in the course of the trial, but by knowledge concerning the character, ability and qualifications of an expert witness, which knowledge had previously been acquired from sources not accessible to his fellow jurors. In other words his verdict would have been affected favorably to the defendant by facts not in proof. It seems very plain that a man who occupies such an attitude toward an important witness in behalf of one of the litigants in a cause does not stand indifferent as between them. *Leuke v. Dry Dock, etc., Co.*, 46 Hun, 283. Opinion by Bartlett, J.

**WATER AND WATER-COURSE—ARTIFICIAL CHANNEL—RIGHTS OF RIPARIAN OWNER.**—In proceedings to restrain defendants from using water-

power, the head of which was 900 feet above their lot that reached across a mill-race, and to and into a stream, the evidence showed that plaintiff had derived title through mesne conveyances from the original owner, and defendants from his agent and joint owner, between whom an agreement had been made that plaintiff's grantor should hold and own "the water-power and mill privileges" on said stream and lots thereby conveyed; while defendants' grantor was to have, and upon suit for specific performance of that contract obtained possession of lots below. *Held*, that defendants had not, in the absence of a grant or title by adverse user, such rights in an artificial channel, although intersecting their lot, as to the water of a natural stream. The courts hold that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbor's land, do not stand upon the same ground. *Greatrex v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 id. 743; *Magor v. Chadwick*, 11 Ad. & E. 571; *Sutcliffe v. Booth*, 32 L. J., Q. B. 136; *Rameshur Pershad Narain Singh v. Koonj Behari Pattuck*, 31 Moak, 771; 33 id. 91. In the former case each riparian proprietor *prima facie* is entitled to the unimpeded flow of the water in its natural channel, while in the latter case any right to the flow must rest on some grant or arrangement either proven or presumed from or with the owner of the land from which the water is artificially brought, or on some other legal origin. 31 Moak, 776. Defendants' counsel claims that the case stands upon the same principle as *Pickering v. Stapler*, 5 Serg. & R. 107; 9 Am. Dec. 336; *Tabor v. Bradley*, 18 N. Y. 109; *Vorhees v. Burchard*, 55 id. 98; *Lampman v. Milks*, 21 id. 506, and cases of that character. But we think there is a clear distinction between them. Where one sells land upon which there is a mill, he may well be presumed to sell the water-power used to drive the mill, though the deed does not mention such water-power. The power goes as an appurtenance to the estate or thing conveyed. *Kutz v. McCune*, 22 Wis. 628; *Curtiss v. Ayrault*, 47 N. Y. 73 go upon the same ground—that a purchaser of property which is subject to an obvious physical easement is presumed to contract with reference to its condition when he purchased. None of these cases seem to have a very direct bearing upon the question we are considering. But surely not one of them in the least sustains the defendants' right to draw water from the raceway merely because such raceway happens to cross their lot; for the right, if they have it, must rest upon that ground. As we have said, the raceway was made by Lawrence at his own expense, presumably for his own benefit, in order to furnish water privileges to persons operating mills below the power. As was said in *Lawson v. Mowry*, it is common to conduct water from a pond created by a dam by means of artificial channels in order to make available the increase of the head by reason of the additional fall in the bed of the stream below the dam. It is also common to conduct, by such channels, water from a power created by a dam to places below, where it can be utilized to drive mills. It is unreasonable to suppose that Lawrence, when he constructed this raceway, expected that every person who owned a lot abutting it would have a right to draw from it whatever water he could use on his lot without paying for it. The record shows that leases and sales of given quantities of water from the dam were made to various persons. The fact that such sales and leases could be made rendered the water-power valuable. Stress is laid upon the circumstance that this raceway was constructed before the lots in block fourteen were divided, and that one

principal object in making it was to give those lots the advantage of a water-power. Assume that this is according to the fact, still it does not follow that the owners of lots on block 14 were to have the right to take whatever water they might need from the raceway free. It would be absurd to entertain such a supposition. When the raceway was constructed it was not known who would own lots on block 14. That block had not then been plotted, and no arrangement had been made for a division of them between Lawrence and Smith. Upon the facts we see no ground for presuming a grant to Smith of a right to use water from the raceway free, and of course the defendants have no such right. Supr. Ct. Wis., Dec. 13, 1887. *Fox River Flour and Paper Co. v. Kelly*. Opinion by Cole, J.

### OUR NEW YORK LETTER.

THE giants have been doing mighty battle this past fortnight. Valiant have been the thrusts and more than clever the parries. Millions are at stake, and the reputation of more than one famous lawyer hangs in the balance. The Tilden and Stewart will cases will easily pass into history as *causes célèbres*, and the contending lawyers as the representatives of the best equipped advocates of their day and generation. The arena changes, but the same warriors face each other from day to day. The Tilden case was concluded to-day, and Choate, the Apollo of the American Bar, has sheathed his glittering weapon well stained, but unbent and with sundry fragments of the famous "thirty-fifth clause" appearing to cling to it; Carter, whose thunder has no uncertain sound, has discharged his heavy artillery in the defense of the most important instrument he ever drew, and with Rollins, a Vulcan, who himself forges the weapon he wields so well, will now wait for the decision on the merits of the engagement in which all fought so well. Choate's fighting was the most brilliant; it always is, and his attack unflagging. His argument was almost irresistible, fortified as it was on all points by authorities covering the entire range of the law relating to trusts and powers. His arraignment of the trustees of the Tilden will for smuggling their charter through the Legislature was dramatic in the extreme. He evidently had the popular side. The public appear to entertain a very firm conviction that one's own relatives, providing they are respectable and deserving, are quite proper persons to inherit a testator's wealth or at least a good share of it, and that when a testator is so indifferent to the kind of philanthropy he will indulge himself, in that he farms the decision out to executors and trustees, that the testator's own flesh and blood ought to be given a chance at "the boodle." I have referred to the Tilden will as having been drawn by Mr. Carter. It has been so stated, but of the truth of this statement I cannot say. If it is not true, and Mr. Tilden did draw the instrument, there is much that is plausible in Mr. Choate's statement that Mr. Tilden was too good a lawyer not to know that the trust was invalid, and would be so held, and that after securing the reputation of having most philanthropic intentions toward the human race in general, "his own" would come in at the right time and get away with the millions in the confusion. It was at one time suspected that Mr. Tilden was a subtle man. He could work for the *Kudos* and the *honorarium*, but not intentionally. He had a natural affinity for hard cash and hard sense, and usually made all connections.

By stepping across the corridor from the forum where the wrangle over the Tilden millions has been

concluded, you may hear the echoes taken up over another dead man's pile. Any lawyer who has been engaged during the past week in a case not involving at least a million and a half is ashamed to acknowledge it. Strictly speaking, the Stewart fight is not over a dead man's pile, except it be taken at second hand. As I have stated, the line of battle is much the same here. The famous ex-senator from New York, the Roscoe Conkling of the American bar (I can find no term or hero for comparison—he is *sui generis*), here stands guard over the interests of the enterprising and faithful Hiltons. Mr. Conkling is certainly one of the ablest lawyers in the country to-day, but he will persist in trying his great cases clad in a double-breasted pea jacket, his shirt front bearing on its snowy surface the sanguinary ends of a red silk neck-tie. Every man who has kept house in New York for the last twenty years feels as though he had a personal interest in this estate by reason of the trade so long maintained in the retail department. We all expected some sort of a dividend back in the shape of some kind of a public benefaction for investments in pins and needles made during a long period. Then there is a very general feeling of protest against "the family lawyer" realizing so largely from his client's generosity, especially when the contest is made by a relative. Mr. Conkling has been guilty in the course of the trial of perpetrating a very heinous pun. Soon after the delivery by Dr. Dix of his diatribe against the sins of society, allusions were made to the customs of society, when one of the counsel asked what kind of society was alluded to, upon which the great Roscoe replied that it was not "AuthorDix sossociety!" Not long after, he essayed to observe to the surrogate that by the rules established by counsel—at which point he was interrupted by the surrogate, who reminded him that the court made the rules that governed in the trial of this cause. Even great men are occasionally sat upon by the court. Mr. Davies, a member of the firm of which Judge Hilton's son was formerly a partner, is making great efforts to keep the firm fee book from inspection, with but little chance of success. Mr. Choate expects to show that the charging of enormous fees was a part of the alleged conspiracy to absorb the estate in the interest of the Hiltons. Surrogate Ransom has more than justified the expectations of his friends by the manner in which he has discharged the duties of his new position.

Mr. Knodler, one of the best-known "art dealers," who was arrested for selling alleged obscene and nude pictures, all of which were copies of famous French paintings, to-day acknowledged the appropriateness of his name by pleading guilty, and was fined \$50, in the Court of Sessions—a victory for Anthony Comstock, but a shocking blow to nude art. Men almost hesitate to look upon the naked truth in these days lest Anthony may apprehend. Notwithstanding all the fun that has been made of him and his society, there can be little doubt but that his and its influence have been most salutary in this community, and over-zealousness in their work can be easily forgiven.

The death of Chief Justice Waite is already spoken of chiefly in connection with the name of his probable successor, who it is thought will be selected from the bar of this State, and probably of this city. It is a surprising fact that for nearly a hundred years this great office has been filled by the appointment of an active practitioner, and not by promotion from the bench. There is in this city a lawyer of less than twenty years' standing at the bar, who in my opinion would be the choice of the president if he carried ten more years on his age. He is not a politician, but stands high in the councils of his party, and in the opinion of your cor-

respondent is one of the ablest lawyers here. He will go there some day if he does not this time.

One of the most interesting papers that has fallen into my hands for many a day is a copy of a dissertation read not long since before the Illinois State Bar Association by Stephen S. Gregory, Esq., of Chicago, whom I can pay no higher compliment than to say, that in my opinion he is the Hornblower of the Chicago bar. His paper is entitled "Trial and Procedure." He pleads with much force for a Code of Civil Procedure, and says of his State: "With a singular but perverted conservatism, we have retained the very husks and refuse of the common law, which have been abandoned by every other jurisdiction where that system obtains, including England, and upon this system grafted innovations of our own, thus destroying those features of the common law which in other governments have survived the existence of its forms and been approved as enduring and valuable institutions of their jurisprudence." And again: "The question of procedure is a practical one. It serves no good purpose to declaim and rant about our present system as the perfection of human reason;" to vociferate that a "code dwarfs the profession," and to point to ourselves as living examples of the growth and development of great lawyers under a different one. We cannot isolate ourselves from the world, and claim that on a question of this character we know every thing and the rest of the world nothing." There are certain pro-code indications in this that distinguish Mr. Gregory from Mr. Hornblower. For the information of those of your readers who may not know who Mr. Hornblower is, I will state that Mr. Gregory stands *facile princeps* among the lawyers of Chicago of less than twenty years at the bar. His plea for improvement in the selection of juries is likewise good. He especially deprecates the system of special venirees, and the summary of talesmen as conducted there, as well as the practice of permitting juries to act as judges of the law in criminal cases. There, if I mistake not, the jury fixes the degree of crime and the measure of punishment.

The recent developments in the career of Luther R. Marsh have been the causes of the deepest distress to his many friends in this city. Few lawyers here were better or more favorably known, and in his prime, perhaps twenty years ago, I doubt if there was a better *not prius* lawyer at our bar. The case is inexplicable, and yet not without precedent. Your readers will recall the case of Judge Edmonds, who surrendered completely to the dominance of the most extreme spiritualistic theories, and then died of mortification and chagrin when he found he had been made a simple dupe. There are many interesting features in the case of Mr. Marsh to the alienist as well as to the student of psychology. His intellect is just as keen and his reasoning powers as discriminating as ever when used in connection with any subject but spiritualism, and yet he has been fully persuaded by a low-bred, vulgar woman that she has the power to make an effigy of the great departed Cæsar "blush out" of the virgin canvas, without the use of earthly pigments, and that she invokes the aid of the sky wanderers to fashion from rude marble the bust of Apelles or full-fashioned figure of Minerva fresh sprung from the head of Jove. Miss Dis Debar does not forget in the midst of all her spirito-artistic labors to impress upon Mr. Marsh that the one thing that the spirit country needs is a deed of his Madison Avenue house and lot with Miss Dis Debar as the grantees. There is considerable humbug also in regard to a temple of the new thought—but she got the house. Truly it is pitiful.

DEMOT ENMOT.

NEW YORK, March 26, 1888.

## CORRESPONDENCE.

MORE DOGGEREL.

*Editor of the Albany Law Journal:*

Appropos of the lines celebrating the qualities of the family dog, on page 244 of the last number of the ALBANY LAW JOURNAL, we are reminded of the "summing up" of a dog case a short time since in Brooklyn.

Bedell kept a groggery; also two dogs. When Mrs. Rowan passed one day, carrying her husband's dinner, Bedell, instigated no doubt by the devil, cried "Sic em," and the dog obeyed, much to the confusion of Mrs. Rowan and her petticoats.

When the auspicious moment arrived, to add to the interest of the occasion, Bedell attached the hose pipe to the hydrant and turned on the water, deluging the bewildered matron, until Bedell's appetite for fun was slaked. Hence the suit of *Rowan v. Bedell*.

When plaintiff's counsel, Mirabeau L. Towns, rose to address the jury, he inquired of the court if there was any objection to doggerel in a dog case, and before the court could rule upon the question, he began as follows:

In July last, about the time  
That hungry mortals like to dine,  
The plaintiff, being a married woman,  
Went forth to find her husband Rowan.  
The frugal meal, yet smoldering warm,  
She had in bucket 'pon her arm,  
For 'twas this lady's chief delight  
To quench her husband's appetite.  
Now the defendant, Charles Bedell,  
Keeps near the Park, Oh, sad to tell!  
A low resort for vice and sin,  
Where he dispenses rum and gin.  
Yet not content with deadly cups,  
He keeps two wild, ferocious pups  
To slay those who escape his snare  
With a bite of hydrophobiai.  
When plaintiff came into the Park  
This Charles Bedell, just for a lark,  
As he sets up in his defense—  
By way of excuse or pretense—  
Seeing she was but a woman,  
Set his pups upon Mrs. Rowan,  
To bite her legs and tear her dress,  
And put her in extreme distress.  
And as he saw her pale with fright,  
Trying to save herself by flight,  
He shouted: "Bill, before she goes,  
Just play upon her with the hose."  
Assaulted, bitten, almost drowned,  
Bleeding from the puppies' wound,  
The plaintiff, gentlemen of the jury,  
At last escaped the blackguard's fury,  
And brings this suit to see if you  
Will do as you'd nave others to.

At this stage of the summing up the stenographer threw up the sponge, and so posterity loses the remainder of the speech. Needless to say, the plaintiff had a verdict.

BROOKLYN.

## NOTES.

A distinguished judge said to us on State street, the other day, with an air of triumph: "I have discovered the meaning of 'contingent remainder.' It means what is left to a plaintiff in an accident suit which his lawyer has taken on a contingent fee."

# The Albany Law Journal.

ALBANY, APRIL 14, 1888.

## CURRENT TOPICS.

**M**R. PHILIP SNYDER has an article in the *Popular Science Monthly*, entitled "Forms and Failures of the Law." Mr. Snyder is probably aware that he does not commend himself to the patient consideration of lawyers when he stigmatizes them as "non-producers of public wealth" and as a "parasitic class." They certainly produce as much wealth as any other profession. But let us see what he has to suggest. As to the jury system, he says "there is wide-spread dissatisfaction with it," especially as to criminal cases. We think he is wrong here. The dissatisfaction is mainly in respect to civil cases. He is right in urging the requirement of unanimity. He asks, "why not have trained men for jurors?" The shortest and most conclusive answer out of many to this is, that judges are notoriously much less apt to agree on facts than are untrained men. There can be little disagreement with the essayist in his denunciation of the detestable system of detaining witnesses of crimes, of the brow-beating of witnesses, and of the superfluity of words in legal documents; but these are "chestnuts." Now let us look for something new. And Mr. Snyder makes two suggestions, on which he certainly is entitled to copyright. First, he asks: "If judges are really 'learned in the law,' as they should be, why are lawyers needed at all as advocates, *pro* or *con*, in the trial of ordinary jury cases? Why not make it the business of the judge to examine the witnesses and bring out all the facts?" This in connection with his recommendation to dispense with juries in most cases is distinctly precious. The spectacle of a judge, "learned in the law," but very ignorant of the facts, besieged by a clamorous party at either ear, and hearing their conflicting statements and claims for the first time, and undertaking to make head or tail of them or discover where the right really lay, would be amusing, but it would be a very inefficient way of promoting justice. It would lack every element of a fair trial. It would lack every element of the sifting process produced by the carefully prepared efforts of counsel, each familiar with his side of the controversy, and alert in the strife of wits. But this crude and foolish suggestion is surpassed in silliness by another: "A reform of great value to the State would be the education and training of judges at public expense, instead of taking them, as now, from among practicing lawyers. We have a national military academy and a national naval school from which to obtain officers for the army and navy, though only at long intervals and in great emergencies is there any serious need of them; but the administration of justice, which is an everyday need, is left pretty much to chance. \* \* \*

If the United States, or each State, had a school for the education of judges in which the course of study, in addition to a knowledge of the principles of law, aimed to fit the pupils to administer justice without much regard to mere technicalities or legal hair-splitting, and which kept in view, first and foremost, that the courts were for the benefit of the people at large, and not to furnish a living for lawyers, the gain to justice would be something akin to what modern inventions have given us in contrast with the methods of former generations. From the graduates of these schools our judges should be appointed to serve during good behavior, with promotions regulated according to ability in the discharge of duty, and seniority of service where otherwise there was equality, such considerations to rule as would secure the best service. The details for such a school, and for selections from its alumni, could be readily worked out, but are unnecessary here. The gradations of courts, after the system was once inaugurated, would give the new graduates the necessary experience from the lower courts up, and would bring into the service a class of judges who, owing nothing to the lawyers, would not be influenced by them in any schemes for delaying or defeating justice, or in allowing them enormous fees because great sums were at stake. These judges should take the place of lawyers to a certain extent in examining witnesses, so as to draw out the whole truth and only the truth, instead of only such parts of it as suit the *ex parte* counselors. As long as the lawyer was an aid to the court he might be tolerated and encouraged, but when he proved an obstruction the mandate of the court should remind him of his true work, and keep him in line with it." It is almost impossible to regard this proposition with soberness. Indeed it is worthy of a professional humorist. While you are about it, why not have a school of presidents, of senators, of chief justices, and so on? If this suggestion is deemed worthy of a serious answer, it will suffice to say that justice is not to be administered by a cadet system, but judges are to be educated by the experience of practicing lawyers. It is hardly worth while to spend more time on Mr. Snyder. We have only noticed his absurd theories because they exemplify the protest against lawyers which is practically voiced in every part of the country. Mr. Snyder goes so far as to say that lawyers are poor law-makers. He urges the community to "shake off the grip of the lawyer," and that half or two-thirds of them might well be dispensed with. Lawyers may afford to laugh at the essayist's proposed substitutes, but they cannot afford to despise the fact which his paper evidences, that lawyers are becoming unpopular, and are regarded as opposed to reform.

One of the most useful and most suggestive of recent law books is "The Conflict of Judicial Decisions," by William H. Bailey. This must not be confounded with the conflict of laws. The design

is simply to show how courts have differed in their judgment of certain important subjects. The general subjects considered are Action for a Life; Alteration of Instruments; Comparison of Handwriting; Contracts—by advertisement, by correspondence; Sabbath-breaking; Elective Franchise; Fraud; Guaranty—consideration; Insanity—deeds, wills (*onus probandi*); Intensity of Proof; Limitations; Married Women—separate estate; Office; Options; Original Evidence—entries; Railway Law; Revesting Title by Cancellation; Sureties; Telegraphy. The text covers four hundred pages; the table of cases cited, seventy-six; and a "list of pivotal cases," four pages. The list of conflicting decisions on the point as to who are fellow-servants covers thirty-five pages. The form of the work is substantially that of a digest; the conflicting decisions are arranged by States; the treatment is pointed and concise; but there are occasional forcible and witty expressions of opinions. *Yale v. Dederer* is "vindicated," and *Hartfield v. Roper* is said to have been relaxed. Mr. Bailey we think is in error in saying that the *Ryan* case, 85 N. Y. 210, is overruled by the *Webb* case, 49 id. 420. Mr. Bailey regrets "that there is not more conservatism in the New York decisions," and finds it difficult to reconcile the *Collins* case, 71 N. Y. 609, and the *Fero* case, 22 id. 209. We know of nothing answering the same or a similar purpose as this work, and it is a remarkably convenient manual. It would be wise to extend the same treatment to other leading topics of the law. We have said this work is suggestive. It is—of the "glorious uncertainty of the common law," and so far as it goes it confirms an utterance which we have frequently made, that there is no principle of common law on which there are not conflicting decisions by respectable courts. There is a little slang in the book which is unpleasant—"smokist" is not even funny. There is a little bad proof-reading—"barbarious," "encumbent." There is an occasional comment on a judge or a case not in good taste—"one blast upon his bugle-horn were worth a thousand men" is rather startling when quoted with reference to Judge Ruffin, although he was a great judge. We might overlook it if it had been said with regard to Judge Hornblower. There is a repetition of a note, pages 68, 70. But these are trifles, and we cite them mainly to show that we have examined the work with some care. It is one of the few books which we shall keep constantly at our hand. It is very handsomely printed by M. Curlander, Baltimore.

The late ex-Attorney-General Brewster was not only a very accomplished lawyer, but a man of elegant cultivation and general scholarship, and of very exquisite tastes. We remember that we once referred a very obscure passage in Tennyson to our friend Judge Folger for solution, and as he could not explain it he referred it to Mr. Brewster, who was his authority on all matters of scholarship.

The passage in question was the following from Tennyson's "Gareth and Lynette:—"

"In letters like to those the vexillary  
Hath left crag-carven o'er the streaming Gelt."

Mr. Brewster's answer to Judge Folger was as follows: "The passage that you wrote to me puzzled me as much as it did you, but I soon saw my way out. A *vexillary* was an officer known to the Romans; *vexillatio* was in the Roman army what we would call an ensign. I knew that *Gelt* was either a Welsh or a North of England name, and represented some river or stream, and I directed search to be made where such a stream was, either in Wales or the north of England, and I found that the little river Gelt is in the county of Cumberland, England, between Brampton and Carlisle, and Erkswald. There is a forest there called the King's Forest of Geltsdale. It is near the Castle Carrick. I hold the map in my hand, and am describing the place by it. I quote from Hutchinson's History of Cumberland, first volume. If you turn to page 188 of that book it will be found that on the rocks on the border of that little river is an inscription in an abbreviation by which it appears that an ensign of the second legion of Augustus, under Agricola, the pro-prætor, had written his name, and the fact that he did it, and what his rank was, and it seems to have been put there as a mark to indicate by official authority that those stones were to be used as a quarry (as they were) for the purpose of building the wall of Cumberland. The rock is on the side of the river next to Brampton, and about half a mile above the Gelt bridge. The book says the *vexillatio* in his 'crag carving' intended the abbreviations to mean: '*Vexillatio legionis secunda Augusta ob virtutem appellata sub Agricola optione Apro et Maximo consulibus ex officina mercatus filius fermii.*' Now it is all plain. 'In letters like to those the vexillary' (here are the letters on the rock) 'hath left crag-carven o'er the streaming Gelt.' When you wrote to me, as I said before, I was completely puzzled about it, but when I came to study it for a minute I saw the difficulty would be solved as soon as I discovered where 'Gelt' was, and it appeared to me to be evidently a river or a stream, and I supposed at first it was a Welsh name, but it is evidently an old British name; and causing the search to be made at the right place, I found the word 'Gelt' explained the whole of it, and was happy in learning also the history of the whole subject, to-wit, as I have before stated, that the ensign by the order of his superiors had left 'crag carven o'er the streaming Gelt' the orders for the use of this very stone. It was a military order engraved upon the very rocks themselves. The book contains a print or copper-plate which gives an exact picture of the place and the stream, of the crags, of the carving, and the abbreviated Roman capital letters, just as they are there now. They are supposed to have been put there in the reign of Severus, in the year 207." But now, if any of our readers can give a satisfactory transla-



tion of the last six Latin words they can do more than the faculty of one at least of our colleges.

### NOTES OF CASES.

**I**N *Woods v. Wiman*, 47 Hun, 862, an action for libel, the matter complained of was contained in a pamphlet, presented to the governor upon a hearing upon a bill by the defendant as chairman of a committee of citizens promoting the measure, and not distributed or circulated. The defendant did not write or prepare the pamphlet, and was ignorant that it contained the matter in question. *Held*, not a publication, and privileged. The court said: "It was much like the case of *Rex v. Baille*, 2 Esp. N. P. 91, cited with approbation in *Howard v. Thompson*, 21 Wend. 827. That was the case of a printed book containing an account of the abuses of Greenwich hospital and treating the officers of that institution with much asperity, but copies were distributed among the governors of the hospital only, and Lord Mansfield arrested the prosecution on the point that such a proceeding did not amount to a publication. His reasons were that the distribution had been confined to persons who were called upon and had power to redress the grievances, and Judge Cowen said if that was not a publication no civil action could have been maintained for a libel. The same rule must be applied here. The defendant made no distribution of the pamphlet except to hand one copy to the governor. He is guiltless of every thing except laying down the paper in the hands of the executive. He did not write the paper, and he did not know its contents; and he did not and could not know it had any reference to the plaintiff in this action. In fact that knowledge could not be derived from the paper alone by any examination he could make. We think also the defendant was justified in handing the pamphlet to the governor, and that the same was a privileged communication. The doctrine of privilege extends to all matters growing out of legislative proceedings, and great immunity is attached to words spoken or written, communications made in the due course of parliamentary and judicial proceedings, and a party is protected from an action for damages on account of their defamatory character where he is actuated by honest motives and his acts are for the redress of a public grievance, and no action can be maintained for such communication without proof of express malice. *Perkins v. Mitchell*, 81 Barb. 467; *Thorn v. Blanchard*, 5 Johns. 508; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Cook v. Hill*, 3 Sandf. 849."

In *Brand v. Hinchman*, Michigan Supreme Court, March 2, 1888, an action for malicious prosecution, Morse, J., said: "While in this case there was no service of the writ, there was at least a technical taking and possession of the property. The officer went in the store to make the levy, and did not go out of it until ordered to by the agent of Hinch-

man & Sons. He testifies that he should have prevented any one from removing any goods from the building, and he certainly had possession enough to have done so. But whether he had such possession or not, I am fully satisfied, from a consultation of the authorities, that the action is maintainable without any arrest or seizure of property. There are but few if any wrongs for which the law does not provide a remedy, and if a man is hurt or damaged in his property, business, credit or reputation, by the malicious commencement or prosecution of a civil suit without probable cause, the better doctrine is that he can maintain an action on the case for such hurt or damage. Some of the authorities presented by the counsel for defendants upon the argument support his position, notably the following: *McNamee v. Minke*, 49 Md. 133; *Mayer v. Walter*, 64 Penn. St. 283; *Wetmore v. Mellinger*, 64 Iowa, 741; *Potts v. Imlay*, 4 N. J. L. 377; *Bite v. Meyer*, 40 id. 252; S. C., 29 Am. Rep. 233. The majority of text-writers also sustain the proposition of defendants' counsel, as do also the English authorities. The principle is grounded in most of these cases, and by the text-writers, upon the idea that in a malicious civil suit, where no property is seized, and the person is not molested, the recovery of his costs is a sufficient recompense to the injured party. 'Where a civil action is wrongfully brought the costs which the party gets are a compensation for the wrong; but in a criminal proceeding there are no costs.' Townsh. Sland. & Lib., § 410; 2 Add. Torts, § 863. While it may perhaps be said that the weight of authority denies the action in such cases, the weight of reason certainly approves it. And latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of the suit. The matter of costs I do not consider a sufficient reason for denying remedy, as the costs, under our practice, awarded the prevailing party are never sufficient to reimburse him for the actual cash expenses of the litigation, to say nothing of the loss of time and the inconvenience and trouble suffered. Even some of the cases cited by defendants' counsel hold, in language at least, that without an arrest of the party, or a seizure of his goods, if any special injury is sustained by him, an action might lie to recover his damages for such injury. See *Wetmore v. Mellinger*, 64 Iowa, 741-744; S. C., 52 Am. Rep. 465; *Bite v. Meyer*, 40 N. J. L. 252; S. C., 29 Am. Rep. 233. A large number of cases hold that it is not necessary that there should be an arrest or a seizure of property, but that the malicious prosecution of a civil suit, and especially the swearing out of a false attachment without probable cause, is actionable. *Tomlinson v. Warner*, 9 Ohio St. 104; *Fortman v. Rotier*, 8 id. 548; *Marbourg v. Smith*, 11 Kans. 554; *Whipple v. Fuller*, 11 Conn. 581; *Closson v. Staples*, 42 Vt. 209; *Pangburn v. Bull*, 1 Wend. 345; *McCardle v. McGinley*, 86 Ind. 538; S. C., 44 Am. Rep. 343; *Lockenour v. Sides*, 57 Ind. 360; *Burnap v. Albert*, Taney, 244; *Cox v. Taylor's Adm'r*, 10 B. Mon. 17; *Eastin v. Bank*, 66 Cal. 123; S. C., 56

Am. Rep. 77; *Burton v. Railway Co.*, 83 Minn. 189; *Parmer v. Keith* (Neb.), 20 N. W. Rep. 103; *Woods v. Finnell*, 18 Bush 629. The reason for the rule laid down by these last-mentioned authorities seems to me to be satisfactory, and in accordance with right and justice. The common law declares that for every injury there is a remedy. Especially is this so where the injury is malicious. If a man is injured in his credit and reputation, and his business lessened or broken up, it can make no difference, in his right to recover for such injury, that his person or property has not been manually seized or disturbed. But this is my individual opinion, the other members of the court not deeming it necessary in this case to express any opinion upon this matter." See note, 44 Am. Rep. 846.

In *Matter of Dayger's Will*, 47 Hun, 128, the question was whether a will was signed by the witnesses "at the end of the will." The court said: "The will was upon four half sheets of note paper, which were fastened together, end to end, with mucilage. Upon one side of this strip of paper the will was written and signed by the testator. It occupied all of that side except two lines between the signature and the bottom of the sheet. It is quite evident that after the completion of the body of the will the person preparing it folded this strip of paper with one fold and then turned it over and wrote the attestation clause upon the other side. After the will was thus prepared it was signed by the testator in the presence of the attesting witnesses, and thereupon they signed the same, as such witnesses, at the end of the attestation clause. There was no other writing whatever upon this paper. The whole will was fully completed before it was signed by either the testator or the attesting witnesses, and the signatures are all below or at the end of the point of completion. The appellant's sole contention is that the witnesses were required by statute to sign their names as such at the immediate end of the will, with no intervening space between the end and their signatures, and because this will was not so signed it was void. The cases of *Remsen v. Brinkerhoff*, 26 Wend. 265; *Matter of Hewitt*, 5 Redf. 271; 91 N. Y. 201; *Matter of O'Neil*, 91 id. 516; *McGuire v. Kerr*, 2 Bradf. 244; *Sisters of Charity v. Kelly*, 67 N. Y. 409, are cited as sustaining the appellant's contention. None of the cases cited sustain the position contended for by the appellant. In each of those cases some material provision of the will appeared, either after the signature of the testator, or after the signature of the witnesses, or after the signature of both. Not so here. Here all the provisions of the will precede the signature of the testator, and also precede the signatures of the attesting witnesses. The construction contended for cannot and ought not to be maintained. So literal a compliance with the statute is not required; a substantial observance of it is sufficient. An instrument is signed at the end thereof when nothing intervenes between the in-

strument and the subscription. Accordingly it was held that a codicil was signed by the subscribing witnesses at the end thereof, although there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause. *Matter of Gilman*, 38 Barb. 364; *Younger v. Duffie*, 94 N. Y. 535, 541; *Hitchcock v. Thompson*, 6 Hun, 279."

In *Lehman v. Brooklyn City Railroad Co.*, 47 Hun, 365, a married woman, in a state of pregnancy, was standing in the door of her husband's house in Hicks street in the city of Brooklyn, with her little child, about four or five years of age, when a horse belonging to the defendant company, and which had run away, dashed up the street at a high rate of speed, with whiffletree dragging after him. The horse plunged toward the woman, but his progress was arrested by a post against which he fell. The woman, although not touched by the horse, sustained a severe shock from her fright, which brought on a long train of nervous diseases. *Held*, that she could not maintain this action for the injury. The court said: "We have been unable to find either principle or authority for the maintenance of this action, and we have been referred to none by the counsel." See *Renner v. Canfield*, 34 ALB. LAW JOUR. 3.

#### MUNICIPAL CORPORATION — DEFECTIVE SIDEWALKS OUTSIDE LIMIT OF STREET—FAILURE TO ERECT GUARDS.

NEW YORK COURT OF APPEALS, FEB. 7, 1888.

JEWHRUST V. CITY OF SYRACUSE.

Where an injury is received by reason of a defective sidewalk, which is outside of the limits of a street, and was not built by the municipal corporation, nor under its control, the corporation is not liable for failure to repair such sidewalk; but if the boundary forming the line of the street is not visible so as to inform a person injured whether he is on the street or not, and the corporation has due notice of its dangerous condition, but fails to erect a guard along the true limits of its street, it will be liable for injuries caused by such neglect of duty.

APPEAL from General Term, Supreme Court, Fourth Department. Action for damages by reason of injuries sustained on a defective sidewalk just outside the line of a street. Judgment for plaintiff, and defendant appeals.

C. L. Stone, for appellant.

Forbes, Brown & Tracy, for respondent.

PECKHAM, J. The place where the accident occurred was outside of the actual limits of Tallman street. That street had been legally opened for some years of the width of sixty feet, and the accident happened two or three feet north of its northern boundary, the street running east and west. There had never been any such dedication and acceptance on the part of the owners and the city authorities of that portion of land where the accident happened as to make it any portion of the public street over which the city had any jurisdiction. It had not built the sidewalk or any portion thereof, and never assumed any jurisdiction over this piece of land. The city had

no legal right through its officers to go upon the premises where the accident happened, for it did not own the same. Under these circumstances we think it clear that the city cannot be held to any liability for the condition of the sidewalk outside of the line of the street, founded upon any duty to repair such sidewalk; for as it did not build it, never assumed control over it, did not own and had no legal right to go upon the land where the plank lay, such duty to repair or liability for neglect to repair does not exist. *Carpenter v. City of Cohoes*, 81 N. Y. 21; *Veeder v. Village of Little Falls*, 100 id. 843. Nor is there any thing in the case of *Beck v. Carter*, 68 id. 283, which aids the plaintiff. In that case defendant's testator had made an excavation about ten feet from the line of an alley, which under the facts in that case, the court held was to be considered as part of the public highway, and the plaintiff passing along the alley on a dark night fell into the excavation and was injured. The defendant was held liable for making an excavation so near to the highway as to make its use dangerous to one while exercising ordinary care. The action was against the person who made the excavation and not against the municipality. The case is also unlike that of *Sewell v. City of Cohoes*, 75 N. Y. 45. The officers of the city had in that case treated a piece of land within the city limits as a public street, and under and in pursuance of a resolution of the common council which fixed the grade, the land had been graded and paved as a street by the city authorities, and was used and travelled over as a public highway. The land had been in fact actually appropriated by the city, and it had assumed the burden and duty of keeping it in a safe condition like any other of the public streets of the city. The court held that under such circumstances the city was estopped from setting up a lack of title to the street or that it was not a legal highway.

But there is a class of cases of which *Cogswell v. Inhabitants of Lexington*, 4 Cush. 307; *Hayden v. Inhabitants of Attleborough*, 7 Gray, 338; *Alger v. City of Lowell*, 3 Allen, 406, and a number of others are examples where a city has been held liable for a failure to guard the boundary of a street under circumstances which rendered the roadway dangerous on account of such failure. They are mostly cases where the injuries were received outside of the legal limits of the highway, but at a spot which was apparently within such limits and which was rendered dangerous by an obstruction or an excavation, and no step had been taken to guard the traveller from running against or into it while passing along what seemed to be the highway and in the exercise of reasonable care and caution. Thus in the first of above cases plaintiff was travelling in the evening along the highway, the line of which was not indicated by any visible objects; and the post which occasioned the injury was outside of yet near the true line of the highway and within the limits of the general course and direction of the travel, and where travellers were accustomed to pass, and rendered the travelling dangerous. The court held the defendant liable even if it had no right to enter upon the land where the post was to remove it, because it clearly had the right and it was its duty, if it could not lawfully remove the post, to place such a fence or other barrier between it and the road as would have rendered the road safe. So in the case of *Hayden v. Inhabitants of Attleborough*, *supra*, where the limits of the highway were not indicated by any visible objects, and there was nothing to show a person driving thereon in the evening that the course he was pursuing was not within the way intended for public travel, defendant was held liable for an injury caused to the plaintiff by being thrown from a wagon at night into a cellar which had been dug two years

before, although the cellar was outside of the limits of the road, and the plaintiff at the time of the accident was outside of such limits. But there was evidence that the owner of the land at the place of the accident had some years before thrown it open for travel and set back his fence; and such space so thrown open was as smooth as the highway and in good order to travel upon with horses and carriages, and before the digging of the cellar much of the travel had been accustomed to pass over the place where the cellar was dug. The court charged the jury that if the line of the highway was not indicated by any visible objects, such as fences, banks of earth, or other objects; and if there was nothing to show the plaintiff in the evening that the route she was pursuing was not within the way intended for public travel; and if within the general course and direction of the travel, where travellers were accustomed to pass along the said highway, the cellar was so situated within the limits of the highway as to render the travelling there dangerous; or without the limits of the located way, but so near as to render the travel there dangerous in the condition in which it was at the time of the accident; and there was nothing to indicate to travellers their approach to the cellar until too late, etc.—then after proper notice the town would be liable. This charge was approved by the Supreme Court of Massachusetts, which held that the want of a railing necessary to the security of travellers made a highway "deficient" within the meaning of the statute. The court was requested to charge that if the plaintiff, while travelling out of the road-bed—there being a proper and sufficient road-bed there—met with the accident at a point of the road-bed and without the located way, then the defendants were not liable. This was refused, and defendants took an exception, which was overruled by the Supreme Court.

We have not had our attention called to any case in this State precisely similar in its facts, but the principle of several of the cases decided here sustains this reasoning. Thus in *Saulsbury v. Village of Rhoda*, 94 N. Y. 27, although the village authorities had not built the plank walk, and had not even decided that a sidewalk should be built there, yet the court decided that the duty rested upon the village to keep a reasonably safe highway; and if the sidewalk was dangerous, no matter by whom built, the village owed a duty to the public to take such steps in the matter as would remove the danger. It is true the sidewalk in question in that case was within the limits of the street, or in other words the cause of the dangerous condition of the street lay within its limits; while in the case at bar the cause of the danger in the street proper existed just outside of the true limits thereof, but still very near to it. We are unable to perceive why the duty to keep the street reasonably safe does not exist in the one case just as much as the other; the only difference being that where the cause of the danger lies within the limits of the street the corporation has the right to go upon the spot and there remedy the defect; while in such a case as this the corporation cannot go outside its limits, but is confined to a remedy within them. In *Veeder v. Village of Little Falls*, *supra*, it was claimed that the duty of the defendant was to put up a guard on its own land and near the property of the State so as to prevent any one from running into danger existing on such State property. But the court said it would not be under any such obligation if the barrier which was thus erected would prove more of a danger than that which was to be avoided by its erection; and it was held error to have refused the request of defendant to submit to the jury that question with a direction that if the erection would constitute a greater danger than the one sought to be avoided, the corporation was not

negligent in failing to erect it. Yet in that case the necessity of doing something on its own land, as a general rule to avoid a danger on the land of another very near to the street and apparently being part thereof, was tacitly recognized as resting upon the municipality; and the excuse for not doing it, which was alleged, was held a proper fact to be submitted to the jury.

The referee in this case found as a fact that for a year prior to and at the time of the happening of the accident the sidewalk, for want of repair, had become and was in an unsafe and dangerous condition, of which the defendant had due notice. He further found that the sidewalk was constructed of two strips of 12-inch plank with one foot space between them to be filled up, and the planks ran lengthwise of the street and rested upon string-pieces running across. The plank in the sidewalk, by the breaking of which the plaintiff was injured, was on the north side of the sidewalk and outside of the exterior line of the street, while the adjacent plank on the other side of the same sidewalk was within the limits of the street. There was no mark or indication to the public as to where the true line bounding the north line of the street was, and the sidewalk was ostensibly a sidewalk upon the street, and the contrary thereof could not be ascertained without a survey and measurement; and the defendant, from the time of the construction of the sidewalk until after the accident, permitted the same to remain apparently a sidewalk upon the street for the use of the public, and the same was extensively used by the public to the knowledge and acquiescence of the defendant. Upon these findings of the referee we think, so far as this question is concerned, a cause of action is made out. Generally the cause which rendered the highway dangerous has been, it will be observed, an excavation or an obstruction near it, and the question has been mooted whether the principle can be applied to such a case as this where the defect was outside of the limits of the highway, and consisted only in the dangerous condition of the plank there laid in the manner above described. It is urged that such a danger is not within the principle, for it is so slight in degree that it cannot fairly be claimed to be negligence to fail to discover the object, or if discovered, to guard the true limits of the street from such plank by a railing or some other structure. We do not see how any such distinction can be maintained. It is a question of fact and not of law as to the dangerous condition of the street. Under the finding of the referee this planking outside of the street was and had been for a year in a dangerous condition, and was so known to be by the city authorities. The walk was rendered dangerous because it was out of repair, and danger from such a source may be quite as great as that arising from an excavation or an obstruction in the road near the highway. I do not see how it can be said as matter of law that the city might be responsible for damages arising from the existence of an excavation or an obstruction, such as a post, and yet free from such liability arising from a sidewalk rendered dangerous from being out of repair. If the sidewalk outside of the limits of the street were dangerous upon the facts in this case because out of repair, I think the street itself may be said, under the same facts, to have been in a dangerous condition, and that the city was liable so far as this question goes for injury arising therefrom. Indeed the finding of the referee is substantially to the effect that the highway was dangerous because of the condition of the plank just outside of its limits, and as there is evidence to sustain that finding, we are bound by it in this court.

It has been also argued that the plaintiff herein voluntarily chose the plank which was outside of the street

limits and was not injured either while within the true limits of the street or while passing from such limits to a point which was beyond, but that she had fully and safely and voluntarily passed outside of and beyond the limits of the street and was pursuing her way along the private property of adjacent owners when she received the injury; and hence she ought not to be permitted to recover. The argument might hold good and furnish a good defense if the further fact were found, viz., that at this time the plaintiff knew she was outside the limits of the street and had knowingly left those limits for her own convenience. The case cited by defendant's counsel of *Tisdale v. Inhabitants of Norton*, 8 Met. 388, is of such a character. The highway was out of repair and in a dangerous condition, and the plaintiff knowingly and for the purpose of avoiding the danger existing in the highway, turned out therefrom and went about four rods and there sustained the injury for which he brought suit. The court held his action could not be maintained because it did not happen in the highway from which he had knowingly departed, and the fact that he left it because it was dangerous did not make the town liable for injuries sustained by him while he was thus knowingly and voluntarily outside of the highway. But in this case the findings of the referee, already set out fully, we think answer the argument above stated. The other case cited by the defendant's counsel (*Rowell v. City of Lowell*, 7 Gray, 100), does not touch this point. There the plaintiff was coming to the street, but had not yet arrived on it when she slipped on some steps outside of the limits of the street, and continuing to slip, came on the sidewalk, which being slippery and dangerous, the plaintiff fell and sustained injury. The court held she could maintain no action against the city because she could not recover unless the defect in the highway was the sole cause of the injury. The case is no authority for or against the principle upon which we sustain this action.

Where there is no visible boundary to the line of the street, and a portion of the roadway travelled on is so near the actual line (although really outside thereof) as to induce the belief in any one exercising reasonable care that he is within such line, if such portion is for any reason rendered dangerous for travel, and the city has notice thereof in due time, and such danger can be remedied by the exercise of reasonable care, either by the erection of a guard or railing along the true limits of the street or in some other way, and the city neglects to build it, we see no reason why it should not be held liable to one who is injured outside of such limits under such circumstances, he being himself free from any neglect contributing to the injury.

The judgment is right and should be affirmed with costs.

All concur; Ruger, C. J., not voting.

## CONSTITUTIONAL LAW—PROHIBITORY LIQUOR LAW.

RHODE ISLAND SUPREME COURT, JAN. 7, 1886.

STATE V. FITZPATRICK.\*

A statute provided that "no person shall manufacture or sell or suffer to be manufactured or sold or keep or suffer to be kept on his premises or possessions or under his charge for the purpose of sale any" intoxicating liquors. This statute differs from previous statutes in omitting the

\* An abstract of this was given last week, but some points were omitted, and we now publish it in full.—Ed.

words "within this State" after the words "for the purpose of sale." *Held*, (1) That this statute did not apply to liquors kept by a person for his own use, not for sale; (2) that it did not apply to liquors transporting through the State for sale in another State; (3) that it did not apply to liquors simply stored in this State, though intended ultimately to be exported for sale; (4) that the statute was within the limits allowed to State legislation by *The License Cases*, 5 How. (U. S.) 504; (5) that the statute was not violative of the Constitution of the United States, art. I, § 8.

**C**ONSTITUTIONAL questions certified to the Supreme Court under Pub. Stat. R. I., cap. 220, §§ 1-9.

*Clarence A. Aldrich*, assistant attorney-general, for plaintiff.

*Hugh J. Carroll & Thomas J. McParlin*, for defendant.

**DURFEE**, C. J. This case comes before us from the District Court of the Tenth Judicial District by certificate on a constitutional question. It is a complaint under Pub. Laws R. I., cap. 596, of May 27, 1896, and cap. 634, of May 4, 1897, against the defendant for keeping without lawful authority intoxicating liquors "for the purpose of sale" in violation of cap. 634, § 1, in amendment of cap. 596, § 1, charging the offense substantially in the language of the statute. In the District Court the defendant made the following motion, to-wit:

"The defendant moves that the above entitled complaint be dismissed because it is brought under section 1 of chapter 634 of the Public Statutes, which attempts to prohibit the keeping for the purpose of sale of any of the liquors enumerated in said section, without making any distinction as to whether the sale is to be within or without this State, and he claims that he has a right to keep the same for the purpose of sale without this State. Art. I, § 8, Constitution of the United States."

The District Court overruled the motion, and having found the defendant guilty, has certified the question involved in it to this court for decision.

The first section of chapter 634, so far as it is necessary to recite it for the purposes of the question, is as follows, to-wit:

"No person shall manufacture or sell or suffer to be manufactured or sold or keep or suffer to be kept on his premises or possessions or under his charge for the purpose of sale, any ale, wine, rum or other strong or malt or intoxicating liquors, a part of which is ale, wine, rum or other strong or malt or intoxicating liquors, unless as hereinafter provided."

The corresponding sections in earlier statutes, whether license or prohibitory, contained the words "within this State" after the words "for the purpose of sale," thus making the keeping illegal only when it was for the purpose of selling the forbidden liquors within the State. The defendant contends that in consequence of the alteration the keeping is prohibited if the liquors are kept in this State for the purpose of sale, even though they are intended to be sold out of the State, and that the section is therefore repugnant to section 8 of article I of the Constitution of the United States, which confers upon Congress a variety of powers, and among them power to "regulate commerce with foreign nations and among the several States."

It will be well to determine the scope and import of the question thus raised before we proceed to consider and decide it. First, then, when is it that liquors which are in the possession of a person in this State are kept by him for the purpose of sale within the meaning of the statute? They are clearly not so kept when they are kept by him for his own use without any intention of selling them. Suppose he has the

liquors in the State in the act of transporting them through this to another State for the purpose of selling them in the latter, are they then being kept by him for the purpose of sale within the meaning of the statute? We think not, for though in a general sense he keeps such liquors for the purpose of sale, it is not the purpose for which he is keeping them in this State, the purpose for which he keeps them here being not sale but transportation. If such a person were complained of for illegal keeping, the charge would be that in some particular town he did without lawful authority keep the liquors for the purpose of sale, and he could truly reply that he did not keep them in that town for that purpose, and was therefore not guilty. The same construction will hold if intoxicating liquors are kept in this State for storage simply, though they are intended to be ultimately carried elsewhere and sold. But if keeping in either of these ways is not prohibited, then the operation of section 1, in so far as it can interfere with commerce with foreign nations and among the States, is extremely limited. We do not say however that liquors may not be kept in this State for the purpose of sale in other States in such way that the keeping would violate section 1. For instance: If intoxicating liquors were kept in this State to be sold on orders received or procured in other States, or to customers coming from other States, we think the keeping would be within the prohibition, even though the sales were meant not to be completed in this State. In such a case the place of keeping would be the headquarters of the traffic or at least the place from which, if not at which the sales would be made. Making the sales would be the purpose for which the liquors were kept there, and we think the General Assembly must be held to have intended that no such place should be tolerated in the State. But no other way occurs to us in which liquors not intended for sale in this State can be kept here so that the keeping would be within the prohibition of section 1. The question presented then is whether because such keeping is prohibited, section 1 is in conflict with the Constitution of the United States.

It will be seen that the question as presented assumes that the prohibition, if it be unconstitutional as it applies to intoxicating liquors kept in this State for sale elsewhere, is likewise unconstitutional as it applies to such liquors kept in this State for sale within it. This is not clear to us, *State v. Amery*, 12 R. I. 64, nor are we clear that the question presented can be properly raised by a mere motion to quash. *Mugler v. Kansas*, 36 Alb. L. J. 525, 531, issue of December 31, 1887. But passing these points which have not been argued at the bar, we proceed to consider the question in the larger way in which it has been discussed.

We deem it to be perfectly well settled by the decisions of the Supreme Court of the United States that the several States have power to restrict and even prohibit altogether the sale of intoxicating liquors for use as a beverage within their borders, and consequently of course to prohibit the keeping of them for sale to the same extent. *Cooley Const. Lim.* \*582, \*583, and cases cited; *Mugler v. Kansas*, *supra*. The power to do this has been denominated a police power, a power not delegated to the general government, but remaining to the States to enable them to regulate for their own welfare, as they understand their welfare, their internal or domestic concerns. The power is signally exercised in legislation designed to promote popular education, to protect the public health and morals, to punish and prevent crime, to alleviate and prevent pauperism, and especially to diminish and prevent the demoralization and impoverishment and the numberless vices and miseries which are the sure concomitants and consequences of

a free traffic in intoxicating liquors by restraining or prohibiting it. The power was exhaustively discussed and considered in the Supreme Court of the United States in the *License cases*, 5 How. (U. S.) 504, with particular reference to its exercise in legislation for the restraint of the liquor traffic; and while the justices did not fully agree in the reasons given by them for decision, they did agree in fully affirming the authority of the States within their own borders. Chief Justice Taney and Justices Catron and Nelson rested their judgments distinctly on the ground that the power of the States to pass restrictive laws in the matter was complete, notwithstanding the laws might indirectly interfere with interstate commerce, so long as they did not come into conflict with any law or regulation of Congress; and some of the other justices, enough to make a majority of the court, unless we misunderstand their opinions, concurred with them, though they preferred to take their stand upon a still deeper and broader ground of State rights. If this doctrine of Chief Justice Taney and Justices Catron and Nelson is correct and is still adhered to by the Supreme Court of the United States, the defendant's contention of course cannot prevail, for it is not pretended that there is any Federal regulation of interstate commerce with which the provisions under which he is complained of comes into conflict. But not to put too much reliance on this view, we will proceed to the broader consideration of the question.

As we have seen there can be no doubt of the power of the States under the decisions of the Supreme Court of the United States to prohibit altogether the sale of intoxicating liquors within their borders, and yet it is perfectly evident that such a prohibition does obstruct the freedom and lessen the extent of commerce among the States. For example: A manufacturer of intoxicating liquors in another State could not send the product of his manufactory to a prohibitory State and sell it there. He could not even receive orders for his liquors from such a State and fill them, if a delivery in such State were necessary to a complete compliance with the order. Nor could a person living in another State go into such a State and purchase intoxicating liquors there to carry home with him, though it might be very advantageous to him to do so if he were not prevented by the law. In the *License cases*, 5 How. (U. S.) 504, a law of New Hampshire, under which a sale in that State of gin imported from Boston was punished, was held not to be void for interfering with the power of Congress to regulate commerce among the States, though the gin was sold in the cask in which it was imported. In the same case, in reply to the argument that the restrictive legislation tended to lessen importation, Mr. Justice McLean said that "a law of a State is not rendered unconstitutional by an incidental reduction of importation, and especially not when the State regulation has a salutary tendency on society and is founded on the highest moral considerations." And he further remarked: "When in the appropriate exercise of these Federal and State powers contingently and incidentally their lines of action run into each other if the State power be necessary to the preservation of the morals or safety of the community, it must be maintained." The doctrine of the justices who took the broader view, if we rightly understand their opinion, was that a State law passed in good faith for the suppression of intemperance or of the traffic in intoxicating liquors could not be condemned as unconstitutional because it might incidentally among its effects hamper the freedom or lessen the extent of interstate commerce. And see *State v. Peckham*, 3 R. I. 289. The question which we now propose to consider is whether this State has trans-

scended the power thus conceded to it by the enactment under which the defendant was complained of.

In considering this question we will in the first place refer to a matter to which we have already adverted, namely, that the quantity of intoxicating liquors kept in this State solely for the purpose of selling them elsewhere must, from the nature of things, be very small. For what is there to induce any person who has liquors to sell in other States to keep them in this State for that purpose? Some such persons there may have been when the law first enacted under the prohibitory amendment went into effect, but that law did not prohibit the keeping for the purpose of sale out of the State, and there was ample time to dispose of liquors so kept before the present law went into effect. There might be such persons if the manufacturing of intoxicating liquors was permitted, but manufacturing is prohibited equally with selling. In its practical operation therefore the enactment can have but little effect on interstate commerce.

In the second place we remark that the more unlimited the prohibition is, the more effective it is likely to be; for if intoxicating liquors can be lawfully kept in the State for the purpose of sale elsewhere, the fact that they can be so kept is liable to be availed of as a blind or feint under which to cover a keeping of them for sale in this State. The State borders would afford a favorable ground for the practice of such an evasion or circumvention of the law. Moreover, if the traffic be an evil, can the State permit itself to be the starting point from which the evil shall proceed into other States without some loss of the moral prestige and power which it must preserve in order to secure for its laws that popular homage and respect without which they cannot be effectually enforced. Certainly the State would have full power to follow its own judgment and legislate as it has done in this matter unless it thereby encroaches unwarrantably upon the power of Congress; and in that regard we find it difficult to see how a law which forbids the keeping of intoxicating liquors in one State for sale in another interferes with interstate commerce any more than a law which forbids the sale of such liquors in one State which have been imported from another. And yet as we have seen, a law of the latter description has been held to be a proper exercise of the police power of the States by the Supreme Court of the United States. *Pearson v. International Distillery*, 34 N. W. Rep. 1.

We see no reason to doubt that our law was passed in perfect good faith for the purpose of carrying the prohibitory amendment into effect, or to suppose that if it interferes with foreign or interstate commerce, the interference is other than a merely incidental effect or consequence. It is our duty to uphold it as constitutional until we are satisfied that it is unconstitutional. We are not satisfied that the provision of our prohibitory law under which the defendant has been complained of is unconstitutional. We sustain it as valid and send the case back to the District Court for sentence.

Order accordingly.

**LANDLORD AND TENANT—DANGEROUS PREMISES—COAL-HOLE IN SIDEWALK—CONTRIBUTORY NEGLIGENCE—ACTION FOR TORT—ACTS OF JANITOR.**

NEW YORK COURT OF APPEALS, FEB. 23, 1888.

JENNINGS V. VAN SCHAICK.

A person has a right to assume that the safety of the sidewalk on which he is walking until in some manner warned of his danger; and where the jury finds that a

person who in broad day falls into an open coal-hole, which is unguarded by some person, or a box or crib, as required by a city ordinance, is not guilty of contributory negligence, such finding is conclusive.

It will be presumed, where a coal-hole has been in use for eighteen years without objection, that permission was originally given by the municipal authorities for its construction; but this consent is upon condition that it shall be properly used, so if it is left open and unguarded, this is a wrongful use; and in an action against the owner for personal injuries received by falling into the hole, it is not error to charge that the action was founded on a tort.

Where the owner of a building rents it in flats, and hires a janitor to take care of it, and retains some control of it, he is responsible for an injury, occasioned by the janitor opening a coal-hole in the sidewalk, and leaving it unguarded and unprotected, to take in coal, though the coal was for one of the tenants.

In an action against a landlord to recover for injuries occasioned by falling through an open coal-hole in a sidewalk, through which coal was delivered, it is proper to refuse to charge the jury that if they find that the janitor received the coal for a tenant, and not for or in the service of the defendant, the defendant is not liable, where there is no evidence to support such findings.

**A** PPEAL from General Term, Court of Common Pleas, city and county of New York. Action to recover damages for personal injury.

*Van Schatck, Gillender & Stotter* and *A. H. Stotter*, for appellant.

*Jeroloman & Arrowsmith*, for respondent.

**FINCH, J.** The plaintiff fell into an open coal-hole, left uncovered and unguarded in a crowded city street. She had a right to assume the safety of the sidewalk, and so was not called upon to give attention to her steps until in some manner warned of danger. Undoubtedly she knew that vaults and coal-chutes were common under and adjoining the sidewalks, and that through the ordinary openings coal was deposited in such vaults. But she had a right to assume that they were securely covered, or if left open, were guarded by some one to give warning, or by the crib or box prescribed by the city ordinance. Neither protection was provided in the present case. It was said that loose coal lay around the opening, and its presence should have warned the plaintiff of danger. In a crowded street it might not be observed in time to avoid a fall; but she swears no such sign of possible peril was present, and though contradicted, we must take the verdict of the jury as settling the question of fact in her favor. Somebody therefore was responsible for the injury.

It does not appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk; but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city. Assuming however that authority for the construction had been granted, the duty of safe covering and of protection when open remained, and if not performed, the unguarded opening became at once a wrong and a nuisance. Where an owner builds a coal-vault under or adjoining the sidewalk, with an opening to the surface, by the permission of the municipality, and constructs it in all respects safely and properly, and then rents the premises to a tenant, who takes the entire possession and occupation, the landlord reserving no control; and the tenant, in his use of the property, carelessly leaves the coal-hole open, whereby some one is injured, it is the tenant, and not the landlord, who is liable; since the latter has neither created nor maintained a nuisance, nor

been guilty of any negligence or wrong. But that is not this case. The building was rented in flats or apartments. The owner remained in control to some extent, and hired and employed a janitor to take care of the premises. He controlled the halls and some portion of the basement, and especially the coal-vaults, in one of which was stored the coal for the building, and in the other that for the tenants. The coal for the building was for the use of the janitor and the engineer. The cover to the sidewalk opening was held in its place, and so made safe, by a chain fastened underneath. When this coal was delivered the janitor took the ticket, and unfastened the chain, so that the cover could be removed. His employment by the tenants was to deliver the coal to their rooms. To open the coal-chute, and allow it to be received, was his duty as janitor under his employment by the owner. That duty he neglected to perform properly, and permitted the cover to be removed without the least attention to the safety of those passing by. There was thus enough in the case to make the owner responsible for the injury. The evidence permitted an inference by the jury that the landlord controlled the use, and did not admit the inference involved in the requests to charge which were refused, that the tenants employed the janitor to open the cover, and see to the delivery. Roberts said his employment by Dannot, the tenant, was to deliver coal to his rooms, and the effort to make him say differently failed.

The exceptions relied upon by the appellant were mainly involved in two propositions of the defense—the one, that the action was not founded upon a wrong as charged by the court; and the other, that the jury were at liberty to find, from the evidence, that the janitor was the servant of the tenant in the use and management of the coal-hole, and not of the defendant. We have assumed that from long use and acquiescence the consent of the municipal authorities to the construction of the coal-vault and its aperture should be inferred; and so the structure was not in and of itself a nuisance. But the consent of the city is conditional upon certain modes of use, and if the opening is left unguarded it becomes at once a trap and a nuisance. No consent to leave it open and unprotected can be possibly claimed; and so the act is a positive wrong on the part of the person or individual leaving it open, and without warning to the public, either by some one guarding it or by a box or crib placed over it, as required by the city ordinance. The court therefore did not err in saying that the action was founded upon a wrong, and in treating the open and unprotected coal-hole as a nuisance. Thereupon the question arose, who was guilty of the wrong, and responsible for the nuisance? and that ended in the inquiry, who controlled the use of the coal-hole? The janitor controlled it beyond question. He occupied the basement, and had the care of whatever about the house was for the common convenience of the tenants. If the cover on the sidewalk was so made that it could be opened by anybody from the outside, maliciously or accidentally, the construction was faulty. But that apparently was not the case, and the janitor himself scarcely denies that he loosened the chain and allowed it to be opened. He was the servant of the owner, put there to control and care for the premises. Until some evidence was given to change that relation the owner alone was responsible for the wrongful management of the coal-hole. We discover no such evidence. The janitor testified that “the coal-hole in question here was used for the tenants;” that he was employed by some of the tenants to “deliver coal to” their rooms or apartments. And that answer being unsatisfactory, was followed by a very leading question, viz., “To see that it was delivered in the



house?" Which the witness answered by saying: "I didn't take it in that consideration." None of the evidence of the witness tended to show that this coal-hole was put under the control or care of any one or all of the tenants; and the requests to charge that the jury might find that it was in the exclusive use of the tenants, and so the landlord not liable, and that if they found that what the janitor did "in regard to the receipt, delivery or removal of the coal" was for the tenant, Mr. Dannot, "and not for or in the service of the defendant," then the defendant is not liable, were properly refused. There was no evidence to justify such finding by the jury. Admitting that it was no part of the janitor's duty to "assist" in putting in or receiving coal for the tenants, it by no means follows that the opening and closing of the cover, and its general control, did not devolve upon him as the servant of the owner. The landlord, through his janitor, retained the general possession of the house, and had not absolutely parted with its control. It remained his duty to care for the sidewalks, to remove the snow and keep them safe, and in no respect had he shifted that duty upon those occupying rooms or apartments in the building. He never transferred, and they never accepted, any such duty or obligation. It attached to his owner, and could only be removed by a complete transfer of the possession, which left no power of control in him.

For these reasons we think no error was committed on the trial. The judgment should be affirmed with costs.

All concur, except Earl and Peckham, JJ., not voting.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**ARBITRATION AND AWARD—SUBMISSION—CONSTRUCTION—EVIDENCE—MATTERS OCCURRING BEFORE ARBITRATORS—FAILURE OF PARTIES TO OFFER EVIDENCE BEFORE ARBITRATORS.**—(1) The plaintiffs sold the defendant a quantity of jute butts, "guaranteed bagging quality," and the defendant rejected a part, on the ground that they were not of the guaranteed bagging quality. The matter was referred to arbitrators "for a just and equitable settlement as to their rights and obligations under the contract." *Held*, that it was within the submission for the arbitrators to allow one-sixteenth of a cent per pound as damages to buyer for failure of the sales to be of bagging quality, and the buyer was bound by the award. (2) In an action in which there had been an award by arbitrators, under an agreement by the parties which set forth that it was referred for the purpose of obtaining a just and equitable settlement of their rights and obligations arising out of a contract of sale of a certain quantity of jute butts which the buyer had refused to take, because not of the guaranteed bagging quality, one of the arbitrators was asked, "Would you have made the award, in so far as you made the deduction of this award, if you had not received the letter from the sellers?" after stating that he had not made the award before receiving the letter. *Held*, that the terms of the submission were unambiguous, and the answer to such question was inadmissible in evidence. (3) The plaintiffs sold to the defendant a certain quantity of jute butts, "guaranteed bagging quality," and the defendant rejected a part on the ground that they were not of the guaranteed quality. The matter was referred to arbitrators "for a just and equitable settlement as to their rights and obligations under the contract," and an award was made by them, after a personal inspection of the rejected article, that the buyer should take the jute and receive an allowance of one-sixteenth of a cent per pound on account of

the defective quality. *Held*, that it appearing that the arbitrators were well acquainted with the value of the article, the failure of the parties to offer evidence before them as to the value of the goods would not tend to show that the award was not within the submission. Feb. 28, 1888. *Cobb v. Dolphin Manufacturing Co.* Opinion by Peckham, J.

**ATTACHMENT—AFFIDAVIT—FOREIGN JUDGMENT—ACTION ON.**—A judgment, whether founded on tort or contract, is a contract within the meaning of the Code of New York, § 635, providing that attachments may be granted in actions to recover a sum of money as damages for "breach of contract, express or implied, other than a contract to marry," and an attachment granted in an action upon a foreign judgment will not be vacated because the affidavit and complaint does not show the character of the claim upon which the judgment had been obtained. A judgment is not for all purposes and under all circumstances to be treated as a contract, and yet it has frequently been so treated. There is always, on the part of the judgment-debtor, an obligation or promise implied by law to pay the judgment. In *Taylor v. Root*, 43\* N. Y. 335, in an action upon contract, it was held that a judgment in an action of slander could be set up as a counter-claim for the reason that it was a cause of action arising on contract, and existing at the commencement of the action. In *Nazro v. Oil Co.*, 36 Hun, 296, upon an appeal from an order of the Special Term denying a motion to vacate an attachment issued in an action brought upon a judgment recovered in the State of Pennsylvania, Davis, P. J., said: "We think a judgment is a contract, 'express or implied,' within the meaning of section 635 of the Code of Civil Procedure." In *Donnelly v. Corbett*, 7 N. Y. 500, an attachment was based upon a judgment recovered against the defendant in a suit in the State of South Carolina. Two kinds of contracts are contemplated by section 635, express contracts, which are such as are voluntarily made by the parties thereto, and implied contracts, which though not expressly made by the parties, are made by the law where it, enforcing a sound morality and a wise public policy, acting upon principles of equity and justice, imposes upon a party an obligation to pay a debt or discharge a duty. After the recovery of this judgment, whether it was recovered for a tort or upon contract, the recovery became a debt which the defendant was under obligation to pay, and the law implied a promise or contract on his part to pay it. The previous cause of action, whatever it was, became merged in the judgment. *Besley v. Palmer*, 1 Hill, 482; *Goodrich v. Dunbar*, 17 Barb. 644; *McButt v. Hirsch*, 4 Abb. Pr. 441; *Mallory v. Leach*, 14 id. 449; *Clark v. Rowling*, 3 N. Y. 216, 227; *Suydam v. Barber*, 18 id. 468; *Dock Co. v. Mayor*, etc., 53 id. 64; *Freem. Judgm.*, §§ 215, 217. This is not therefore an action *ex delicto*, but *ex contractu*, and the plaintiff was entitled to such remedies only as are authorized in actions upon contracts. If the Texas judgment had been for tort, and the defendant had been a natural person upon any judgment recovered in this action, an execution could not have been issued against the person of the defendant. We find nothing in the letter of the statute or in the policy upon which it is founded which requires us to hold that the plaintiff is not entitled to an attachment in this case, and we find no authority sustaining the contention of the defendant. There are authorities which hold that judgments, for some purposes, are not contracts, but there is no authority that they are never to be treated as contracts, and all of them recognize the implied obligation of every judgment-debtor to pay the judgment, and that for the purpose of actions and remedies upon them, they are to be treated as contracts. *O'Brien v. Young*, 96 N. Y. 428;

*Chase v. Curtis*, 113 U. S. 452. In a suit upon a binding judgment, whether foreign or domestic, the plaintiff must therefore be entitled to the same provisional remedies to which he would be entitled in an action upon a contract, express or implied. If the plaintiff's original cause of action was for a tort, it was merged in the judgment, and the plaintiff could not thereafter sue in this State for the tort; but even if he could, there is no authority holding that he was obliged to, and that he could not take his remedy in this State upon the judgment treating the tort as merged therein. Jan. 24, 1888. *Gulla-Percha & Rubber Manufacturing Co. v. City of Houston*. Opinion by Earl, J.

**CONSTITUTIONAL LAW—TITLES OF LAWS—OBJECTS EMBRACED—DUE PROCESS OF LAW—CONCLUSIVE EFFECT OF TAX DEED—HIGHWAYS—TAXATION—LIABILITY OF NON-RESIDENT LANDS—SALE—PROCEEDINGS—REPEAL OF STATUTE—TAX TITLE—VALIDITY—PRESUMPTION FROM LAPSE OF TIME—ASSESSMENT—ENTRY OF—OMISSION OF DOLLAR SIGN—DATE OF WARRANT—NUMBER OF DISTRICT.**—(1) The New York act of 1882, chap. 287, entitled "An act to amend chapter 229 of the Laws of 1879, entitled 'An act in reference to the collection of taxes,'" in certain counties, and making under certain circumstances the conveyance of the comptroller and treasurer of the lands in the said counties conclusive evidence of title, is not in violation of the Constitution of New York, art. 3, § 16, which provides that "no local bill shall embrace more than one subject, and that shall be embraced in its title." (2) Nor in violation of the Constitution of New York, art. 1, § 6, which provides that no person shall be deprived of life, liberty or property without due process of law. (3) The Laws of New York of 1835, chap. 154, § 1, providing that "the real property of non-resident owners, improved or occupied by a servant or agent, shall be subject to assessment of highway labor, and at the same rate as real property of resident owners," does not exempt from such tax non-resident lands not so occupied, nor does it repeal section 19, part 1, title 1, chapter 16, article 2, which made all not-resident lands pierced by or adjacent to a road assessable for highway labor. (4) The New York act of April 10, 1850, repealed Revised Statutes, pt. 1, tit. 3, chap. 13, arts. 2, 3, relating to the assessment and collection of taxes, but with the proviso that such repeal should not affect "any tax levied or assessed prior to the year 1849, nor any proceeding for the collection thereof by a sale of the lands taxed or otherwise," and changed the proceedings for the collection of non-resident taxes by taking from the comptroller the authority to make the sale, and giving it to the treasurer. *Held*, that a sale made by the treasurer in 1852, pursuant to the act of 1850, for taxes levied in 1849, but returned to the comptroller before April 10, 1850, was valid. (5) In an action of ejectment, plaintiff contested defendant's title, which was acquired at a tax sale in 1852, for the reasons (1) that the assessors did not sign the judgment roll as required by statute, though they did sign the certificate attached thereto; (2) that in that part of the certificate which relates to the mode of valuation the words "solvent creditor" appeared, instead of "solvent debtor;" (3) that the assessment was not verified at the proper time; (4) that the treasurer's notice of the tax sale was not delivered to the printer until after the time provided by law, though otherwise sufficient. *Held*, that these defects were not jurisdictional, and were cured by the New York act of 1882, chap. 287, which provides that when fifteen years have elapsed since such sale of unoccupied and unimproved lands belonging to a non-resident, the sale and all proceedings shall be deemed to have

been regular. (6) The Revised Statutes of New York, pt. 1, tit. 2, chap. 13, art. 3, § 33, provides that the county board shall set down in the assessment roll, opposite the valuations of real and personal estate, "the respective sums, in dollars and cents, to be paid as tax thereon." *Held*, that a tax set down in the proper column, but without the dollar sign, was not for that reason invalid. (7) The Revised Statutes of New York do not require that the date of the commissioner's warrant or the number of the road-district shall appear upon the assessment roll, to make a highway tax valid. *Ensign v. Barse*, 14 N. E. Rep. 400, followed. Jan. 24, 1888. *Ensign v. Barse*. Opinion by Finch, J.

**CONTRACT—BUILDER'S—AGREEMENT TO SUBMIT TO ARBITRATION—PLEADING.**—A failure to comply with a clause in a builder's contract providing that any dispute as to the true meaning of the drawings or specifications shall be decided by an architect, and as to the true value of extra work by arbitrators, is no defense to an action for services rendered under such contract, where there are no allegations in the answer setting up such failure, that there was such a dispute, or that defendant ever offered, or plaintiff refused, to submit such matters as provided for. Feb. 10, 1888. *Johnston v. Varian*. Opinion by Earl, J.

**—FOR ERECTING PUBLIC BUILDINGS—CHANGES IN SPECIFICATIONS—LIABILITY OF STATE—WAIVER OF OBJECTION TO CHANGE—REFUSAL BY STATE TO COMPLETE CONTRACT—DAMAGES—INTEREST.**—(1) In pursuance of Acts of New York of 1870, chap. 378, appropriating money for the erection of an asylum, plans and specifications were made for the construction of the buildings, which provided that the exterior facings of the walls of all these buildings should be of sandstone; and the claimants, being the lowest bidders, were awarded the contract for furnishing the stone required for the construction, according to the plans and specifications. Afterward the managers advertised for bids for cutting the stone to be furnished, and the claimants were awarded this contract. *Held*, that these contracts had not the same subject-matter, and were not contemporaneous, and a clause in the latter reserving the right to make changes in plans and specifications did not debar the claimants from recovering damages for a change from sandstone facings to brick with sandstone trimmings. (2) A resolution of the managers was subsequently made changing the plan from sandstone to brick with sandstone trimmings, and the claimants continued to furnish and cut sandstone after such change, and received pay therefor in full under the contracts. *Held*, that this was no waiver of their claim to damages, by reason of such change arising out of the breach of first contract. (3) In the first contract no time was specified when the work was to be done, but in the contract for cutting the stone it was specified that the work was to be commenced at once and prosecuted diligently to its completion. After part of the work had been done, the board of managers, by a resolution, agreed to discontinue work, and ordered the contractors to remove the stone. *Held*, that the contractors could recover damages for the refusal to complete the contract, without further tender of performance. (4) In estimating damages for breach of a contract to furnish and cut sandstone for a public building which it would take years to complete, it is proper to consider the distance the stone had to be transported, the capital, machinery and implements to be supplied and kept for the performance, and the contingencies and accidents to vary results, as well as the time at the disposal of the claimant after refusal by the State to permit him to complete it, which could be used in other work, thereby lessening his damages.

(5) A claim against the State for damages for breach of a contract to furnish stone for the construction of a public building not completed is an unliquidated claim, and interest cannot legally be allowed thereon. Feb. 28, 1888. *McMaster v. State*. Opinion by Earl, J. Danforth, J., dissenting.

**CRIMINAL LAW—EVIDENCE—PROOF OF ANOTHER CRIME.**—Upon a trial for murder, committed in connection with burglary, defendant was asked, on cross-examination, if he had entered at night a certain house, and had run off when discovered. He denied this, and swore on redirect examination that he had never entered any man's house in the night-time with intent to steal. *Held*, error to allow evidence to contradict these statements, the evidence on cross-examination being collateral to the issue, and the evidence on redirect having been rendered competent by the course of the cross-examination. It is familiar law that the people were bound by his answers given upon such cross-examination, and that they could not afterward call witnesses to contradict him in reference to such answers. *Stokes v. People*, 53 N. Y. 184; *People v. Ware*, 20 Hun, 473, affirmed, 92 N. Y. 658. Nor was it admissible, in rebuttal of the defendant's evidence given on his re-examination, that he had never entered any man's house in the night-time for the purpose of stealing. That evidence was rendered competent by the course of his cross-examination, and did not lay the foundation for proof of the crime committed at Mohring's house. It was not competent for the purpose of showing that the defendant was a burglar, and addicted to the crime of burglary. It is never competent, upon a criminal trial, to show that the defendant was guilty of an independent crime not connected with or leading up to the crime for which he is on trial, except for the purpose of showing motive, interest of guilty knowledge; and this evidence was not proper or competent for that purpose. *People v. Sharp*, recently decided. Nor was it competent in rebuttal of evidence introduced by the defendant on his own behalf as to his good character. It is never proper for the purpose of impeaching the character of a party or a witness to call witnesses to prove specific acts of dishonesty, immorality or crime. If the people desired to prove that the defendant's character was bad, the only course open to them was to call witnesses who were acquainted with his character. *Com. v. O'Brien*, 119 Mass. 342; *Troup v. Sherwood*, 3 Johns. Ch. 558; *Wehrkamp v. Willett*, 4 Abb. Dec. 548; *Bakeman v. Rose*, 18 Wend. 146; *People v. Reator*, 19 id. 569; *Corning v. Corning*, 6 N. Y. 97; *Rathbun v. Ross*, 46 Barb. 127; 1 Greenl. Ev., § 461. Such error will necessitate a new trial when the evidence connecting the prisoner with the crime charged in the indictment is entirely circumstantial, and the conviction is of murder in the first degree. Feb. 7, 1888. *People v. Greenwall*. Opinion by Earl, J.

**— REPEAL — REVIEW OF FACTS — STATUTES — AMENDMENT.**—Laws of New York of 1887, chap. 493 (amending the Code of Criminal Procedure, § 528, so as to vest in the Court of Appeals the same jurisdiction to review the facts as the Supreme Court), provides in section 3 that the amendment "shall not affect any appeal taken to and pending in the Supreme Court or Court of Appeals at the time this act shall become a law." *Held*, that in a case in which an appeal had been taken to the Supreme Court before the enactment of the law, but appealed to the Court of Appeals after the enactment, the Court of Appeals would review the facts. (2) On a trial for murder there was evidence that defendant was of a jealous, nervous and angry disposition; that on the night of the murder he was awakened by whisperings in a room below, and going down, he saw his fiancée,

in her night-dress, in close proximity to the deceased, whom he suspected of being a lover; that defendant returned to his room for his revolver, as it appears, and walked into the room, and made some casual remark to the deceased, and mildly remonstrated with the girl; that defendant then passed around the deceased to one side, placed the pistol close to his head, when his attention was diverted, and fired the fatal shot. *Held*, that the jury properly found a verdict of murder in the first degree. Feb. 28, 1888. *People v. Brunt*. Opinion by Finch, J.

**EMINENT DOMAIN—PUBLIC USE—RAILROAD COMPANIES—RIGHT TO EXERCISE POWER.**—Petitioner was incorporated under the New York "General Railroad Act" of 1850, and the articles of incorporation declared it to be organized for the purpose of constructing and operating a railway for "public use." The proposed road did not connect with a highway, and could only be reached by passing over State or private lands. There could be no habitations along and no freight traffic over the road. Its sole business was to convey sight-seers to points of interest along the Niagara river, and its season of operations was confined to four months in the year. *Held*, that petitioner was not a railroad corporation contemplated by the act, and there was no such "public use" as justified the exercise of the right of eminent domain in its behalf. What is a public use is incapable of exact definition. The expressions "public interest" and "public use" are not synonymous. The establishment of furnaces, mills and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges; in a word, they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In this State the duty of laying out and maintaining highways has in the main been performed directly by the State or by local authorities; but from an early day the Legislature has from time to time delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impracticable and contrary to our usages, for the State to enter upon the business of constructing and operating railroads, and in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers, and as incident thereto the right to take private property under the power of eminent domain on making compensation. In considering the question what is a public use for which private property may be taken *in invitum*, Judge Cooley (Const. Lim. 669) remarks: "That can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matter of public necessity, which on account of their peculiar character, and the difficulty — perhaps impossibility — of making provision for them otherwise, it is alike proper, useful and needful for the public to provide." Whatever rule, founded on the adjudged cases, may be formulated on this subject, it cannot, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who

visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or comfort of those who may visit the Falls. The State has under recent legislation taken lands for a park or public place at Niagara Falls. The taking of lands by municipalities for public parks is recognized as a taking for public use. *Commissioners v. Armstrong*, 45 N. Y. 234; *In re Mayor*, etc., 99 id. 569. They contribute to the health and enjoyment of the people, and are laid out with drives and ways for public use. Nabant Road, 11 Allen, 530, and Mount Washington Road, 35 N. H. 134, were justified on the ground that they were public highways in the ordinary sense, although primarily intended as pleasure drives. It is, as we have said, difficult to make an exact definition of a public use. It is easier to define by negation than by affirmation. We are conscious of the serious responsibility which the court assumes in undertaking to declare that not to be a public use which the Legislature has declared to be such. The validity of an act of the Legislature is not to be assailed for light reason. It is especially necessary that the question of what constitutes a public use should not be dealt with in a critical or illiberal spirit, or made to depend upon a close construction adverse to the public; but having these considerations in mind, we are nevertheless constrained to conclude that the enterprise in question is essentially private, and not public, and that private property cannot be taken against the will of the owners for the construction of the road of the petitioner. Feb. 23, 1888. *In re Niagara Falls & W. Ry. Co.* Opinion by Andrews, J.

**EXECUTORS AND ADMINISTRATORS—ACTIONS BY—EXACTION OF BOND—ILLEGALITY OF.**—(1) A complaint by executors stated that upon a settlement with their testator's former partners the latter wrongfully exacted from them a bond with surety, conditioned upon their keeping secret all the affairs of the late firm; that they deposited with the surety money belonging to their testator's estate to secure him from loss; and that the bond was given without consideration, and for the purpose of concealing unlawful acts. Plaintiffs prayed for a return of the money and cancellation of the bond. *Held*, that the complaint stated a good cause of action, the plaintiffs' personal complicity in the wrong not barring a suit brought solely for the benefit of the trust fund. (2) Such a complaint does not improperly join two causes of action, the object sought being the restoration of the money to the trust fund, and the cancellation of the bond being merely a necessary incident thereto. Feb. 7, 1888. *Zimmerman v. Kinkel*. Opinion by Danforth, J.

**MARRIAGE—CONVEYANCE BY MARRIED WOMAN—DIVORCE FROM BED AND BOARD.**—A decree in divorce from bed and board divested the husband of all interest in or control over the wife's person and estate. Subsequently she, as a *feme sole*, during the husband's life, executed a deed to the land in controversy, but the acknowledgment did not state that the grantor was examined apart from her husband, and that she executed the deed without his compulsion. *Held*, that however irregular the decree was which released her person and property from her husband's control, the court having jurisdiction, it was not void, and that it could not be attacked collaterally in an at-

tempt to avoid the deed, by a stranger to the title, for lack of such statement in the acknowledgment. Under such circumstances it would have been quite an idle, useless ceremony to require a private examination of Mrs. Pool, and an acknowledgment that she executed the deed freely, and without any fear or compulsion of her husband. It is a fundamental rule that statutes should be so construed as to give effect to the purpose of the law-makers. Statutes framed in general terms frequently embrace things which are not within the intent of the law-makers, and sometimes things within such intent are not within the letter. Hence in construing statutes it has frequently been held that a thing which is within the letter of a statute is not within the statute unless it be within the intent of the law-makers. *People v. Insurance Co.*, 15 Johns. 358; *Jackson v. Collins*, 3 Cow. 89; *Railway Co. v. Roach*, 80 N. Y. 339. We are therefore of opinion that in consequence of the decree separating Mrs. Pool from her husband, she was taken out of the operation of the statute above referred to, and that she could acknowledge a deed conveying her real estate as if she were unmarried. The reason of the statute ceased to apply to her, and while she was still a married woman, and within its letter, she ceased to be a married woman within its spirit and meaning. Feb. 23, 1888. *Delafield v. Brady*. Opinion by Earl, J.

**NEGLIGENCE—DRIVING OVER CHILD IN STREET—CONTRIBUTORY NEGLIGENCE.**—(1) A child, not yet seven years old, crossing a street, not at the crosswalk, was injured by collision with a horse and wagon driven by defendant's servant, who was looking back talking to a fellow-servant behind. He was driving on a jog-trot up grade, and if he had been looking could have prevented the injury. *Held*, that the driver was negligent. (2) In an action for injuries received by a child by being run over by a wagon while crossing a street, where the child, in response to leading questions, testified that he had always before waited if he saw a wagon till it passed, but on this occasion did not think of it, but looked straight ahead, when crossing the street, instructions assuming that the child had used no vigilance were properly refused. Feb. 10, 1888. *Moebus v. Hermann*. Opinion by Danforth, J.

**RELIGIOUS SOCIETIES—NUNS—INDIVIDUAL PROPERTY RIGHTS.**—In an action by a member of a society of nuns to recover property left her by the will of her grandfather, and which his executor had transferred to other persons, she testified in her deposition that the members of the society held every thing in common; that whatever property they had, after taking the vows, belonged to the society; and that the regulations of the order were printed. *Held*, that the testimony was properly excluded, because it did not prove that the plaintiff had parted with her property, and that it was moreover secondary evidence. Feb. 28, 1888. *White v. Price*. Opinion by Danforth, J.

**WATER AND WATER-COURSES—UNDERGROUND CURRENTS—DIVERSION.**—The waters from a spring situated on defendant's land, about 120 feet from the plaintiff's line, had been for many years conducted to a trough. It was shown by experiment that the waste water from the trough disappeared into the ground, but about 100 feet from the trough, and near plaintiff's line, appeared on the surface, sometimes seen to be in motion toward a sluice, under the fence dividing defendant's land from plaintiff's, where it then disappeared, and came again to the surface about twenty feet on plaintiff's side of the line, forming a spring or reservoir. The defendant diverted the water from his spring for domestic purposes, and thus, as it was claimed, intercepted the supply of plaintiff's spring or

reservoir. *Held* that these were but subsurface currents or percolations, with no well-known channel, and that defendant was not liable for the diversion of the water of his spring. No stream or water-course ran from the spring. The source from which it came, and the flow of its waste or surplus, were alike underground, concealed, and matters of speculation and uncertainty. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to water-courses, and their diversion apply. *Broadbent v. Ramsbotham*, 34 Eng. Law & Eq. 553; *Rawstron v. Taylor*, 33 id. 435; *Delhi v. Youmans*, 45 N. Y. 363; *Goodale v. Tuttle*, 29 id. 466; *Ellis v. Duncan*, 21 Barb. 234; *Barkley & Wilcox*, 86 N. Y. 147. The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious, and flow in a natural channel between defined banks. A few such exceptions are admitted to exist, and others may occur. But outside of these, subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water-courses, and they may be intercepted or diverted by the owner of the land for any purpose of his own. The case first above cited resembled the present one in the feature that the action was to prevent the interception and diversion of certain sources of supply reaching a water-course known as "Longwood Brook." One of these was a swamp or wet piece of ground which the opinion describes as "merely like a spring, so to speak, fixed on the side of a hill;" and of the subterranean courses communicating with the swamp, which certainly existed, it was deemed a sufficient answer that they were "not traceable so as to show the water passing along them ever reaching Longwood Brook." Another source of supply was described as a stream welling out of the ground at a depth of about two feet, which flowed into a receiving basin, three feet square, used as a watering place. In those respects it resembled the spring in the present case; but unlike that, the surplus and waste, instead of disappearing in the ground, followed ditches and depressions in the surface until it reached the brook. Both supply sources were intercepted and diverted, and a right of action therefor denied—as to the first, on the ground that the subterranean currents were concealed, and not traceable; and the second, upon the distinct proposition that the owner might intercept or stop them before they reached a natural water-course. In *Village of Delhi v. Youmans*, *supra*, it was said that the owner of land might lawfully intercept percolations or underground currents. The reasons and justification of the doctrine are well stated in *Atton v. Blundell*, 12 Mees. & W. 324. They are, that as the water does not flow openly in the sight of the owner of the soil under which it passes, there is no ground for implying consent or agreement between the adjoining proprietors, which is one of the foundations on which the law of surface streams is built; that a different rule would enable a lower proprietor to prevent the upper owner from using the water in his own soil, and expose him to loss and danger in making improvements on his own land; and a further reason is found in the indefinite nature of the right claimed, and the great extent of obligation which would be incurred. The law in other States is in accordance with the views here expressed. *Haldeman v. Bruckhart*, 45 Penn. St. 514; *Greenleaf v. Francis*, 18 Pick. 117; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Booth v. Driscoll*, 20 Conn. 533. And the rule is strongly stated in *Angell on Water-Courses*, chap. 4, § 114, as being that "the owner of land on which a spring issues from the earth has a perfect right to it against all the world except those through whose land

it comes; and has a right to it even as against them until it comes in conflict with their enjoyment of their own property." The proposition, while very broadly stated, and somewhat open to criticism, embodies the substance of the prevailing doctrine as to the right of the owner to intercept and divert underground currents and percolations for his own uses, without responsibility to a lower proprietor. Feb. 23, 1888. *Bloodgood v. Ayers*. Opinion by Finch, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CARRIERS—NEGLIGENCE—PASSENGERS ON FREIGHT TRAIN.**—The plaintiff, a passenger on a freight train, while standing up in a caboose was thrown down owing to a sudden movement of the train and a bone of his thigh was fractured. The evidence showed that the plaintiff knew of the jerks incident to freight trains; that there was a seat at his disposal; that there had been frequent jerks during the journey, such as are usual in freight trains, and other passengers had kept their seats in consequence. *Held*, that the plaintiff was guilty of contributory negligence in standing up. A caboose attached to a freight train does not furnish all the appliances and conveniences for the safety and comfort of passengers that are provided for passenger trains; and while it is the duty of the company carrying passengers on such a train to exercise every reasonable care, and take every precaution against injury or danger to the life of such passengers which the appliances for that mode of transportation will admit of, it is also the duty of the passenger who travels on such a train, with full knowledge of the increased risk incidental thereto, to be correspondingly careful in guarding against injury by reason of the risk incidental to such mode of travel. An act may be negligent or not according to the attendant circumstances. An act on a regular passenger train, with air-brakes and other appliances to secure smooth and comfortable as well as safer travel, may not be at all negligent in the passenger; while the same act on a "caboose" attached to a freight train might be careless and negligent. It is a fact of common knowledge that even on a passenger train, with every appliance for comfort and safety that can be devised, there is more or less of jar and jerk incident to the starting and stopping of trains; and it is in evidence in this case that such jars and jerks are much greater on freight trains, and necessarily so by reason of their character. The passenger on such a train assumes the ordinary risk and discomfort incident thereto; and if the train is managed with such care and prudence by skillful and competent employees as to subject him only to the discomfort and risk thus incident, the company would not be liable for any accident resulting therefrom by reason of the failure of the passenger to observe usual and ordinary precaution. There is evidence tending to show that the plaintiff did not do this. It is in evidence that the jerks and jars incident to the freight train were known to him; that on this occasion the train was a long one, and the locomotive was moving it with difficulty, and there had been frequent jerks more or less severe, and such as seem to have suggested to other passengers the propriety of retaining their seats; for one of the plaintiff's witnesses testified that he "kept his seat," knowing that "they were pretty rough about starting." It was in evidence that there were seats for all the passengers; and the fact that the others in the "caboose" kept their seats and none of them were hurt, constitutes some evidence tending to show that it was careless and negligent in the plain-

tiff under the circumstances to be standing. Sup. Ct. N. C., Dec. 23, 1887. *Wallace v. Western N. C. R. Co.* Opinion by Davis, J. [To the same effect is *Harris v. Haunibal*, etc., R. Co., 89 Mo. 233; S. C., 58 Am. Rep. 111, and note, 113.—Ed.]

— INJURY TO PASSENGER WHILE APPROACHING FERRY-BOAT—PRESUMPTION.—Plaintiff, a passenger, was injured in passing from defendants' waiting-room to their ferry-boat by contact with a swinging door of ordinary construction and use, at the end of the passage-way, which was permitted to come violently against him by a person moving in advance. Held, that negligence was not to be presumed. Plaintiff had purchased a ticket from the defendant company entitling him to carriage from Philadelphia to Burlington, New Jersey, and was proceeding from the ticket office to the boat on which a part of the journey was to be made. His route was through a long, narrow passage intended to accommodate persons passing in single file. At the end near the landing was a door, the upper half of which was provided with glass, and which swung either way to permit the passage of persons to and from the boat. The person in front of plaintiff passed out at the door, leaving it to swing back behind him. The plaintiff put out his hand to arrest his motion and push it open again, and instead of directing his hand toward the frame or wooden portions of the door, pushed it against the glass, which broke under the force of the impact and let his hand through, cutting it and inflicting the injury sued for. This was the whole case, and upon it the plaintiff contends that he should have been allowed to go to the jury upon the ground that the mere happening of the injury raises *prima facie* a presumption of negligence, and throws the burden of disproving negligence on the carrier. In support of this position he cites *Laing v. Colder*, 8 Penn. St. 474, and several cases following it. The authority of these cases is beyond question, but the applicability of the rule established by them to this case is not. The rule requires that a carrier of passengers shall exercise "the utmost degree of care and diligence" to secure the safety of its passengers. To this end it must provide a safe road-bed, well-constructed cars, engines, and skillful, trustworthy servants to take charge of the movement and management of trains. All these things are under the exclusive control of the officers of the company. The public have no right and no opportunity to interfere in regard to them. When therefore a passenger is injured by a collision or other accident while on his journey, the law presumes the accident to be due to want of proper care on the part of the company conducting the transportation, and puts the burden of showing the actual condition of the track, the car or other appliances involved in the accident upon the only party in a condition to bear it, viz., the carrier, which has the exclusive possession and care of it. The legal presumption takes the place of the proof which the injured person is unable to make, and puts the carrier at once upon the defense. *Laing v. Colder*, *supra*; *Meier v. Railroad Co.*, 64 Penn. St. 226; *Railroad Co. v. Anderson*, 94 id. 356. But the reason ceasing, the rule ceases. If an intoxicated person, after having purchased his ticket at a railroad station, should on his way out of the ticket-office stumble upon a heated stove and suffer serious injury, there would be no reason for excusing the injured man from making out his case because he had a railroad ticket in his pocket, or because the stove on which he fell belonged to a railroad company, or was standing in a railroad station. It was no part of the machinery of transportation, and was in no sense peculiar to the business of the railroad company. The same thing is true of the case in hand. The plaintiff was injured in the wait-

ing-room or passage-way leading to the wharf by putting his hand through the glass in the swinging door. The door was no part of the machinery employed for the carriage of passengers. It was not built upon a pattern peculiar to the defendant company. So far as the pleadings or the plaintiff's evidence enables us to judge, it was constructed like the swinging doors to be met with in places of business in every part of the country. It was certainly visible to all comers and goers passing between the waiting-room and the boat, for it was so located that all passengers were obliged to push it open in passing to and from the landing. If there was any thing in the construction of the door that made it unfit for the purpose for which it was used or the place at which it was located, it was easy for the plaintiff to show it by a multitude of witnesses. There was no reason therefore for resorting to the legal presumption of negligence in aid of the plaintiff's case. The cause of the accident and the erection and construction of the door were as clearly known to the plaintiff as to the defendant and its employers; and it was the duty of the plaintiff to make out his cause of action in this case as he would be bound to do if the swinging door had been in a hotel or store. Not having done this, the court was clearly right in ordering the nonsuit. Sup. Ct. Penn., Jan. 16, 1888. *Hayman v. Pennsylvania R. Co.* Opinion by Williams, J.

CRIMINAL LAW—PUBLIC INTOXICATION—MISTAKE AS A DEFENSE.—Where a person is charged with the offense of being drunk in a public place, the defendant may show, as a part of his defense, that he became intoxicated through an honest mistake of fact. The question is whether a person may be guilty of the offense forbidden by the statute where he innocently drinks the liquor which intoxicates him, without having any knowledge of its intoxicating qualities, and without having any idea that it would make him drunk. The court below, over his objections and exceptions, excluded nearly all the evidence offered by him to show his ignorance of the intoxicating character of the liquor and its possible power to produce drunkenness; and the court also gave, among others, the following instruction to the jury, to-wit: "The defendant's ignorance of the intoxicating character of liquors drunk by him, if he did drink any such, is no excuse for any drunkenness resulting therefrom, if any did so result." It has always been a rule of law that ignorance or mistake of law never excuses, and this, with a kindred rule that all men are conclusively presumed to know the law, is founded upon public policy and grounded in necessity; but no such rule is invoked in this case. The question in this case is simply whether ignorance or mistake of fact will excuse. It is claimed by the prosecution that it will not; and this on account of the express terms of the statute. The statute provides in express terms and without any exception that "if any person shall be drunk," etc., he shall be punished. And it would seem to be contended that there can be no exceptions. But are idiots, insane persons, children under seven years of age, babes and persons who have been made drunk by force or fraud and carried into a public place to be punished under the statute? And if not, why not? And if these are not to be punished, then no sufficient reason can be given for punishing those who have become drunk through unavoidable accident or through an honest mistake. Of course the Legislature has the power to provide for the punishment of "any person" who may be found drunk in a public place, whatever may be his age or mental condition, or in whatever manner he may have become drunk; and it is also for the Legislature to determine whether the public exigencies are such as to require



that injustice shall be done to innocent individuals by inflicting upon them unmerited punishment. But we should never suppose that the Legislature intended to punish the innocent, unless particular words are used that will bear no other construction. General terms inflicting punishment upon "any person" who might do any particular act should be construed to mean only such persons as act voluntarily and intelligently in the performance of the interdicted act. We should not suppose, in the absence of specific words saying so, that the Legislature intended to make accidents and mistakes crimes. Human actions can hardly be considered as culpable, either in law or in morals, unless an intelligent consent of the mind goes with the actions; and to punish where there is no culpability would be the most reprehensible tyranny. The Legislature usually, in enacting criminal statutes, enact them in general terms, so as to make them by their terms include all persons; and yet it is always understood that some persons, as idiots, insane persons, young children, etc., are not to be considered as coming within the provisions of the statute. It is always understood that the courts will construe the statute in accordance with the general rules of statutory construction and apply the act only to such persons as the Legislature really intended to apply it; that is, to apply the act to such persons only as should intelligently and voluntarily commit the acts prohibited by the Legislature. With respect to punishment notwithstanding ignorance or honest mistake of fact, Mr. Joel Prentiss Bishop, one of the ablest and most philosophical law writers of this country, uses the following language: "A statute, general in its terms, is always to be taken as subject to any exceptions which the common law requires. Thus if it creates an offense, it includes neither infants under the age of legal capacity; nor insane persons; nor ordinarily, married women acting in the presence and by the command of their husbands. If it creates a forfeiture, it does not apply to women under coverture." Bish. St. Cr., § 131. "In the law of crime, the maxim is *ignorantia facti excusat*. As expressed by Gould, J.: 'Ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse.' To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because misled while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing a wrong in the future; it could inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts and promote vice instead of virtue." 1 Bish. Crim. Law, § 301. "What is absolute truth no man ordinarily knows. All act from what appears, not from what it is. If persons were to delay their steps until made sure beyond every possibility of mistake that they were right, earthly affairs would cease to move; and stagnation, death and universal decay would follow. All therefore must, and constantly do, perform what else they would not through mistake of facts. If their minds are pure, if they carefully inquire after the truth, but are misled, no just law will punish them however criminal their acts would have been if promoted by an evil motive and executed with the real facts in view. In the law therefore the wrongful intent being the essence of every crime, it necessarily follows that whenever one is misled without fault or carelessness concerning facts, and while so misled, acts as he would be justified in doing were they what he believes them to be, he is legally innocent, the same as he is innocent morally. The rule in morals is stated by Wayland to be that if a man 'know not the relations in which he stands to others, and have not the means of knowing them, he is guiltless. If he know them, or have the

means of knowing them, and have not improved these means, he is guilty.' The legal rule is neatly enunciated by Baron Parke thus: "The guilt of the accused must depend on the circumstances as they appear to him." This doctrine prevails likewise in the Scotch law, as it necessarily must in every system of Christian and cultivated law." 1 Bish. Crim. Law, § 303. See also the able and exhaustive note appended to section 303a. The following, among other cases, tend to support the views expressed by Mr. Bishop: *Farrell v. State*, 32 Ohio St. 456; 30 Am. Rep. 614; *Miller v. State*, 3 Ohio St. 475; *Brown v. State*, 24 Ind. 113; *Faulks v. People*, 39 Mich. 200; 38 Am. Rep. 374; *People v. Parks*, 49 Mich. 333; *Com. v. Presby*, 14 Gray, 66; *Duncan v. State*, 7 Humph. 148; *Dotson v. State*, 6 Cold. 545; *Birney v. State*, 8 Ohio, 280; *Price v. Thornton*, 10 Mo. 135; *Com. v. Stout*, 7 B. Mon. 247; *Stern v. State*, 53 Ga. 229; *State v. Hause*, 71 N. C. 518; *Cutter v. State*, 36 N. J. Law, 125. See also the case of *Wagstaff v. Schippel*, 27 Kans. 450. There are also many cases in opposition to the views expressed by Mr. Bishop, nearly all of which are cited in a note to the case of *Halstead v. State*, 10 Cent. Law J. 290, 294. The decisions in Massachusetts and also in Michigan are to some extent contradictory and conflicting. There are cases in each of these States which support and others which oppose the views expressed by Mr. Bishop. In Massachusetts and in Michigan is found the greatest departure from the doctrine enunciated by Mr. Bishop. In Massachusetts, where a man and a woman were married, and afterward lived together in the utmost good faith as husband and wife, it was held that the man was guilty of adultery, because the woman at the time of the marriage had a husband living, although she did not know it, although from evidence satisfactory to her she believed him to be dead, and although she had not seen him or heard from him for more than eleven years. *Com. v. Thompson*, 11 Allen, 23. And in Michigan it has been held that an hotel keeper, who also kept a bar for the sale of spirituous liquors, might be convicted and punished for keeping an open saloon on Sunday because his clerk, who was employed only for legal purposes, opened the bar-room and sold a single drink of whisky on Sunday without the knowledge or consent of the hotel keeper. *People v. Roby*, 52 Mich. 577. Mr. Greenleaf, in his work on Evidence, uses the following language: "Ignorance or mistake of fact may in some cases be admitted as an excuse; as where a man, intending to do a lawful act, does that which is unlawful. Thus where one being alarmed in the night by the cry that thieves had broken into his house, and searching for them with his sword in the dark, by mistake killed an inmate of his house, he was held innocent. So if the sheep of A. stray into the flock of B., who drives and shears them, supposing them to be his own, it is not larceny in B. This rule would seem to hold good in all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute it seems will not excuse the violation. Thus for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which, irrespective of motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts and to obey the law at his



peril." 3 Greenl. Ev., § 21. To sustain the latter portion of this section, Mr. Greenleaf cites only Massachusetts cases, which undoubtedly sustain the proposition. But has not the Supreme Court of Massachusetts gone astray? The first part of the foregoing section, we think, is unquestionably correct, and the present case falls within it. Voluntary drunkenness in a public place was always a misdemeanor at common law, and it was always wrong morally and legally. It is *malum in se*. Therefore under either the rule enunciated by Mr. Bishop, or the one enunciated by Mr. Greenleaf, this case was erroneously tried in the court below. Whether the latter portion of said section of Mr. Greenleaf's evidence is correct or not, it is not necessary for us now to decide. Whether a party who through an honest ignorance or mistake of fact, commits an act which is only *malum prohibitum*, may be punished for the act or not, it is not necessary now to determine. Mr. Bishop would say not; Mr. Greenleaf, following the Massachusetts Supreme Court decisions, would say he should be. Mr. Bishop's views are more in consonance with justice. Sup. Ct. Kans., Jan. 7, 1888. *State v. Brown*. Opinion by Valentine, J.

**MASTER AND SERVANT—NEGLIGENCE—FAILURE TO PROVIDE RULES FOR SAFE CONDUCT OF BUSINESS.**—Plaintiff brought an action against a railroad company for personal injuries, setting forth facts showing that they resulted from the failure of the defendant to provide a system of signals, or rules and regulations, by which employees in and about cars standing on the track might be warned of the danger when other cars were being "kicked" upon the same track, and likely to collide with those standing there. *Held*, that the demurrer to the petition should not have been sustained. The duty of the master is stated in Shear & R. Neg., § 93, as follows: "It is also the duty of the master, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks, which they could not reasonably anticipate, though he is not bound to guaranty them against risks. One who employs servants in complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal neglect, for the consequences of which he is liable to his servants. Thus a railroad company is bound to regulate the time and manner of running its trains so as to avoid collision, and to enable all its servants to know when a train may be expected, and thus to avoid danger." The defendant in error contends that joining of the cars for the purposes and in the manner described in the petition is so common, necessary and frequent, especially in the case of freight trains, that it cannot be said to involve any extraordinary risk. We do not agree to the proposition. It is certainly a complex business, requiring care, and it must be dangerous if not done under proper regulations; at least so far as other servants are concerned, whose business requires them to be in and out of the cars liable to be jolted. In these cases of making a flying switch, and of shunting or kicking of cars, it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured; and cases are not wanting where railroad companies have been held liable to servants for injuries received in consequence of a want of such regulations for the guidance of the servants in performing these manoeuvres. *Vase v. Railway Co.*, 2 Hurl. & N. 728; *Railway Co. v. Taylor*, 69 Ill. 461. Mo. Sup. Ct., Dec. 19, 1887. *Reagan v. St. Louis, K. & N. W. Ry. Co.* Opinion by Black, J.

**SALE—IMPLIED WARRANTY—SALE OF FOOD BY FARMER.**—Where a farmer kills and sells hogs to be used as food, there is no implied warranty on his part that they are fit for that purpose. It was known to

the defendants that the plaintiffs purchased the meat to be used as provisions, but in order that they should recover, it was held by the presiding judge that they must prove the allegations in their declaration that the defendants knew the meat sold by them was unwholesome and improper to be used as provisions. He instructed the jury that at common law the general rule is that where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in or has a right to sell the chattel. He added that there is no exception to this general rule where a provision dealer or market-man sells provisions, as meat and vegetables, to his customers for immediate use; and that in such case there would be an implied warranty that they were fit for use and wholesome. Whether this exception exists or not it is not important, in the case at bar, to inquire, as it cannot be and was not claimed that the defendants were brought within it. The contention of the plaintiffs is that even if the rule is well established that where there is no express warranty and no fraud, no warranty of the quality of the thing sold is implied by law, and that the maxim of *caveat emptor* applies, there is a more general exception, which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made. That in a sale of an animal by one dealer to another, even with a knowledge that the latter dealer intends to convert it into meat for domestic use, or that in the sale of provisions in the course of commercial transactions, there is no implied warranty of the quality, appears well settled. *Howard v. Emerson*, 110 Mass. 320, and cases cited; *Burnby v. Bollett*, 18 Mees. & W. 645. While occasional expressions may be found (as in *Van Bracklin v. Fonda*, 12 Johns. 468) which sustain the plaintiffs' contention, we have found but one decided case which supports it. In *Van Bracklin v. Fonda*, *ubi supra*, it is said that in a sale of provisions, the vendor is bound to know that they are sound at his peril; but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved. The case of *Hoover v. Peters*, 18 Mich. 51, does sustain the plaintiffs' contention, as it is there held that where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or any other person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business than he should be called on to bear. The opinion is not supported by any citation of authorities. In a dissenting opinion by Mr. Justice Christiancy, it is said: "Had it appeared that he (the defendant) was the keeper of a meat market or a butcher's shop, and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brothers have expressed." If there is an exception to the rule of *caveat emptor* which grows out of the circumstances of the case, and the relations of buyer and seller, where the latter is a general dealer, and the former a purchaser for immediate use, there appears no reason why it should be further extended. In the case at bar the defendants were not common dealers in provisions or market-men. They were farmers, selling a portion of the produce of their farms. No representations of the quality of the meat sold were made by them. In making casual sales from their farm of its products, to hold them to the

duty of ascertaining, at their peril, the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they were to be used as food, that they were fit for the purpose, imposes a larger liability than should be placed upon those who may often have no more means of knowledge than their purchasers. The plaintiffs contend that the case of *French v. Vinling*, 102 Mass. 132, is decisive in their favor, but it appears to us otherwise. In that case the defendant sold hay, which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effect of eating the hay the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive; his belief that he remedied the difficulty was conjectural, uncertain, and proved to be wholly erroneous. In the case at bar, while the defendant's herd had been exposed to hog cholera, there was evidence that a portion of them only had been affected by it; and further, that even if affected by it, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease, and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome. In *French v. Vinling* the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued if it had been unsuccessful, and if he sold the hay without informing the purchaser of the dangerous injury which it had received. *Sup. Jud. Ct. Mass., Jan. 4, 1888. Gtoux v. Stedman. Opinion by Devens, J.*

**STATUTE OF FRAUDS—SALE OF LAND—SUFFICIENCY OF MEMORANDUM.**—A memorandum for the sale of land was as follows: "Lancaster, June 28, 1887. Received from H. Morrison forty dollars on my place, known as the 'James Perry Tract of Land,' which tract I have sold to him for forty-five hundred dollars, part cash and the balance to bear interest at ten per cent per annum until paid. Mrs. N. B. Dalley." Held, sufficient under the statute of frauds. The description of the land is sufficient. All that is required is that the premises shall be so described that they can be definitely ascertained. By determining what land defendant owned at the date of the contract, which was known as the "James Perry Tract," the property sold could be identified with certainty. So far all the authorities are agreed. *Ragsdale v. Mays*, 65 Tex. 255; *Fulton v. Robinson*, 55 id. 401; *Blitner v. Land Co.*, 67 id. 341, 3 S. W. Rep. 301; 1 *Reed St. Frauds*, §§ 409-416; *Browne St. Frauds*, § 385; *Pom. Spec. Perf.*, § 90; *Wat. Spec. Perf.*, § 237. Upon the question presented by the proposition in the demurrer that the terms of the contract are not sufficiently shown in the memorandum, the decisions are in conflict. The weight of authority seems to be in favor of the rule that all the material terms of the contract should appear in the writing. *Riley v. Farnsworth*, 116 Mass. 225; *Graoe v. Denison*, 114 id. 16; *Drake v. Seaman*, 97 N. Y. 230; *Gault v. Stormont*, 51 Mich. 636, 17 N. W. Rep. 214; *Minturn v. Baylis*, 33 Cal. 129; *Soles v. Hickman*, 20 Penn. St. 180. But the contrary rule is not without authority to support it. *Ellis v. Bray*, 79 Mo. 227; *O'Neill v. Crain*, 67 id. 251; *Holman v. Bank*, 12 Ala. 369; *Johnson v. Ronald's Adm'r*, 4 Munf. 77; 1 *Reed St. Frauds*, § 419. The courts which held the affirmative of the question seem to base their conclu-

sion upon the ground that by the use of the word "agreement" or of the word "contract," the statute meant all stipulations agreed to by the parties. On the other hand it is considered by some of the authorities that the object of the statute, so far as lands are concerned, was to abrogate parol titles, and that this was sufficiently accomplished by a memorandum of the promise to convey the land, to be signed by the vendor, without requiring the other terms of the agreement to be stated. We need not decide which is the better reason, for we regard it as now settled in this State that all the terms of the contract need not appear in the memorandum. In *Fulton v. Robinson*, 55 Tex. 401, a receipt which named the vendee and recited that it was "part of the purchase-money of my own head-right, lying on Rush creek, in the Cross timbers," and which was signed by the vendor, was sufficient under the Statute of Frauds. The memorandum before us is quite similar to that, but is more explicit. It states the price and that it was to be paid partly in cash and partly on a credit, and shows the rate of interest. If that memorandum was sufficient, this must be. The decision in the case cited lays down a rule of property; and though we may consider it against the weight of authority and the better reason, we are not at liberty to depart from it. It is not without both reason and authority to support it. The justice of the doctrine of *stare decisis* is illustrated in the very case before us. The similarity of the memorandum in the two cases is so great as to suggest the possibility that the conveyancer who drew the latter had before him the opinion which affirmed the sufficiency of the former, and that the plaintiff parted with his money upon the faith of that decision. *Fulton v. Robinson*, *supra*, is not cited by the brief of counsel in this court, and we presume it was not called to the attention of the trial judge in the argument upon the demurrer. *Sup. Ct. Tex., Nov. 22, 1887. Morrison v. Dalley. Opinion by Gaines, J.*

## CORRESPONDENCE.

STEWART WILL CASE—PROTEST FROM MR. DAVIES.

*Editor of the Albany Law Journal:*

In your New York Letter, found at page 283 of the ALBANY LAW JOURNAL of April 7, your correspondent, Mr. Demot Enmot, I am sure unintentionally, does an injustice to Mr. Choate and to my deceased father, Ex-Judge Henry E. Davies, who was counsel for the firm of Davies, Work, McNamee & Hilton, of which I was a member in 1876.

Your correspondent says: "Mr. Choate expects to show that the charging of enormous fees was a part of the alleged conspiracy to absorb the estate in the interest of the Hiltons."

First. My personal efforts were directed, not so much to prevent the firm book from being inspected, so far as it contained references to any persons concerned in the Stewart will controversy, as to prevent my books from being taken from my personal custody by reason of the fact that they contained the entire transactions of my old firm for four years, with all its clients. It was of course my duty to raise the point that the entries in the books were privileged with respect to all of my clients. So far as I know, nobody cared about the disclosure of the contents of the books, so far as they related to any of the transactions of the firm with Stewart or Mrs. Stewart, or Judge Hilton, or the executors of the wills of either Mr. or Mrs. Stewart. All that I cared personally about was to prevent my books passing out of my custody, for the sake of my clients generally.

Second. Mr. Choate never said, to my knowledge, in the course of the case, and I do not believe that he ever said elsewhere, that he expected to show what your correspondent states that he did expect to show. What Mr. Choate said was, that if he could show that enormous fees were charged, it would be evidence of fraud. After Mr. Choate had shown from the books all the fees that actually had been charged by my father and by my former firm, for services to the Stewart estate in 1876, it appeared that the fees were so reasonable and moderate that the surrogate himself said he thought the evidence did not appear material or relevant to the case.

I am naturally a little sensitive about this matter, for the reason that it is the first time that I have ever heard of even a suggestion being made that reflected upon the professional conduct of my late father. He was very widely known throughout the State, and I am sure that many of your readers who were his old, personal friends, social, professional and political, must have read with great pain the statement that Mr. Choate had any such expectation as that attributed to him. I am sure that Mr. Choate himself is too careful and too honorable a gentleman to state any expectation in the way of proof in the case that he had not some foundation for, and it is Mr. Choate's high reputation for honorable conduct in dealing with the reputation of others that leads me to take any notice whatever of his having been thus misrepresented, to the injury of every member of the old firm.

It may be that your correspondent in his next letter will set this matter right. I notice that his letter is dated March 26 and published on the 7th of April. Before the latter date it had been made plain that Mr. Choate could not prove what it is said that he expected that he would prove, and that the facts did not exist to justify the expression of any such expectation.

I look upon this matter as simply a piece of careless reporting, which may be accounted for only by the haste of literary work, and I write you with the assurance that any gentleman whom you admit to your paper as a correspondent would be quite willing to correct an erroneous statement of the nature of that to which your attention has been called, especially when it reflects somewhat upon the reputation of a member of the bar who is no longer living, and who, his family feel justified in thinking, commanded the respect and regard of his brethren on the bench and at the bar to a high degree.

May I not suggest that you send this letter to your correspondent, that he may be informed of the whole matter, and have the opportunity of saying what is proper? I have no wish to have any notice whatever taken of the matter unless your correspondent himself is willing to make the correction, for I feel that my father needs no defense at my hands. Should your correspondent call on me I will be glad to put him in the way of getting the stenographer's minutes and of informing himself fully about the matter if he cares to do so. I remain,

Very truly yours,

JULIEN T. DAVIES.

NEW YORK, April 9, 1888.

#### CODE CIVIL PROCEDURE, § 375.

*Editor of the Albany Law Journal:*

The confusion in regard to the meaning of section 375 of the Code of Civil Procedure would have been obviated had the final clause been made to read as follows:

"The time of such a disability is not a part of the time limited in this title for commencing the action

or making the entry, or interposing the defense or counter-claim: except that when the disability ceases or the person so disabled dies within the time so limited, such time cannot be extended more than ten years, nor in any case more than ten years after the disability ceases, or after the death of the person so disabled."

The sentence quoted by Mr. Seyboldt from the opinion of Finch, J. (95 N. Y. 623), should be amended by striking out all after the word "limit" and substituting the words "by more than ten years," so as to read: "Any unexpended part of the period of time fixed by the general rule of limitation belongs to the party entitled to sue, after the disability has ended, and so much added time as will not extend the original limit by more than ten years."

This leaves as anomalous the cases where the disability ceases within ten years after the cause of action first accrues, etc.; and they are governed by the third rule, as stated by Mr. Seyboldt, on page 264 of this volume.

His fourth rule is incorrect, and such cases come under his second rule.

To illustrate: When a cause of action first accrues in 1860, for all those under a disability whose disability ceases before 1870, the time limited is extended twenty years after the disability ceases. But for all those under a disability, whose disability ceases after 1870, and before 1890, the time limited is extended to 1890 and no further in any case.

Yours truly,

CONTAB.

NEW YORK, April 4, 1888.

#### NEW BOOKS AND NEW EDITIONS.

##### INDEX-DIGEST U. S. SUPREME COURT REPORTS.

*A Complete Indexed Digest of the United States Supreme Court Reports* from the organization of the court in 1789 to October Term, 1886, 118 volumes. Includes full index to editorial notes to this company's edition. Also indexed citations to all cases digested, and biographical sketches of the justices. Lawyers' Co-Operative Pub. Co., Rochester, N. Y. Two vols. Pp. xci, 2343.

There is no lack of recent works covering this particular field. On the whole we like this the best of all as to typography and arrangement, and its dimensions avouch that it is thorough and comprehensive. In the first place the matter is set forth in the ordinary digest form, the principle being indicated in each paragraph by a few words in heavy-faced type. Then follows a table of cases and citations, a most valuable piece of work, covering nearly seven hundred double-columned pages. The amount of labor indicated is enormous, and shows skillful and experienced handling. The volumes would prove a very tolerable substitute for the reports themselves.

##### WATERMAN ON CORPORATIONS.

*A Treatise on the Law of Corporations Other than Municipal*, with citations from the English and United States courts, and from the courts of every State and Territory in the Union. By Thomas W. Waterman. Two vols. Pp. cxvii, 681, xii, 1016. Baker, Voorhis & Co., New York.

Mr. Waterman is well known to the profession as a prolific and careful law writer and as a judicious editor. The present work has a special value as the latest word on the most important of modern legal

subjects, and the subject is one on which the latest word is indispensable, whether it is the wisest or not. From our examination, necessarily somewhat restricted, we are led to believe that this treatise is well worthy of the patronage of the profession, convenient, comprehensive, discriminating and exact. It bears evidence confirmatory of the author's prefatory declaration that he has personally examined, during the six years of preparation, every one of the eight thousand cases cited. The work is certainly one of herculean labor, and we have no doubt will prove the laborer worthy of his hire. It is sumptuously printed.

#### BIGELOW ON FRAUD.

*A Treatise on the Law of Fraud on its Civil Side.* By Melville M. Bigelow. Boston: Little, Brown and Company. 1 vol. Pp. lxxv, 714.

It is always a pleasure to look over Mr. Bigelow's publications. They show the perfection of good sense, learning and skill, and a proper idea of proportion. This is not a second edition of his former work on Fraud, but is entirely new and independent. It is to be unhesitatingly commended to the profession.

#### PENNSYLVANIA SUPREME COURT DIGEST.

This is the second volume of the work, and contains the decisions for the year 1887. It is edited by Charles H. Barnard, and published by F. & T. W. Johnson & Co., Philadelphia. It gives remarkably full statements.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, April 10, 1888:

Award confirmed with costs—John A. McDougal, claimant, v. State, appellant.—Judgment affirmed on opinion of Supreme Court with costs—People, respondent, v. E. Remington & Sons, respondent.—Order reversed and case remitted to the Supreme Court for further consideration without costs in this court to either party—James B. Herbage, respondent, v. City of Utica, appellant.—Judgment affirmed with costs—William A. Sweet, respondent, v. Edmund Merry, survivor, etc., appellant.—Judgment reversed, new trial granted, costs to abide event.—Isabella Cumins, respondent, v. Brooklyn City Railroad Company, appellant.—Judgment affirmed with costs—Griffith Jones, respondent, v. Henry W. Chamberlain and others.—Judgment affirmed with costs—Mary Ann Jackson, appellant, v. Sarah P. Badger and others, respondents.—Judgment of General Term reversed and that of the Clinton Oyer and Terminer affirmed—People, appellant, v. Frank Palmer, respondent.—Judgment of the General Term affirmed—First National Bank of Batavia, respondent, v. Horatio N. Ege and another, appellants.—Judgment affirmed with costs—Frank L. Herdic, appellant, v. Charles Roessler, respondent.—Judgment affirmed with costs—Walter M. Hunt, appellant, v. Mayor, etc., of New York, respondents.—Order of General Term affirmed and judgment absolute rendered against the plaintiff on the stipulation with costs—New York State Monitor Milk Pan Company, appellants, v. Philo Remington and others, respondents.—Judgment of the General Term and that entered in the report of the referee reversed and a new trial granted.

costs to abide event; unless the defendant shall stipulate within twenty days after the entry of this order to abandon his second cause of action; in which event the present appeal may at any time be brought to a hearing on the merits in this court—James H. Goodsell, respondent, v. Western Union Telegraph Company, appellant.—Judgment affirmed with costs—William Bedell, respondent, v. David T. Kennedy, appellant.—In the intrusion case, judgment of General Term reversed and that of conviction affirmed; in the larceny case, judgment affirmed on opinion below—People, appellant, v. Henry K. Stevens, respondent, two cases.—Judgment affirmed with costs—John H. Gallagher, respondent, v. Stephen J. McMahon and another, appellants.—Judgment affirmed with costs—Sutliff T. Seward v. City of Rochester, appellant.—Judgment affirmed with costs—L. Winant Winants, appellant, v. Marcus L. Blanchard, respondent.—Order of General Term affirmed with costs—In re application of Charles Gertune v. Supervisors of Kings county.—Order affirmed with costs—People ex rel. George W. Ostrander and others, appellants, v. Alfred C. Chaplin, comptroller, etc., respondent.—Orders of General and Special Terms reversed with cost to appellant in both courts, and the case remanded to the Special Term for further hearing on the motion—Donald Miller v. Benjamin Wright and others, appeal of W. L. Peck, a purchaser.—Order of General Term reversing judgment of Special Term and granting a new trial reversed and judgment of Special Term affirmed—Mial H. Peck, respondent, v. Martin Goodberlett, appellant.—Judgment affirmed with costs—Julia Elgie, respondent, v. City of Troy, appellant.—Judgment affirmed with costs—Ezekiel G. Bell, respondent, v. Edward L. Merrifield, appellant.—Judgment affirmed with costs—Gleason B. King, respondent, v. William McKellar, appellant.—Judgment affirmed with costs—Edward Hoopes, respondent, v. Auburn Water Works Company, appellant.—Judgment and conviction affirmed—People, respondents, v. John De Leon, appellant.—Order of General Term affirmed and judgment absolute rendered against plaintiff with costs—John B. Kiley, appellant, v. Western Union Telegraph Co., respondent.—Judgment affirmed with costs—John Haffelfinger, respondent, v. Henry Fessler, appellant.—Judgment reversed, new trial granted, costs to abide event—Adella F. Hill, appellant, v. Ninth Avenue Railroad Company.—Judgment reversed, new trial granted, costs to abide event—Thomas Collins, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment affirmed with costs—Frank McQuade, respondent, v. Manhattan Railway Company, appellant.—Four cases, of which each and all orders and judgments are affirmed with costs—Thomas M. King and others, respondents, v. Reon Barnes impleaded with John H. Post and others.—Judgment and conviction affirmed—People, respondent, v. John McNell, "boodle alderman," appellant.—Judgment affirmed with costs—Charles F. Coughlan, respondent, v. John Stetson, appellant.—Judgment affirmed with costs—Matthew D. Breen, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Both judgments affirmed with costs—Julian Turner, respondent, v. City of Newburgh, appellant, and George Turner, her husband, respondent, v. Same, appellant.—Judgment affirmed with costs—Froilan Miranda and another v. Greenwich Fire Insurance Company, appellant.—Judgment affirmed with costs—Glorvina R. Hoffman, appellant, v. Amanda M. De Graaf, respondent.—Judgment reversed, new trial granted, costs to abide event—John H. Byron, respondent, v. Henry R. Low, appellant.

# The Albany Law Journal.

ALBANY, APRIL 21, 1888.

## CURRENT TOPICS.

A GREAT individuality has passed away in Roscoe Conkling. For one who for thirty years or more has held such a prominent place in the notice of his countrymen he has left singularly little behind him. He was not a great lawyer, although if he had followed the profession from his youth he would probably have become at least a great advocate. He was not a great statesman; he never created a public measure that we can recall, nor so identified himself with one as to make it his, unless it may be the electoral commission. Probably no one will ever read his speeches. He was simply a born leader of men, and he was a party leader of almost unexampled powers and attractions. This too was singular, for he was not a man of popular tastes or manners; on the contrary a born aristocrat. He was a grand declaimer, withal somewhat of a *poseur*. He was an intellectual gladiator, and on the floor of the Senate chamber was always a formidable antagonist. He however lacked one essential of the gladiator, he could not take punishment with patience. Strong blows he could give; strong blows he could not take, and so in a fit of boyish petulance he resigned a great public trust on account of an insufficient personal grievance. He must be regarded mainly as a sovereign party manager, and in this capacity he had one shining and peculiar virtue—he was not only honest and incorruptible, but no slightest charge to the contrary was ever raised against him. He had enemies as bitter as death, but not one of them ever dared say that Roscoe Conkling was not the very soul of honor. He was also an unswerving patriot, and our country is deeply indebted to him for eminent services in the Senate at the time of her direst extremity. His glowing utterances and his heroic example were greatly instrumental in preserving the union of the republic. In spite of his somewhat haughty and aristocratic nature, so strong was his sense of right, that his sympathies were always warm and faithful toward the humble and down-trodden, and in his last hours they rose up to bless him. His combative and defiant character was exhibited in his death, due to a useless but gallant struggle against the forces of nature. We deeply regret that he should have died just now, for we believe that his best and most useful days were before him. Age seemed to chasten and lend him philosophy and patience, and it would not have been unsafe to predict that even greater public honors were in store for him. But as it is, he must be pronounced a man of his time and not a man for time. He has left no admirable remains, and will excite few loving memories like his contemporaries, Lincoln, Seward, Grant, Sumner, and

this is the more to be regretted because we feel that as he had stood by them in life, he ought also to lie down with them in the hallowed corner of our national cathedral not built with hands.

Unless we meet with a considerable protest, we shall hereafter omit the announcement of the decisions of the Court of Appeals. It must be old news when it reaches our readers, and we would rather devote the space to something more readable. But if any considerable number of our readers object, of course we shall retain it.

The president undoubtedly has a puzzling task to select a successor to Chief Justice Waite. The associate judges, or at least those from whom it might reasonably be expected that he would select, are too old. The only Democrat among them who could expect it or is in any respect fit for it—and he is eminently fit for it in all respects but age—is too old. The president would naturally desire to appoint a man who could serve fifteen, or at least ten years before seventy. Among the eminent Democratic lawyers of the country Mr. Phelps would instantly occur to all as an unexceptionable name, unless possibly his age is against him; of that we have no information. It is a very delicate situation. A man of say fifty-five, to be put over the great and experienced lawyers on that bench, certainly ought to have large attainments, and it would be all the better if he had had experience in Federal litigation. Probably the wisest course would be to promote one of the circuit judges, or take one who has been a circuit judge. Unless he is expert in the Federal jurisdiction, and experienced in the law of patents, bankruptcy, admiralty, removal of causes, and other subjects which form the greater part of the questions before this court, a judge, although accomplished and expert in State litigation, will be all at sea here. Especially he ought to know something of the history of adjudication in this court. We take it for granted that the president will nominate a Democrat, and one from the north or west. Our State has a fair claim to the nomination, if the precedent of taking two judges from the same State, sanctioned by the appointment of Mr. Justice Matthews, shall meet with his approval. We dislike the precedent, and hope the president will look elsewhere for the new man. It would be but fair to concede it to Pennsylvania, or Indiana, or Illinois, or Missouri, or Michigan, which have no representative on the bench. Especially we hope he will not appoint a judge from the city of New York, which already has one, and whose bar always have the delusion that there are no other lawyers in the land worth speaking of. If he should revert to his old gubernatorial home, we can suggest the proper man. We shall not do it publicly unless we are asked, for we do not desire to stir up unnecessary jealousies. But we can lay our hands on the right man right here. If he should look to the west, there are no fitter men

than ex-Governor Hoadley, and Mr. Hitchcock of St. Louis.

Madame (why do she-impostors always call themselves "madame?") Dis De Barr, the spook-woman, languishes in a dungeon-cell, with her husband and sundry other coadjutors. This is as it should be. Of course the imprisonment is merely voluntary, and suffered for conscience's sake. To a woman of the madame's powers it must be a trifling matter to summon some legions of angels (or others) to her aid, and to soar or float triumphantly forth from the Tombs, and even to restrain her persecutors in her stead. It showed a singular lack of faith in her friend, Mr. Marsh, to go about to bail her out. Perhaps it was because he feared she couldn't float as above. But seriously, the whole affair is sickening. There are doubtless many thousands of people in this country who believe in "spiritualism," but up to this time their faith has rarely been evinced by parting with real estate, or even available personal property. The extreme of credulity usually has been to bestow diamonds and sealskin sacks on good looking media. Seldom has a lawyer fallen a victim to this imposture. We know that Judge Edmonds was a remarkable exception. He was one of the most accomplished lawyers of our State, and he fancied himself surrounded by spirits most of the time. But we do not remember that he bestowed lands or goods on the exponents of the doctrine, and we never heard that he was haunted by any comely medium. The law has heretofore looked with a contemptuous leniency on the professors of this phase of magic. Wills of spiritualists have been upheld, sometimes even when the testators thought that they were dictated by the spirits. But when it comes to doing an acute lawyer out of his property, even for a "temple" for the errant spirits, we feel that we must draw the line. Spirits should dwell in "temples not made with hands." The most that this madame's spiritual patrons could reasonably ask would be a modest studio with a north skylight. They don't need an expensive Fifth Avenue mansion, with a butler's pantry and bath-rooms and a laundry, and all that. But we forget ourselves. We are losing our seriousness again. It is difficult to find a case in point, because as we said before, men generally are prudent in their donations when the spirits pass around the plate. The case nearest in point that we can recall is *Hides v. Hides*, 65 How. Pr. 17, a Special Term decision by Judge Landon. The head-note is as follows: "While a belief in spiritualism is not *per se* sufficient cause for setting aside a marriage and a conveyance of property, yet where a shrewd, designing, lewd and unchaste woman, in middle age, knowing that an old man who is deaf and living in seclusion, is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance, pretends to be a medium and to receive communications from spirits commanding that they marry, and that the old man convey to her valuable property, claims to be a clairvoyant

and to be able to cure his deafness, and by other fraudulent devices induces the old man to marry her and to convey to her the property, the marriage and conveyance will be set aside as procured by fraud and undue influence when the court is satisfied from all the evidence that they were so procured." This case will amply repay perusal. But in this case the old man had one tangible ground, or rather hole in the ground, to go on, for the spirits told him where to dig for a mineral spring, and he struck it at a depth of seven hundred and fifteen feet. Our good old friend, Charlie Hughes, gravely argued in this case on behalf of the "medium," that the parties could not be put *in statu quo*, but Charlie always was a joker, and it was of no use. The court even shut its eyes to the well, although we are assured that truth lies therein. On the whole we are inclined to advise Mr. Marsh to forswear practice at this Barr, and to take the madame's mahlstick and drive her and her spirits out of his house, and if he feels generously disposed, to bestow the property on a more material charity, calling in some competent lawyer to construct the trust, and thus avoiding Mr. Tilden's error.

The Society of Medical Jurisprudence and State Medicine have published a paper by Mr. Austin Abbott, on "The Physiology of the Rogue." Mr. Abbott dissects, in a very amusing and brilliant manner, the Tramp, the Dead-Beat, and the Crank. He also explains very satisfactorily why the law is not content with the modern medical doctrine that the test of criminal responsibility should be the ability of the will to resist the wrong impulse rather than the capacity to distinguish right from wrong. Mr. Abbott approves the plan of Mr. Everest, of England, for determining the insanity of persons defending on that ground, by a special tribunal, before the trial on the merits. This plan would be well enough if the medical head of the tribunal were sworn to administer the legal rather than the medical test. The ablest defense of the medical theory was made by Judge Somerville, of Alabama, in *Parsons v. State*, 81 Ala. 577; S. C., 60 Am. Rep. 193; 36 ALB. LAW JOUR. 249. His views were ably answered by Chief Justice Stone in a dissenting opinion. 36 ALB. LAW JOUR. 326. Judge Somerville informs us that his views are based on a practical investigation and clinical study of the subject for ten or twelve years as a trustee of the State Insane Asylum. His views undoubtedly are in consonance with those of many if not most of the ablest modern physicians, but none the less do we regard them as unsafe. In our judgment, Mr. Abbott is correct in saying: "I do not think that medical men appreciate, generally, the power which the existence of the law and its penal sanctions exercise on the lawless in aiding the control of what would otherwise be uncontrollable impulse." "If those medical men who are the strongest advocates of treating irresistible impulse as a defense were put in charge of the administration of justice in this

community, under full responsibility to preserve peace and order, and with power to do whatever was necessary for that end, through the police force and the judicial and penal establishments, it is safe to predict that they would not begin by setting free from arrest every accused who convinced them that he acted in a condition of unconsciousness or without the power of controlling himself."

#### NOTES OF CASES.

**S**PEAKING of cats, it is held libellous in Georgia falsely to represent that a daughter likened her mother to a cat. In *Stewart v. Swift Specific Co.*, 78 Ga. 280, a newspaper article complained of purported to be a voluntary interview between a reporter of a newspaper and the plaintiff, in which the plaintiff is represented as having made statements to the reporter to the effect that her mother, having been bitten by a cat, was afflicted with a disease similar to hydrophobia; that she dreaded the approach of water, suffered extreme pain, and was much swollen in her body and members; that she acted like a cat, purring and mewing, and assuming the attitude of a cat in the effort to catch rats, and did other like acts; and that a wonderful cure of this disease had been effected by a certain medicine called S. S. S., which was sold by the defendants. Held, libellous. The *Atlanta Constitution* probably accepted that funny reporter's resignation. Another amusing case is *Stevens v. Cent. R. & B. Co.*, Georgia Supreme Court, March 3, 1888, which held that in an action against a railroad company to recover damages for injuries sustained to one's spine, evidence that the plaintiff the next day after the accident walked four or five miles to keep an assignation he had made with a colored woman, is properly admissible as showing his physical condition after the injury. In our judgment all this after the words "four or five miles" was error, and prejudicial. The evidence however showed an unwonted degree of fidelity to the colored race. Let us hear no more of "the bloody shirt." Brother Beach, please copy.

In *Hood v. Bloch*, 29 W. Va., 244, a practical test in evidence was refused. The action was in regard to the quality of cheese sold. The court said: "I do not think however the court erred in refusing to permit the defendants to produce one of the cheese to the jury on the trial. No matter how bad the cheese may have been in February, when it was delivered, it would certainly have been much worse three months thereafter, when the case was tried. Then if the defendants were allowed to produce one of the worst cheese, as they no doubt would have done, the plaintiff would have the right to produce one of the best, and so the process might be continued until the entire lot of cheese had been brought into the court-room. In all cases of this kind a large discretion must be

confided to the trial court as to exhibitions of articles of a bulky nature before the jury, and I do not think that discretion was abused in this particular matter in question." See notes, 49 Am. Rep. 191, 726.

Another case of a practical test in evidence is *State v. Henderson*, 29 W. Va. 147, a prosecution for forgery, where witnesses, acquainted with the genuine signature in question, were permitted to write one of its letters in presence of the jury, as they thought it was made, and the jury were permitted to compare it with the simulated signature. The court said: "The objection urged to this is, that it is a comparison of handwriting by the jury, which it is alleged is not allowable, and the following authorities are cited: *Rowt v. Kile*, 1 Leigh, 216; *Burress' case*, 27 Gratt. 946; *Clay v. Alderson*, 10 W. Va. 50. It is true, as these cases hold, that it is not allowable to lay other proved but not admitted specimens of the party's handwriting before the jury for the purpose of permitting them to judge by a comparison thereof with the signature in question, whether the said signature is not genuine. But here no such thing was permitted. The jury was not asked to compare different signatures of Leonard with his name signed to the alleged forged receipt. The witnesses were only asked to write an 'L' as they thought Leonard wrote it, so that the jury could the better understand the testimony. If a jury do not have a clear idea of the location of a place where an act is alleged to have been done, no one doubts the right of a party to have a witness describe the place, and by a word painting of it and its surroundings make its location clear to the minds of the jury. What objection then can there be to the permitting of the witness to make in the presence of the jury a diagram of the place to enable the jury the better to understand the witness? There can then be no valid objection to the permitting of the witnesses in their attempt to describe how Ebenezer Leonard wrote the letter 'L' to illustrate their meaning by writing the letter themselves, so that the jury could see whether or not it was in fact different from the alleged simulated 'L'."

*Clairain v. Western Union Tel. Co.*, Louisiana Supreme Court, Feb. 13, 1888, was a novel case of negligence. The court said: "The cause and manner of the death is set forth substantially as follows: That Clairain was employed by the company as a lineman in putting up and tying wires on their telegraph poles. That while he was so engaged some forty feet from the ground, and on a telegraph pole, it became necessary to stretch a wire on the outer end of a cross-arm of the pole, there being five wires already strung on the poles—three on the inner and two on the other side. That in order to perform his work it was necessary for him, by the aid of a steel spur or iron point attached to one of his legs, to force the same into the telegraph



pole as a support for his body, throw his other leg, free from any iron support, around the pole, and lean outward in a diagonal position from the pole to the outer wire of the arm attached to the pole, and there secure the telegraph wire, with iron nippers or pinchers, by a wire around the glass cup placed over the pin inserted in the cross-arm. While in this position, the wire being hauled taut many hundred feet ahead of him by means of a reel and apparatus provided by the company, the wire broke near the cross-arm at which he was, the cross-arm itself broke where it was fastened to the telegraph pole, and by reason of his then necessary position he could not recover his center of gravity when the break took place, and was precipitated headlong to the stones beneath him. He was picked up, and after suffering intense agonies, died within a week, leaving a widow and three minor children, as his heirs, deprived of his comfort, his support, his life. It is specially charged that the wire furnished for the work which he was performing was second-hand wire, full of kinks—that is, where it had been twisted it had lost its strength; and that the cross-arm of the telegraph pole was of light material, too thin, improperly bored, and of such brittle nature as to be entirely unfit for the purpose for which it was used. That Clairain has been for six years engaged in this business, both upon telegraph and telephone poles. \* \* \* It must be considered that the employment was a dangerous one; not dangerous in merely climbing or ascending the poles, and reaching out to the end of the cross-arms and fastening the wire, but dangerous from the fact that the wire and its wooden support might chance to be defective or unsound. These, necessary for his work, the employee had a right to presume were entirely safe, and he was entitled to rest on this presumption for his security. *Hanson v. Railway*, 38 La. Ann. 111. And it further follows that the employment being a dangerous one, as conceded and asserted by the defendant's counsel, the defendant company, the employer, should be legally held to the greatest care and diligence in the selection of the necessary materials, and every thing else calculated to insure the safety of the employee in the prosecution of his work. *Id.*, *Black v. Railroad Co.*, 10 La. Ann. 38; *Railroad Co. v. Derby*, 14 How. 486. 'It is indispensable to the employer's exemption from liability to his servants for the consequence of risks thus incurred, that he should be free from negligence. He must furnish the servant with the means and appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury results, he is liable to the servant as he would be to a stranger.' *Railroad Co. v. Ross*, 112 U. S. 377."

#### PRIORITY OF LIENS—COMPUTATION OF TIME.

JUDGE STEWART gives the following note to *Doane v. Millville Mut. M. & F. Ins. Co.*, 43 N. J. Eq. 522:

A statute required five days' service of a summons in a Justice's Court. The writ was served at half-past 3 o'clock on December 3, and returnable at 3 o'clock December 8. *Held*, defective. *Pedrick v. Shaw*, Pen. (N. J.) \*57; but see *Columbia Road v. Haywood*, 10 Wend. 432; *Hemming v. Brabason*, Bridg. C. P. 8; *Faulds v. People*, 66 Ill. 210.

A defendant in a Justice's Court may plead that he had brought an action against the plaintiff earlier the same day before another justice. *Johnson v. Pennington*, 3 Gr. 188; *Dickinson v. Lee*, 2 Coldw. 615.

If the defendant's object in keeping back his plea is delay, the court may refuse to set aside a judgment by default, although it was entered an hour after the plea had been filed. *Rogers v. Beach*, 18 Wend. 533; *Brainard v. Hanford*, 6 Hill, 368; see *Havens v. Dibble*, 18 Wend. 665; *Bangor v. Somerville*, 1 N. J. L. J. 252 (Depue, J.).

A declaration on promises alleged to have been broken on November 7, 1785, the first day of the term, is good, because the declaration could not, in law, be delivered until the sitting of the court at 10 o'clock on that day, and the promises may have been broken at an earlier hour. *Pugh v. Robinson*, 1 T. R. 116; see *Combe v. Pitt*, 3 Burr. 1434; 23 Am. Law Reg. (N. S.) 258; *Swift v. Crooker*, 21 Pick. 241; *Church v. Clark*, *id.* 310; *Smadbeck v. Sisson*, 31 Hun, 582; and so of a declaration for slander (*Synons v. Low*, Styles, 72); or in ejectment (*Roe v. Hersey*, 3 Wils. 274; see *Doe v. Spencer*, 11 East, 495); or in replevin. *Knowlton v. Culver*, 2 Plun. (Wis.) 243.

A statute requiring an appeal to be filed before the next term is complied with if it be filed before 10 o'clock on the first day of the next term. *Vanlear v. Vanlear*, 1 Binn. 76.

Where a statute authorized a judgment by confession only, in vacation, one confessed before 10 o'clock on the first day of the term is valid. *Brown v. Hume*, 16 Gratt. 456.

A rule to discharge a defendant in custody is a good defense to an action for an escape, although the defendant went out before the sitting of the court which granted such rule. *Field v. Jones*, 9 East, 151.

The court may inquire whether in fact the cause of action accrued on the same day, but before the writ issued. *Clarke v. Bradlaugh*, L. R., 7 Q. B. D. 151; 8 Q. B. D. 63.

A copy of a declaration may be served before the original is filed, if on the same day. *Huges v. Patton*, 12 Wend. 234. *Rusk v. Van Benschoten*, 1 How. Pr. 149.

A jury in giving their verdict may count the fractions of a day during which the defendant unlawfully obstructed a highway. *Ferris v. Ward*, 9 Ill. 499.

The hour when an application was made to remove a cause from a State court to a Federal court may be shown. *Maine v. Gilman*, 11 Fed. Rep. 214.

A certiorari to remove a justice's judgment may be delivered to him before he has actually entered such judgment. *Delaney v. Lawrence*, 6 Hal. 25, 102; *Mairs v. Sparks*, 1 South. 369; 2 *id.* 516; see *Morris Canal Co. v. Mitchell*, 2 Vr. 99.

Judgments entered the same day create concurrent liens. 23 Am. Law Reg. (N. S.) 258; *Petrie v. Lord Porchester*, 1 T. R. 116; *Bliss v. Watkins*, 16 Ala. 229; *Spath v. Ship*, 1 How. (Miss.) 234; *Reed v. Haviland*, 38 Miss. 323; *Bruce v. Vogel*, 38 Mo. 100; *Emuel v. Garwood*, 4 Dall. 321, note; *Anderson v. Tuok*, 33 Md. 225; *Porter v. Earthman*, 4 Yerg. 358. Contra: *Lippincott v. Wilson*, 40 Iowa, 425; *Marvin v. Marvin*, 75 N. Y. 240; *Janney v. Stephen*, 2 Pat. & H. 11; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; see *Lytleton v. Cross*, 3 B. & C. 317; *Roberts v. Roberts*, 8 Rich. 15; *McClean v. Rockey*, 3 McLean, 235. Unless the clerk

is required by statute to note thereon the precise time of its receipt or rendition. *Bates v. Hinsdale*, 65 N. C. 423; *Griffin v. Forrest*, 49 Mich. 309; *Seaman v. Eager*, 16 Ohio St. 210; *Meits v. Bright*, 4 Dev. & Bat. 173; *Hale's Appeal*, 44 Penn. St. 438; *Wilson v. Greenwood*, 5 Houst. 519. Or certain office hours are fixed by statute. *France v. Hamilton*, 26 How. Pr. 180; *Polhemus' Appeal*, 32 Penn. St. 323. And so as to a judgment and a mortgage. *Claason's Appeal*, 22 Penn. St. 359; *Hendrickson's Appeal*, 24 id. 363; *Follett v. Hall*, 16 Ohio, 111; *Holliday v. Franklin Bank*, id. 533; *Stagg's case*, 1 Nott & M. 405; see *Morris v. White*, 9 Stew. Eq. 324; *Hollingsworth v. Thompson*, 5 Harring, 432. And a judgment or a set-off. *Collins v. McKee* (Penn.), 10 East. Rep. 743. And a judgment and a deed. *Whittaker v. Wisbey*, 12 C. B. 44; *Clawson v. Eichenbaum*, 2 Grant Cas. 130; *Hoppock v. Ramsey*, 1 Stew. Eq. 413; *Duke v. Clark*, 58 Miss. 465, 477; 59 id. 575. And a judgment and a mechanic's lien. *Hunt v. Miller* (N. J. Ch.), Jan. 1888 (Williams, A. M.).

A purchaser at sheriff's sale holds the title against the defendant's grantee whose deed was filed for record one hour and twenty minutes after the judgment. *Jones v. Luck*, 7 Mo. 551; see *Smull's Appeal*, 24 Penn. St. 396; *Finley v. Smith*, 2 Ired. 225.

As to sheriff's sales of chattels, see *Berry v. Clements*, 9 Humph. 312; 11 How. (U. S.) 398; *Woodland v. Fuller*, 11 Ad. & El. 859; *Whyte v. Treadwell*, 17 U. C. C. P. 488; *Meits v. Bright*, 4 Dev. & Bat. 173; *Cox v. Hodge*, 1 Swan, 371; *Bachman v. Sutsbacher*, 5 Rich. (N. S.) 58.

A deed given on the first day of the term will be prior to a judgment obtained against the vendor during such term, if the first sitting of the court was on the third day of that term. *Skipwith v. Cunningham*, 6 Leigh, 271; see *Withers v. Carter*, 4 Gratt. 407.

As to a judgment by confession, entered the same day the defendant therein died, see *Lanning v. Pawson*, 38 Penn. St. 480; *Boyer's Estate*, 51 id. 422; and judgments in being docketed, *Bates v. Hinsdale*, 65 N. C. 423; *Grantham v. Lucas*, 24 W. Va. 231; *Whitehead v. Latham*, 33 N. C. 232.

A judgment entered the same day, but after the defendant died, is entitled to no priority over his general creditors. *Patterson's Appeal*, 96 Penn. St. 93; see *Müller v. Jones*, 2 Spears, 315; *Mitchell v. Overman*, 103 U. S. 62; *Clarke's case*, 15 Abb. Pr. 227.

Judgment obtained by a creditor against an executor the same day that a decree was made for the administration of the testator's estate, is entitled to no priority over decedent's simple contract creditors. *Parker v. Ringham*, 33 Beav. 535; see *Mills v. Jones*, 2 Rich. 383.

A judgment by default obtained on a writ served on the defendant the same day, but before, he was convicted of a felony, is good. *Neale v. Utz*, 75 Va. 480.

The lien created on a criminal's property by the Illinois statute takes effect during the entire day on which the arrest is made, and overrides a conveyance of his lands made on that day, but before his arrest. *Hitchcock v. Roney*, 17 Ill. 231; see *Morgan v. Collier*, 13 Ga. 493; *McKnight v. Spain*, 13 Mo. 534.

An order approving a guardian's bond is valid, although not signed until after an order directing him to sell his ward's lands had been made the same day. *Revill v. Claxton*, 12 Bush, 558.

The General Court of Virginia was by statute to convene at Richmond on November 15. One of the judges thereof signed a judgment against the defendant at Chesterfield on that day. *Held*, that the court would judicially notice that the two places were not more than three hours' riding apart, and the judge might therefore have been at Chesterfield in the

morning of November 15. *Mendum v. Commonwealth*, 6 Rand. 704.

A marriage by plaintiff at 11 o'clock in the forenoon, when her decree of divorce from a former husband was not obtained until 2 o'clock in the afternoon of the same day, is valid. *Merriam v. Wolcott*, 61 How. Pr. 377; see *Huntington v. Charlotte*, 15 Vt. 46; *Webber v. Webber*, 83 N. C. 280.

An execution may issue the same day that the judgment is filed, although before such filing. *Small v. McChesney*, 3 Cow. 19; *Clute v. Clute*, 3 Denio, 263; *St. Stephen Bank v. New Brunswick R. Co.*, 5 Allen (N. B.) 629, and note. And before a *precedendo* is filed below, after the dismissal of an appeal. *Shrimp v. Hay*, 8 Bradw. (Ill.) 66. And an order for discovery before the execution is returned. *Jones v. Porter*, 6 How. Pr. 286.

A judgment by confession and *præcipe* for *fi. fa.* were handed by the plaintiff to the prothonotary on Sunday; the next day he entered the judgment and issued execution thereon at 6.30 A. M. *Held*, valid and prior to other executions issued against the defendant at 8 A. M. and 8.45 A. M. the same day. *Kauffman's Appeal*, 70 Penn. St. 261.

An execution put in the sheriff's hands three hours before a petition to wind up the defendant company was presented, but possession not taken by the officer until three hours after such presentation, is not entitled to priority. *London & D. B. Co.'s case*, L. R., 12 Eq. 190; *Green v. Laurie*, 1 Exch. 336; but see *Woodland v. Fuller*, 11 Ad. & El. 859; *Cushing v. Arnold*, 9 Metc. 23; *Golden v. Blaskopf*, 126 Mass. 523.

Where the execution was delivered to the sheriff between 1 and 2 o'clock in the afternoon, and the bankrupt defendant was surrendered by his bail between 6 and 8 o'clock the same evening, the execution is paramount. *Thomas v. Desanges*, 2 B. & Ald. 586; *Sadler v. Leigh*, 4 Camp. 197; *Beckman v. Jarvis*, 3 U. C. Q. B. 280; *Godson v. Sanctuary*, 1 Nev. & M. 52; 4 B. & Ad. 255; see *Peutress v. Annan*, 9 Dowl. 828; *Swain v. Morland*, 1 Brod. & B. 370.

Parol evidence is admissible to prove the hour when an execution issued (*Allen v. Portland Stage Co.*, 8 Me. 207; *Shore v. Dow*, 13 Mass. 529; *Herman Ex.*, § 271, note 6; *Lang v. Phillips*, 27 Ala. 314), or was returned (*Bull v. Clarke*, 2 Metc. [Mass.] 587; see *Rex v. Berke*, 5 East, 386), but not when a judgment was entered it seems. *Cox v. Hodge*, 1 Swan, 371, 373; *Burney v. Boyett*, 1 How. (Miss.) 39; *Willey v. Southerland*, 41 Ill. 25.

If an officer returns a *ca. sa.*, *non est inventus* in the morning, and is sued for a false return, the plaintiff cannot show that he might have arrested the defendant in the *ca. sa.* in the afternoon of the day when he made the return. *Hinman v. Borden*, 10 Wend. 367.

A plaintiff in execution, on the last day for the defendant's filing security to stay its issuance, obtained a rule that the sheriff proceed; later in the same day the defendant offered his securities. *Held*, that he was guilty of no delay. *Slingluff v. Ambler*, 2 W. N. C. (Penn.) 67.

Where a defendant died between 11 and 12 o'clock in the morning, and a *fi. fa.* was sued out against his goods between 2 and 3 the afternoon of the same day, it was set aside. *Chick v. Smith*, 8 Dowl. 357; see *Wright v. Mills*, 4 H. & N. 488; *McMahon v. Glasscock*, 5 Yerg. 304.

Where several writs of attachment were served the same day, the precise hour when each one was served may be proved by parol. 23 Am. Law Reg. (N. S.) 257; *Ransom v. Halcott*, 9 How. Pr. 119; 13 Barb. 56; *Ginsberg v. Pohl*, 35 Md. 505; *Whitney v. Butterfield*, 13 Cal. 335; *Case v. Case*, 2 Am. Law Reg. 253; *Jones v. Bonsall*, 11 Phila. 561; see *Long's Appeal*, 23 Penn. St. 296; *Rockwood v. Varnum*, 17 Pick. 289; *Fairfield v.*

*Paine*, 23 Me. 498; *Garity v. Gigte*, 130 Mass. 184; *Baldwin's Appeal*, 86 Penn. St. 483; *Steffens v. Wanboeker*, 17 S. C. 475. And so of an assignment and an attachment. *Malvin v. Sweitzer*, 1 Kulp (Penn.), 5. And a notice to quit and an attachment. *Barrett v. Merchants' Bank*, 28 Grant Ch. 409. And an attachment and a deed. *Taylor v. Emery*, 16 N. H. 359; *Hervey v. Champion*, 11 Humph. 569.

An assignment for the benefit of creditors executed at 10.15 A. M. has precedence over a judgment obtained against the assignor between 11 and 12 A. M. the same day. *Mechanics' Bank v. Gorman*, 8 Watts & Serg. 304; see *Rex v. Earl*, Bunbury, 33 (criticised in *Rex v. Edwards*, 9 Exch. 48, 51); *Clements v. Berry*, 11 How. (U. S.) 398. As to an assignment and a deed, see *Boyer's Estate*, 51 Penn. St. 432.

The burden of proof is on him who claims priority. *Murfree v. Comack*, 4 Yerg. 270 (26 Am. Dec. 232, 234, note); *Neff v. Barr*, 14 Serg. & R. 166; *Boyer's Estate*, 51 Penn. St. 432; *Clark v. Duke*, 59 Miss. 575; see *Ladley v. Creighton*, 70 Penn. St. 490; *Stewart v. Stewart*, 8 J. J. Marsh. 48.

Acts of bankruptcy may be shown by proving the hour when they were committed. *Godson v. Sanctuary*, 1 Nev. & M. 52; 4 B. & Ad. 265; *Ex parte D'Obree*, 8 Ves. 82; *Ex parte Dufrene*, 1 Ves. & B. 51; *Ex parte Bignold*, 3 Mont. & A. 9, 13; *Wydown's case*, 14 Ves. 87; 23 Am. Law Reg. (N. S.) 258.

An order of bankruptcy entered at 4 o'clock does not embrace property acquired by the bankrupt by devise after 5 o'clock the same day. *Pettit's Estate*, L. R., 1 Ch. Div. 478; see *Blair v. Carter*, 63 Va. 621.

Where a sale at auction is made in the morning, the auctioneer cannot bind the purchaser, under the statute of frauds, by signing for him in the evening of the same day. *Craig v. Godfroy*, 1 Cal. 415; *Hicks v. Whitmore*, 13 Wend. 548; see *Bateman Auc.* \*154; *Reed Stat. Frauds*, § 517.

A policy of insurance referred to another "prior in date." *Held*, that it could be shown to mean one executed earlier the same day. *Brown v. Hartford Ins. Co.*, 3 Day, 58.

Under a power of attorney to confess a judgment "at any time hereafter," judgment may be confessed the same day the power is executed. *Thomas v. Mueller*, 106 Ill. 36.

Two applications for the appointment of a receiver were made the same day to different judges. *Held*, that the one first in time should be preferred. *People v. Central Bank*, 53 Barb. 412.

The hour when a statute is approved may be shown. *Burgess v. Salmon*, 97 U. S. 381; *Arrowsmith v. Hammering*, 39 Ohio St. 573; 23 Am. Law Reg. (N. S.) 549, and note; see *Mallory v. Hiles*, 4 Meto. (Ky.) 53; *Fowler v. Peirce*, 2 Cal. 165; *Converse v. Michie*, 16 U. C. C. P. 167; *Tomlinson v. Bullock*, L. R., 4 Q. B. Div. 290; 28 Moak, 571, and note; *Foust v. Trice*, 8 Jones, 490.

A statute provided that a specified license should begin on the day it was granted. A prosecution for not having such a license was begun against the defendant at 12.40 P. M. on October 21, and at 1.10 P. M. the same day he procured a license, and exhibited it at the hearing, whereupon he was discharged. *Held*, that he ought to have been convicted. *Campbell v. Strangeways*, L. R., 3 C. P. D. 105; 30 Moak, 54.

How two inconsistent statutes, relating to the same subject-matter, and passed the same day, are to be construed. *Knight v. Ocean*, 20 Vr. 485.

The actual hour when a justice of the peace took his official oath may be shown. *Courser v. Powers*, 84 Vt. 517. And appraisers under an execution. *Allen v. Portland Stage Co.*, 8 Me. 207; criticised in *Hall v. Crocker*, 3 Meto. (Mass.) 248.

An administratrix ought not to be removed for de-

lay for part of a day in qualifying. *Hart's Succession*, 7 Rob. (La.) 534; see *Kearney v. Andrews*, 2 Stock. 70, 74; *State v. Gasconage Co.*, 32 Mo. 102; *Carpenter v. Titus*, 33 Kans. 7.

As to noticing fractions of a day in criminal cases, see *People v. Beatty*, 14 Cal. 566; *Indianapolis v. Parker*, 31 Ind. 220; *Presley v. Marion Co.*, 80 Ind. 45; *Territory v. Thierry*, 1 Mart. (La.) 102; *Speer v. State*, 2 Tex. Ct. App. 246; *Nixon v. State*, 2 Sm. & Marsh. 497. And in commercial usages. *Bank of Alexandria v. Swann*, 9 Pet. 83; *First Nat. Bank v. Burkhard*, 100 U. S. 686; *Benson v. Adams*, 69 Ind. 353. And in maritime liens. *The Frank G. Fowler*, 8 Fed. Rep. 331. And in a pauper's settlement. *Reg. v. St. Mary*, 1 El. & Bl. 816; *Hopewell v. Amwell*, Pen. (N. J.) \*422. See, in general, 23 Am. Law Reg. (N. S.) 249, note; 3 Alb. L. J. 176.

#### INTEREST—PAYMENT—ENTIRETY OF CONTRACT—LIQUIDATED ACCOUNT—STATEMENT RENDERED.

KENTUCKY COURT OF APPEALS, FEB. 14, 1888.

#### HENDERSON COTTON MANUFACTURING CO. v. LOWELL MACHINE SHOPS.

Under a contract for the purchase of about \$90,000 worth of machinery for a certain factory, \$76,000 worth was delivered. A few months later another lot of machinery for the same factory, worth nearly \$35,000, was delivered by the same party, the two sales having been treated by both parties as parts of one transaction. *Held*, that payment for the second lot of machinery fell due at the time specified in the contract, and bore interest therefrom.

An account, which with the debtor's knowledge, and without his protest, is treated by the creditor as bearing interest, the claim being a large one, and running more than a year, is a liquidated account from the time a statement was rendered and payment demanded, and bears interest from that time.

**A** PPEAL from Circuit Court Henderson county. Plaintiff had judgment, and defendant appeals.

*Montgomery Merritt*, for appellant.

*John Young Brown* and *Edward W. Hines*, for appellee.

**HOLT, J.** The appellant purchased of the appellee the machinery for a cotton factory. The petition does not aver whether the contract was parol or in writing. The evidence shows that it was made by telegram and letter. It is immaterial however to the consideration of the questions involved, whether it was one way or the other. It was for the purchase of about \$90,000 worth, payable at certain times. It is admitted that the first bill of about \$76,000 in value was delivered under this contract. A few months thereafter a second lot, which was necessary to complete the equipment of the factory, was furnished, it amounting to nearly \$35,000. The appellant claims that as to it, and the charges for storage, travelling expenses and labor of hands to put the machinery in the factory, no time of payment was fixed by contract; while upon the other hand, the appellee insists that the contract made prior to the delivery of the first lot of machinery embraced the second one. The principal of the account amounted to \$116,905. The appellant during the year of the purchase, and that following, made various payments upon it at different times, which in all amounted to a sum equal to the principal. The evidence plainly shows that the last one was not accepted by the creditor in satisfaction of the balance of its claim, and was not made until long after the time of payment fixed by the contract; and the others

were made along at different times during the interim, none of them as early as the contract required.

Upon the debit side of the account filed with the petition the items of principal, with interest upon each, are added together; while upon the credit side the payments appear, with interest added to each from the time of payment. The total of one is then deducted from the other, leaving a balance of \$3,817.46 in favor of the appellee, and for it this suit was brought. This mode of counting the interest was erroneous. Our statute provides: "Partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due." Gen. Stat., chap. 60, art. 1, § 5. It was however prejudicial to the appellee, and the appellant cannot therefore complain. It contends however that the account was an unliquidated one, but whether liquidated or unliquidated, that it does not, as a matter of law, bear interest; and as the interest is but an incident of the debt, and follows the principal as the shadow does the substance, that no action can be maintained for it after the payment of the principal. The jury were in substance instructed to allow interest upon the price of the first lot of machinery from the time it was due, save as qualified by the contract; and to do so as to the subsequent purchases, if they were made under the same contract; but if not purchased upon the same terms, and no time for payment fixed, that then the price did not draw interest until the account was rendered and payment demanded. The court refused to comply with the appellant's request, and tell them that the principal of the account had been paid, and therefore the suit could not be maintained. Of course this was not true if any portion of the debt bore interest, because by law any payment had to be first applied to its extinguishment; and the total of the payments only equalled the principal. It also refused to say to them that the allowance of interest was a matter of their discretion. The appellant admits that the price of the first lot of machinery was by the contract payable at certain times; but it avers that the appellee indefinitely extended the time of payment; and it therefore denies the right to any interest whatever. It clearly appears however that the appellee merely indulged the appellant, and allowed the debt to run beyond its maturity. There is no conflicting evidence upon this point. The first installment was due in June, 1884. In October following the appellee notified the appellant that interest was being charged upon the account, and no objection was made to it. In November following the president of the appellant (who was attending to the matter) offered to give the company's note for the balance then owing. In December thereafter he examined the account upon appellee's books, and as the burden of testimony shows, he then made no objection to the interest charges. In July, 1885, a sale of the factory was desired. The appellant was fearful that the appellee would interfere with the sale. The president of the appellant, both as an individual and as president, guaranteed to the appellee in writing that the property should bring enough to pay the balance of its debt, the amount named, including interest as well as principal. During the entire period from the time when the first installment for the first lot of machinery became due until the last payment was made on October 16, 1885, the appellee was frequently requesting payment. It is evident that both parties understood that the purchases made subsequent to the first ones were upon the same terms. It is equally evident that the jury so found, because they allowed the balance shown by the account sued on, and it conformed in its items and charges to this view. This fact renders it unnecessary perhaps to consider further the refusal of the court to tell the jury that the

allowance of interest was in their discretion, or the direction to them, that in the absence of any contract fixing the time of payment, the account would bear interest from the time when it was rendered and payment demanded. Both reason and authority say that if by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time in the absence of any agreement otherwise by the parties. The jury having found this state of case as to the entire claim of the appellee, instructions in the alternative, and based upon different hypothesis, whether correct or incorrect, cannot affect the verdict. If this were not so, yet no error appears. Prior to the statute of 1799, it is questionable whether in this State any debt carried interest unless it was evidenced by writing under seal. It provided: "All debts founded on any specialty, bill or note, in writing, ascertaining the demand, shall carry interest in the same manner as debts due on a bond or bill, with a penalty under seal." 2 M. & B. St. 863, § 2. Neither the Revised nor the present General Statutes contain any such provision; and there is now no statute in this State declaring what debts shall bear interest. Guided by reason, we must therefore turn to the general law for a correct solution of the question. Judicial history tells of a conflict of authority, both English and American, upon the subject. Perhaps no question exhibits in the past a greater variety of opinion. In some instances cases were made to turn upon their particular circumstances, and whether it was equitable or inequitable, to allow interest. In others arbitrary rules were attempted to be laid down, and often without reference to the reasons upon which they should be founded. They were as variant as the cases, and productive of course of confusion instead of system. Hence there is little harmony in the early history of this branch of the law. By the early common law it was unlawful to take any interest upon any debt whatever. All the interest was usurious until the statute of 37 Henry VIII, chap. 9. The first advance was the allowance of it, as a matter of right, upon claims evidenced by writing under seal. Next the practice for a while was not uniform. Some judges allowed it upon liquidated claims supported by simple written contracts, while others were controlled by an almost superstitious reverence for a seal; but at last it became a settled practice to allow interest, as a matter of right, upon liquidated claims, when evidenced in writing. In this country a more liberal rule has generally prevailed than in England. Upon principle there is no ground for a distinction between liquidated claims, whether existing in parol or by writing. Why should the allowance of interest be made to depend upon the character of the mere evidence of the claim, instead of the contract of the parties, either expressed or implied? If A. orally promises to pay B. \$1,000, which he owes him, by a certain time, why, after default, should he not, in reason as well as morally, be as much bound to pay interest, as if the promise had been in writing? In either case the parties themselves fix the time of payment. Our courts, perceiving the wisdom as well as the justice of it, have therefore adopted the rule to allow interest as a matter of law, where a claim is liquidated, and by the contract, whether oral or written, express or implied, is payable at a certain time. The common law is of such a flexible character as to admit of such extension. This fact illustrates its wisdom. Its principles are not fluctuating and uncertain, but so framed as to be applicable to the varying conditions of business and society.

The true ground upon which to put the allowance of interest is the fault of the party who is to pay the debt. If he has made default in payment, then, *ex aequo et*

bono, he should reimburse the creditor for keeping him out of the use of his money. He should render an equivalent for the use of what is not his own. If there be a specified time for payment, and a failure to then pay, or a demand of payment of a liquidated claim, and default, then the debt should as a matter of law, bear interest from the time of such failure. This is the current of authority, and it is supported by both right and reason.

In the case of *Young v. Godbe*, 15 Wall. 562, the Supreme Court said: "If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest began to run at once."

1 Sutherland on Damages, 596, repeats the same rule, when he says: "In this country the principle has long been settled that if a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor, compensation in damages, equal to the value of the money which is the legal interest upon it, shall be paid during such time as the party is in default. The important practical inquiry therefore in each case in which interest is in question, is what is the date at which this legal duty to pay, as an absolute present duty, arose."

In some of the earlier cases in this State, as *Harri-son v. Handley*, 1 Bibb. 443, it was held that interest could not be allowed upon a merchant's account. They were in the line of the old common-law authorities, and were decided when the statute of 1799 was in force. Undoubtedly if an account be not payable by contract at a particular time, the debtor should be put under a duty to pay by a demand; or what is equivalent thereto, an account rendered. An account is to be considered as liquidated after a demand of payment, with knowledge of what is claimed upon the part of the debtor, and without objections by him, or after it has been rendered to him, without objection to it upon his part within a reasonable time. *Walden v. Sherburne*, 15 Johns. 409. The assent of both parties to it, as stated, is thereby implied. Story says: "An account rendered shall be deemed an account stated from the presumed approbation or acquiescence of the parties, unless objections be made thereto within a reasonable time." 1 Story Eq. Jur., § 526.

The rendering of the account is equivalent to a demand of payment. It informs the debtor as to the character and amount of the claim; he may examine it, and if no objection be made, it then becomes a stated one, and from that time a liquidated claim. 1 Suth. Dam. 615. He then knows that payment is desired, and he then becomes chargeable with delinquency if he fails to pay. He is using his creditor's means, and not his own, and he should therefore render an equivalent by paying for its use. In case of an unliquidated claim, as upon a *quantum meruit*, interest is not allowable as a matter of law, or *prima facie* because it does not necessarily follow that the duty has been imposed upon the debtor to pay it. In such cases therefore its allowance or disallowance is properly left to the discretion of the jury, to be exercised according to the circumstances of the case, and whether he has been delinquent without cause; but where it has been liquidated by a rendering of the account to the debtor, or demand of payment made of him, with knowledge upon his part of its character, it then becomes due and carries interest from that time, like one payable by contract at a specified time, because an implied contract to pay it then arises. In this instance payment of the account was often demanded with knowledge on the part of the debtor that inter-

est was claimed and being charged upon it. It could hardly be presumed that it expected to be indulged upon so large a debt for so long a period without the payment of interest. Its president inspected the account upon the books of the appellee, and it continued to make payments until they amounted to a sum equal to the principal of the debt. Most assuredly the claim was a liquidated one. Hence if it did not appear that the jury found that the entire account was by the contract due at a fixed time, yet the court did not err in refusing, upon the facts of this case, to tell them that the allowance of interest was in their discretion. If such had been the case, then it is true that the action could not have been maintained after the payment of the principal.

Our conclusion, after a careful review of the authorities, and as thoughtful a consideration of the matter as we are able to give it, is that interest is allowable as a matter of right and law upon an account from the time when, by the contract, it is payable, or from the time it becomes a liquidated one, unless the parties agree otherwise.

Judgment affirmed.

### MARRIAGE—SEPARATE ESTATE—POWER TO CHARGE—LEX LOCI.

MISSISSIPPI SUPREME COURT, FEB. 20, 1888.

TOOF V. BREWER.

A husband and wife operated a plantation in Arkansas as partners, and there contracted the debt sued for. This proceeding was brought to subject her separate estate in Mississippi to the payment of the debt. She defended that her property was not liable, as she could not enter into a contract of partnership with her husband. Held, that under the law in Arkansas, she could make such contract, and as a personal judgment could have been rendered against her there, such liability will support a judgment in Mississippi subjecting her separate estate.

**A** PPEAL from chancery. Bill to subject land in Mississippi to the payment of notes. Demurrer sustained and bill dismissed.

*Henry Craft, George Gant and Addison Craft*, for appellants.

*H. Watson*, for appellees.

COOPER, C. J. By the Code of 1880 all disabilities of married women were removed, and with us they have equal power with a *feme sole* to acquire and own property, to convey it, to make all sorts of contracts, and to sue and be sued. We are no longer concerned about the separate estates in equity, or separate statutory estates of married women, nor the circumstances, extent, or manner in which they may be charged. There is therefore no public policy of the State which will preclude the enforcement here of any valid contract made in another State by a married woman, such as controlled this court in the case of *Bank v. Williams*, 46 Miss. 618. The controlling inquiry then is what obligation, if any, rested upon Mrs. Brewer, under the laws of Arkansas, arising from the transactions with appellants? For if the dealings between the parties gave rise to no personal obligation, enforceable against her there, the foundation of complainants' suit is withdrawn; while on the other hand, if by the laws of Arkansas the complainants might have obtained a personal judgment against her in that State and were not restricted to a proceeding against her separate estate in equity, or against her separate statutory estate as the debtor, that liability

to a judgment *in personam* there is sufficient to uphold the present proceeding here. In determining this question the decisions of the Supreme Court of that State are binding authority upon us, and in the absence of decision by that court upon any question involved, we must assume that our own decisions upon similar questions are right, and because they are that they would be the decisions of the court of that State. So much of the Constitution and laws of the State of Arkansas as are pertinent to the question involved are as follows:

"The real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she was a *feme sole*, and the same shall not be subject to the debts of her husband." Const. 1874, art. 9, § 7. The effect of the provision is to make all property thereafter acquired by a woman, who is or may become covert, her separate property, as effectually as if conveyed to her by deed to her separate use. *Ward v. Estate of Ward*, 36 Ark. 586.

"Sec. 4624. The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith, and without prejudice to the existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person; that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account, \* \* \* shall, notwithstanding her marriage, be and remain her separate property," etc.

"Sec. 4625. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue and be sued in the courts of this State on account of the said property, business or services."

"Sec. 4630. Whenever a judgment shall have been recovered against a married woman, the same may be enforced by execution against her sole and separate estate or property, to the same extent and in the same manner as if she were sole." Act of April 28, 1873 (Mansf. Dig. 916, 917).

This act was amended by the act of December 15, 1875, and among other amendments, it is declared that "the rule that statutes in derogation of the common law shall be strictly construed, shall have no application to this act." Mansf. Dig., § 4639. Where a married woman is a party to a suit, her husband must be joined with her, except in certain states of case, among which is where the action is between herself and her husband. Civil Code, § 42; Mansf. Dig., § 4951. It has been decided by the Supreme Court of Arkansas that a personal judgment may be rendered against a married woman transacting business under which her separate estate may be sold (*Trieber v. Stover*, 30 Ark. 727; *Chollar v. Temple*, 30 id. 238; *Walker v. Jessup*, 43 id. 163; *Abbott v. Jackson*, id. 212), and that she may form a partnership with a person other than her husband to transact the business in which she is permitted by law to engage. *Abbott v. Jackson*, *supra*. We have not been referred by counsel to any decision of that State in which it has been decided that the husband and wife may or may not enter into partnership; nor do we think what has been said by the court of that State incidentally in other cases, indicates that it intended to express any

view on this subject. But it is said by counsel for appellee that under such statutes it is generally held that the husband and wife may not contract with each other, and that perhaps being a contract, the relation may not be formed between them. This position is supported by the text of Bishop on Married Women, § 435, and by that of Schouler on Husband and Wife, § 316. The cases cited by Bishop are: *Lord v. Parker*, 3 Allen, 127; *Edwards v. Stevens*, id. 315; *Lord v. Davidson*, id. 131; *Knowles v. Hull*, 99 Mass. 562; *Bennett v. Winfield*, 4 Heisk. 440; *O'Daily v. Morris*, 31 Ind. 111. Schouler cites also: *Wilson v. Loomis*, 55 Ill. 352; *Montgomery v. Sprankle*, 31 Ind. 113. With the exception of the cases from Massachusetts the authorities cited are foreign to the proposition they are relied on to support. In Tennessee there is not, and never has been, any such statute, or if there has been it certainly is not referred to in the case in Heiskell. That case rested on these facts: One Bennett was a member of the firm of Winfield, Read & Co. This firm borrowed money of Margaret Moore. Afterward, in contemplation of marriage between Miss Moore and Bennett, a marriage contract was entered into between them, by which her separate property was secured to her separate use. After her marriage with Bennett she brought suit to recover the sum due her by the firm. The other members of the firm pleaded, that by reason of the marriage the husband became owner of the demand, and that he at least was released as debtor. The court held that under the marriage contract the debt remained her separate property. *Wilson v. Loomis*, 55 Ill. 352, was a case in which a married woman embarked her money in trade, the husband having the management of the business as her agent, and devoted his time, labor and skill to the enterprise, which proved exceedingly profitable. The stock in trade was levied on by creditors of the husband. In a suit by the wife, it was held that the husband could not, as against his creditors, give to his wife the profits arising from his time, skill, and labor, the court saying: "The capital originally invested in the trade was increased by the labor of the husband, and then reinvested, and so on until it had increased three or four fold; and the property thus acquired by the labor and energy of her husband must be liable for his debts. A married woman cannot engage in a general trade or business with her husband as managing agent, to which he must devote his whole time and energy, and yet all his earnings be beyond the reach of creditors."

In *Montgomery v. Sprankle*, 31 Ind. 113, and *O'Daily v. Morris*, id. 111, it is distinctly stated by the court that there is no statute of that State modifying the common-law rule that a married woman cannot bind herself by an executory contract, and that there was nothing in either case showing an intent by the married woman to bind her separate estate. In the first case there was nothing in the facts having any sort of reference to a contract between husband and wife, of partnership or otherwise; in the other, an attempt was made to charge a married woman as a partner with her husband, because she had held herself out as such, but the point of the decision was that she could not make the contract sued on, either alone or as a member of the firm. This disposes of all the cases cited by these writers except those from Massachusetts. The first of these, and the one which controlled the others, is that of *Lord v. Parker*, 3 Allen, 127. The section of the Massachusetts statute conferring power on a married woman to engage in trade is substantially that of Arkansas; but the section that permitted her to acquire property excluded the right to acquire it by gift from the husband. Under the Massachusetts statute, the court came to the conclusion that she might not enter into partnership

with her husband. The grounds of that decision, as stated by the court in the case referred to, are: (1) Because the statute did not expressly confer the power, and being in derogation of the common law, was not to be extended by construction; (2) the contract of partnership would make her property community property, and it would thereby cease to be her "sole and separate estate;" (3) the power would open a door to fraud upon creditors of the husband; (4) she could not, by the statute, receive a gift from the husband; (5) because the power to contract with the husband would necessarily carry with it the power to sue him, which would be contrary to the settled policy of the State. Let us now see how many of these reasons do not apply to the Arkansas statute. The first does not, for the statute itself expressly repudiates and abrogates the rule that it is to be strictly construed as being in derogation of the common law. The second does not, for the court of Arkansas has decided that a married woman may enter into partnership with persons other than her husband, and thus her property may become community property as much as it would if the husband was the partner. *Abbott v. Jackson*, 43 Ark. 212. The fourth does not, for by section 4624 Mausf. Dig., the right to acquire property by conveyance from "any person in good faith, and without prejudice to existing creditors," manifestly refers exclusively to conveyances from the husband, for as to other persons these words would be surplusage. The fifth does not, for by the laws of Arkansas she may sue the husband. Civil Code, § 42; *Trieber v. Stover*, 30 Ark. 727.

It is not true then, as stated by Bishop and Schouler, that under statutes of this character it is generally held that a married woman cannot enter into partnership with her husband. In a case in the District Court of the United States for the State of Illinois, the contrary rule was announced under the statutes of that State. *In re Kinhead*, 3 Bls. 405. See also Pol. Cont. 70. In New York this question has frequently arisen, but has not, so far as we know, been directly passed on by the Court of Appeals. In the Supreme Court it has been decided both ways.

In *Kaufman v. Schoeffel*, 37 Hun, 140, the Fifth Department of the Supreme Court held that a married woman could not enter into partnership with her husband.

In *Graff v. Kinney*, 37 Hun, 405, the Second Department of the court held that she could.

In *Fairlie v. Bloomingtondale*, 38 Hun, 220, the Third Department of the court pretermitted a decision of the question, but stated that if it were necessary to decide it, they would "probably agree to the doctrine of *Graff v. Kinney*."

In *Zimmerman v. Erhard*, 58 How. 11, the power to form the partnership was upheld.

In *Noel v. Kinney*, 106 N. Y. 74, the language of the court would seem to imply that such a partnership might be formed.

It is pertinent to note that while the Supreme Court of Massachusetts denies to the wife the power to form a partnership with her husband, and denies to a creditor of a firm in which they were partners recovery against the wife, it is also decided that if the husband and wife are joint owners of a vessel engaged in trade, and of which the husband was in control, the husband and wife are jointly bound by contracts made by the husband. *Reiman v. Hamilton*, 111 Mass. 245.

We find it difficult to conceive of any public policy that would prevent the formation of a partnership between husband and wife in a State in which her individuality is so completely provided for as to her dealings with others. If she may engage in trade, and as an incident thereto, may enter into partnership with

others, why may she not form that relation with her husband? If it be said, as by the Supreme Court of Massachusetts, that the power is not expressly conferred, the reply is that neither is it as to third persons; and yet it is held that with such third persons she may make such contract. The power springs as an incident from the recognition by law of her separate existence, and from the capacity given her to engage in trade. A married woman could not at common law contract either with her husband or a third person, for her existence apart from his was not recognized. He and she were by that law one, and he was that one. But by the statute her individuality is preserved. She is one, and the husband is one. Each has the capacity to contract. Both may desire to contract. Partnership is a lawful subject-matter of the contract, and there is nothing in the law which either expressly or by necessary implication, forbids them from contracting. If we reflect upon the extent of changes wrought by the Constitution and statutes, that they withdraw from the husband the ownership, control, disposition and enjoyment of the wife's estate; that the same are secured to her as though she were a *feme sole*; that the right to her personal services and the fruits of her labor are denied to him and given to her; that her will is freed from the dominion of his as to all property rights; that she may without his consent enter into the closest business relations with third persons—and if we add to this declaration of the statute that the changes it has wrought shall not be restrained by the rule of construction that is ordinarily applied to statutes in derogation of the common law—there seems to be but little force in the suggestion that by implication a disability as to business transactions and contracts, springing from the common-law notion of the unity of husband and wife, still obtains. The construction put upon the words "sole and separate use," "sole and separate property," etc., in the statute, by the Supreme Court of Massachusetts, and by the Supreme Court of New York in the case of *Kaufman v. Schoeffel*, whereby the conclusion is reached that it was intended to preclude any contract between husband and wife is entirely unsatisfactory. To us it seems manifest that the sole purpose of these words is to preclude the marital rights of the husband as they existed at common law and not to prevent the husband and wife from associating their effects in trade, either as joint-owners or as partners. The property or estate of the wife may well remain her "sole and separate property," though it consists of goods, wares and merchandise, book-accounts, notes or other evidences of debt, owned by a firm of which she and her husband are members. The man who is her partner may also be her husband, but his right to manage and dispose of the firm property—his title and possession—spring from his relation as partner, and not from that as husband.

We are of opinion that under the laws of Arkansas Mrs. Brewer incurred an obligation to the appellants on which a personal judgment might have been rendered against her in that State, under which her separate estate might have been seized and sold.

The only remaining question is whether subsequently-acquired property may be subjected to that demand. We deem it unnecessary to decide whether this question should be solved by the law of Arkansas or by that of this State. So far as we are advised, this question has not been decided by the courts of that State. In the absence of such decision, if the question is to be determined by the law of Arkansas, we must assume that it would be decided by the court of that State, as we have decided, that such property may be taken in execution. *Taggart v. Muse*, 60 Miss. 870.

The decree is reversed, demurrer overruled, and



leave given to the defendant to answer in thirty days after the mandate shall have been filed in the court below.

[It was held in *Haas v. Shaw*, 91 Ind. 384; S. C., 46 Am. Rep. 607, that a wife cannot be a partner with her husband. So in *Bowker v. Bradford*, Mass. But see *Noel v. Kinney*, 106 N. Y. 74; S. C., 60 Am. Rep. 423; 36 Alb. L. J. 109.—Ed.]

### HOMESTEAD—CONVEYANCE OF RIGHT OF WAY—CONSENT OF WIFE.

SUPREME COURT OF KANSAS, FEB. 11, 1888.

PILCHER V. ATCHISON, T. & S. F. R. Co.

The husband cannot, without the consent of his wife, grant or alienate the right of way of a railroad across land owned by him and occupied a homestead by his family.

COMMISSIONERS' decision. Error to District Court, Johnson county; Sperry Baker, Judge *pro tem*.

This was an action of ejectment brought by Pilcher against the railroad company. A trial was had at the March Term, 1884, of the Johnson County District Court, resulting in a judgment for defendant, which was reversed by this court. 34 Kans. 46. Another trial was had at the March Term, 1886, of the District Court aforesaid, and judgment for costs rendered against plaintiff. The trial was by court, Hon. Sperry Baker, judge *pro tem*, presiding. The court made the following special findings of fact: "(1) That both plaintiff and defendant claim title from Thomas Pilcher, now deceased. (2) That in his life-time the said Thomas Pilcher was the husband of this plaintiff. (3) That from the year 1868 up to the time of his death, in 1879, Thomas Pilcher and the plaintiff resided, as husband and wife, upon the quarter section of land, a part of which constitutes the premises in controversy, with their family, and made it their home during all of this time. That said quarter section of land is not a part of any incorporated city. (4) That from the time of the death of her husband up to the present time the plaintiff has continually resided and made her home upon said quarter section, being the S. E.  $\frac{1}{4}$  of sec. 35, town 13, range 23, in Johnson county, Kansas. (5) That the plaintiff has a life-estate in said quarter section of land, with power of sale, which she received by the will of her late husband, Thomas Pilcher. (6) That in 1871 and 1872 the St. Louis, Lawrence and Denver Railroad Company built a railroad across said premises, under some kind of an agreement with Thomas Pilcher, the then owner thereof. That by due process of law the Pleasant Hill and De Soto Railroad Company succeeded to the right of the St. Louis, Lawrence and Denver Railroad Company. (7) That the St. Louis, Lawrence and Denver Railroad Company built their road upon the land in controversy under contract for the right of way made with Thomas Pilcher in his life-time, and without any notice from plaintiff of any objection upon her part. The terms and conditions of the contract the court cannot from the evidence find. (8) That the railroad over the premises in controversy was, when built, and for a number of years thereafter, used as a line of railroad running from Cedar Junction, Kansas, to Pleasant Hill, Mo., and as such was used in running regular trains between those points for a number of years. But at present the premises in controversy are not used for running trains over, except as a switch track to transfer cars from the Kansas City, Fort Scott and Gulf railroad to the Southern Kansas railroad; and the said line of railroad from Olathe to Cedar Junction has been abandoned, and is not used

for the running of trains thereon at all. (9) That plaintiff and defendant lived on the premises during the building of the St. Louis, Lawrence and Denver railroad in full view of the same. (10) That plaintiff has never had any conversation at any time with any one representing the railroad company in reference to the passage of the railroad over their land. But that she did frequently while the railroad was building and since protest against it to members of her family; but she never notified any of the agents or employees or contractors of the railroad company while the road was being constructed, that she objected to the construction of the road; and that she was living upon said quarter of land about one hundred yards from the nearest point of the line of railroad during all the time the railroad was in process of construction through said quarter section. And in going from her residence so the city of Olathe she did pass over the line of said road in process of construction. (11) That during the life-time of Thomas Pilcher, he and his wife, this plaintiff, joined in a warranty deed to their son R. A. A. Pilcher, conveying to him a portion of said quarter section of land, and in said deed referred to the said company's right of way as a boundary; and also another deed conveying to their son J. R. F. Pilcher another portion of said quarter section of land over which said road runs and referring to said railroad as a boundary.

### "CONCLUSION OF LAW.

"The court finds that the plaintiff is not entitled to recover in this action, and the court finds for the defendant."

To each and all of the findings of fact and conclusions of law the plaintiff at the time duly excepted.

*Parker & Seaton*, for plaintiff in error.

*Geo. R. Peck, A. A. Hurd and F. R. Ogg*, for defendant in error.

SIMPSON, C. (after stating the facts as above.) The plaintiff in error has continuously resided upon the land that is the subject-matter of this controversy since the year 1868. Her husband, in whom the title vested, died in 1879, leaving by will the plaintiff in error at least a life-estate in this land. She has and does claim it as her homestead, and further claims that by force of her homestead rights, the defendant railway company never acquired any easement therein, and she brings her action in ejectment to recover that portion occupied and used by the railway company. Counsel for defendant in error contend, that as the plaintiff in error elected to take under the will, that her homestead right is waived by that election, and they cite *Watson v. Christian*, 12 Bush, 524, in support of their view. They go still further and deduce from that decision, that as she claims under the will, she ought not to be permitted to set up a claim of homestead under the statute, but she should be bound by everything her husband did to the same extent that he would be bound, because she is privy in estate by virtue of the will. The Kentucky case may have been rightfully decided under the homestead provisions of that State, but this case cannot be accepted as an exposition of the law of this State. We make no criticism upon it. All we say is that it is not to be taken as an interpretation of the operation of our constitutional provisions and statutory enactments upon the subject of the homestead. Thomas Pilcher had the legal title to the land in his life-time, and it was occupied by him and his family as a residence; it was his homestead, and was unquestionably the homestead of his wife and children. When he died and ceased to be the head of the family, his wife, this plaintiff in error, became the head of the family, and she was entitled to be so considered. The land continued to be

a homestead after his death to the same extent that it was before, and so continues until after all the children arrive at the age of maturity, and until it shall have been partitioned among the heirs. It cannot be made subject to the payment of the debts of the husband. The death of the husband does not affect the homestead rights of the wife or children in any respect. If the land descends to them, it is still a homestead. If the husband wills it to the wife, as in this case, during her life, the life-estate supports the homestead right. Any estate that is vendible under an execution will support the homestead exemption. Valentine, J., in *Randal v. Elder*, 12 Kans. 281, says: "We do not think it necessary that all these lots or parcels of land should be held by an absolute fee-simple title, but we think it necessary that they all be held by some kind of title or interest different from that which the whole public may have to the property." Dillon, J., in *Bartholomew v. West*, 2 Dill. 203, says: "When the statute speaks of property owned by the debtor, it does not mean that the ownership must be of full legal title. It is sufficient that the interest may be such as may be sold on execution or subject to the payment of debts." In *Robinson v. Smithy*, 80 Ky. 636, the court says: "That Mrs. Robinson is entitled to a homestead we think is clear. Her husband devised the entire tract of land to her for life, the remainder to his children, and she was in the actual possession and occupancy with her family. She is the owner and in possession of this tract of land, with a life-estate vested in her by the provisions of the will. She can use, sell or dispose of this interest as she pleases, and we see no reason why her right to a homestead is not embraced by the statute. She occupies it as a homestead and owns it for life. She is asserting her right because she is the owner, and not by reason of having derived it from her husband. It is immaterial in what manner she derives title, if she is the owner and occupies the estate as a homestead. In some of the States the homestead exemption is held to apply to an estate for years. See *Pelan v. De Bevard*, 13 Iowa, 53; *Johnson v. Richardson*, 33 Miss. 463. In Illinois the owner of a life-estate is held entitled. *Deere v. Chapman*, 25 Ill. 610." Other courts have gone to as great length in holding that any vendible estate will support the homestead right. The plaintiff in error in this case holds by a devise, that gives her an estate for life, with power of sale, and any remainder goes to the children begotten of the marriage. She has such an estate in this land without the will or operation of the statutes of descent and distribution, as will enable her to claim it as a homestead, because she has been in the actual possession of it, residing thereon ever since 1868. It must be held for all the purposes of this case that her homestead rights attached to the land when she first occupied it with her children as the wife of Thomas Pilcher, the then owner, and that it was at the time of the commencement of this action still her homestead.

The court below finds that in 1871 and 1872 the St. Louis, Lawrence and Denver Railroad Company built a railroad across said land, under some kind of an agreement with Thomas Pilcher, the then owner thereof, and that by due process of law the defendant in error succeeded to the rights of that company; that the St. Louis, Lawrence and Denver Railroad Company built their road upon the land in controversy, under a contract for the right of way made with Thomas Pilcher in his life-time and without any notice from the plaintiff of any objection upon her part. The court finds that the terms and conditions of the contract cannot be stated from the evidence. It will be seen that the substance of the findings of the court is that some contract for the right of way over the land was made by the railroad company with Thomas Pilcher

in his life-time. The railroad company now prefer to put it in the light of a parol agreement rather than in the light of a parol license. In this view it is not necessary to pass upon a question much discussed in the briefs as to whether a license under which work has been done and money expended is revocable. Assuming that there was a parol agreement between these parties, founded on the several considerations claimed—these being a change of route so as to locate on the Pilcher homestead; the erection and maintenance of a depot; the employment of Pilcher's son by the company; and every other consideration alleged—the question then remains, is the right of way of a railroad through and across the homestead such an interest, incumbrance, lien or diversion from its proper use as to require the joint consent of the husband and wife? This is an important question, and is not to be disposed of without careful consideration. The tacit condition underlying the title to all land in this State is that in case it shall be wanted for public use it can be taken by paying just compensation therefor; if only a part is taken, just compensation is made for that and for the injury or depreciation of the remainder of the tract.

By the statutes of this State railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such land is vested in the company, its successors and assigns. The difference between the perpetual use of land and the fee to it is only nominal. The interest the railroad company acquires in land in this State for right of way, while only an easement, may be permanent in its nature and may be practically exclusive. The value of the remaining fee burdened by such an easement of perpetual use is only nominal. *Robbins v. Railroad Co.*, 22 Minn. 286; *Cemetery v. Railroad Co.*, 68 N. Y. 691; *Bemis v. Springfield*, 122 Mass. 110. The statute seems to recognize this, because it requires the commissioners to assess the value of the land taken. The amount of land used by the railroad company in this case is about seven acres, of which it had necessarily the exclusive control and perpetual use. Of course if the husband can grant the right of way to this railroad company, he can grant it to others, and by this means the wife and children can be deprived of the use and enjoyment of a greater part of the homestead. This court held in the case of *Coughlin v. Coughlin*, 28 Kans. 116, "that the husband cannot without the consent of the wife execute a lease to the homestead and give possession thereof to a tenant." In this case the lease was executed for five years, but I apprehend the length of the term of the lease can make no difference, the reason of the rule being based upon the general principle deducible from our organic law that the husband can do no act that will interfere with the occupancy and use of the homestead without the consent of the wife. It has been held by many courts of last resort that the right of way of a railroad across the land conveyed was such an incumbrance as was a breach of the covenants against incumbrances. A leading and early case is that of *Kellogg v. Ingersoll*, 2 Mass. 97, decided by Chief Justice Parsons, approved by the cases of *Prescott v. Trueman*, 4 Mass. 627; *Harlow v. Thomas*, 15 Pick. 68, and *Prescott v. Williams*, 5 Metc. 433. To the same effect is the case of *Mitchell v. Warner*, 5 Conn. 497; *Hubbard v. Norton*, 10 id. 422; *Herrick v. Moore*, 19 Mo. 313; *Haynes v. Young*, 36 id. 557; *Lamb v. Danforth*, 59 id. 322; *Prichard v. Atkinson*, 3 N. H. 335; *Clark v. Estate of Conroe*, 38 Vt. 469; *Kellogg v. Malin*, 50 Mo. 496; *Beach v. Miller*, 51 Ill. 206; *Barlow v. McKinley*, 24 Iowa, 69.

All the authorities state that an easement constitutes an incumbrance on land, and interferes with the absolute dominion, exclusive use and uninterrupted enjoyment of it. A remark of Judge Valentine, in the

case of *Randal v. Elder*, 12 Kans. 261, is quoted by counsel for defendant in error as in opposition to this line of authorities; but when his remark is considered in the light of the facts in that case and the question he was discussing, it will be found not to warrant any such interpretation. The question was whether the debtor could hold as a homestead two or more town lots, separated from each other by an alley; and it was held that he could not. And it is said in this connection that an easement might be created upon or through the land without in any manner affecting its character as a homestead. The court meant that the easement would not so divide the land, or segregate one tract from another, but that a homestead could be claimed on the whole tract, and this we indorse now as the law of this case, and would hold, if necessary, that while the homestead right of the plaintiff is incumbered by the right of way, it is still her homestead on both sides of the strip of land used by the railroad company. We have not overlooked the case of *Randall v. Railway Co.*, 63 Tex. 586. That decides in effect "that the husband may, without being joined by his wife, grant a right of way to a railroad company across a tract of land belonging to himself and wife and occupied by them as a homestead." We cannot follow this case. The statement in the syllabus is that the land belonged to husband and wife, and if by that it is meant that the title vested in them both, the grant by the husband would not bind the separate property of the wife. This is so clear that elaboration would not be justified. A reason given is that the husband can lease the homestead, in Texas, without the consent of the wife. This cannot be done in this State if the lease would in any manner interfere with the wife's occupancy and use of the homestead. The court says: "If the husband should attempt to so exercise this right to destroy the homestead or to materially affect it as such upon proper application the courts would interpose with their equitable power to prevent it." We think the best protection to the wife and children is by a total denial of the right of the husband to incumber the land for this purpose except with the joint consent of the wife. The case of *Railroad Co. v. Swinney*, 38 Iowa, 182, has been examined with some care. It holds that "the husband can convey a right of way over the homestead without the concurrence and signature of the wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such." The qualifying expression involves trouble. Who is to determine whether or not the right of way will not defeat the substantial enjoyment of the property? The court says if the homestead was a single lot, and the right of way occupied it all, or most of it, the case would be very different. Why different? The rule of the Iowa case is too flexible. We cannot adopt it. In this State all questions affecting the rights of the wife and children in the homestead must be discussed and determined by the constitutional and statutory enactments regarding them. These create them; fix their limits; direct their operation; and have such mandatory force of expression that this court can discharge its duty respecting them only by a strict adherence to the letter of the organic command. The homestead law is a part and parcel of the public policy of the State, and its provisions in cases of this character cannot be waived or avoided except by an exact and literal compliance in the mode and manner it has prescribed.

A steady and unwavering adherence to the exposition of the scope and bearing of this provision of the Constitution, as made in the early case of *Morris v. Ward*, 36 N. Y. 587, is not only demanded by its express terms, but the improvidence and necessities of the father and husband are so frequent, the avari-

clous attacks and greedy encroachments of creditors are so persistent and insinuating, that all judicial powers must be constantly exerted to preserve to the beneficiaries the full extent and measure of this great constitutional creation. Its immunity from such attacks can best be protected by repeated judicial declarations that no interest, incumbrance or lien can attach to or affect the homestead unless given by the joint consent of husband and wife, except those specifically mentioned in the organic law. The only way to bind the wife to an alienation, lien, incumbrance, contract of sale, lease or any interest whatever in the homestead that will interfere with or deprive her of the free use, occupancy and enjoyment of all and every part thereof, is her consent freely given, jointly with that of her husband. The fact of joint consent is best evidenced by a writing to that effect; but the Constitution does not in express terms require that it shall be so shown, and hence it can be established by such facts and circumstances as the necessity of particular cases require. Probably no greater amount of evidence or more strict proof will be required to establish it than is deemed necessary to establish any other material fact, but there certainly must be some showing of joint consent, as required by the Constitution. There is no special finding of the court below that there was consent on the part of the plaintiff in error. It is true that it may be fairly said that it is included in the general judgment, but we are of the opinion that all the findings, taken and considered together, do not authorize such a judgment. There is not such an affirmative showing in this case as satisfies a reasonable mind that there was the required consent. Silence is not enough under the circumstances of this case. The execution of deeds of a part of the homestead to the children, in which the right of way of the railroad is referred to as a boundary line, is not so positive an act of recognition as to imply previous consent, for it is difficult to perceive how the recognition of a natural or artificial object as a dividing line can be held to imply the legality of the existence or the right of its location at that particular place. Then again, the finding as to the alleged parol agreement between Thomas Pilcher and the railroad company is not complete. There may have been such an agreement, but what its terms or conditions were or are cannot be stated. How can specific relief be granted on such an intangible basis? Under the evidence and findings the plaintiff in error had an undoubted right to recover the possession of that portion of the right of way over which the running of trains had ceased and the use of which for railroad purposes had been abandoned.

For these material errors it is recommended that the case be reversed and remanded, with instructions to sustain the motion for a new trial.

*Per Curiam:* It is so ordered; all the justices concurring.

#### NEW YORK COURT OF APPEALS ABSTRACT.

ACCORD AND SATISFACTION — BY SUBSTITUTED AGREEMENTS—MISTAKE—REMEDIES.—Defendant was a general partner in an insolvent firm, but plaintiff, believing him to be only a special partner, assigned him, in consideration of his individual note for 25 per cent of the whole amount, all their demands against the firm, and the note was duly paid. *Held*, that an action at law, such transaction not having been rescinded, could not be maintained against defendant, as general partner, for the balance due by the firm, on the demands assigned. It is held that where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or

one from which there may be a legal possibility of benefit, to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application. Upon this distinction the cases rest which hold that the acceptance by the creditor, in discharge of the debt, of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction; as for example, a peppercorn for a thousand pounds (Pinnel's case, *arguendo*), or a negotiable instrument binding the debtor or a third person for a smaller sum (*Curlewis v. Clark*, 3 Exch. 375). Following the same principle, it is held that when the debtor enters into a new contract with the creditor to do something which he was bound to do by the original contract, the new contract is a good accord and satisfaction, if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the parties or the convenience of the remedy." *Thompson v. Percival*, 5 Barn & Adol. 925. In perfect accord with this principle is the recent case in this court of *Luddington v. Bell*, 77 N. Y. 138, in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership, after dissolution, for a portion of the copartnership debt, was a good consideration for the creditor's agreement to discharge the maker from further liability. This action is not brought to rescind the transaction between Allison & Sons and Abendroth, or to set aside the assignment to him by Allison & Sons of the debt against Griffith & Wundram, on the ground of mistake. It is an ordinary action at law, brought by the assignors of Allison & Sons against Abendroth and other members of the firm of Griffith & Wundram, upon an account stated, to recover the unpaid portion of the original debt of the firm, and Abendroth alone answers. There is no equitable relief claimed in the complaint, and no reference to the settlement between Allison & Sons and Abendroth, or to the assignment of the claim. The plaintiffs are in the position of suing upon a claim which has been assigned to the defendant, Abendroth, and to which they have no title. The assignment to Abendroth vested in him, as against Allison & Sons, the legal title to the demand held by that firm against the firm of Griffith & Wundram; and until the transaction between these parties is rescinded, and the assignment set aside or cancelled, the plaintiff cannot maintain this action. It is not necessary to consider what the position of the parties would have been if the settlement and assignment was procured by the fraud of Abendroth. This is not pretended. If the transaction can be set aside, it must be on the ground of mistake. But the rescission of an executed transfer of property on this ground is a matter of equitable and not legal cognizance, and the action is not proved with a view to equitable relief. There has been no rescission or attempt to rescind the transaction, and the action is not brought for a rescission. Feb. 28, 1888. *Allison v. Abendroth*. Opinion by Andrews, J.

**APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY.**—Plaintiff brought an action on account of \$648.95. Defendant answered, admitting an indebtedness of \$420. The testimony showed the issue was whether the plaintiff was to be paid for 1,12½ days' labor at the rate of \$1.75 or \$1.50 per day, and a counter-claim to defendant's answer of \$150. *Held*, under the Code of Civil Procedure of New York, subdivision 3, section 191 (providing that an appeal cannot be taken to

the Court of Appeals, except in an action affecting the title to real property, if the matter in controversy, excluding the costs, is less than \$500, unless the court below allows the appeal on the ground that a question of law is involved which ought to be reviewed by the Court of Appeals), the amount in issue being less than \$500, and the court below finding no point of law involved requiring review, that the appeal would be dismissed. Feb. 28, 1888. *Knapp v. Deyo*. Opinion by Ruger, C. J.

**DEED—CONSTRUCTION—BOUNDARIES—COURSES AND DISTANCES GOVERN RECITALS.**—A deed conveying lands by metes and bounds, and further describing it as containing a certain number of acres, more or less, which was more than was actually included in the description, and as being the premises now in the possession of the grantor and formerly conveyed to him by a third person, will not be held to include a tract of wild land situated some distance from the other, though the amount of land in such tract would make up the amount described in the deed, and though it was purchased from such third party. While it is the settled rule that such conveyances shall be construed so as to carry into effect the intent of the parties so far as such intent can be collected from the whole instrument, it is equally well settled that nothing will pass by a deed except what is described in it, whatever the intention of the parties may have been. *Coleman v. Manhattan Beach Co.*, 94 N. Y. 229. The question here presented is whether the parties intended to embrace the wood lot in the description given, or whether, having given a precise and definite description of land, the court is authorized, from the inconclusive and indefinite language following the description, to infer an intention to convey another distinct parcel of land not referred to and lying at a distance from that described, and confessedly not included within the boundaries given. The rule, as stated in the head-note of *Jones v. Smith*, 73 N. Y. 205, seems to be of controlling force in the disposition of this question. It is there said: "When a deed contains an accurate description by permanent boundaries capable of being ascertained, a general reference, in addition, to the premises as in the possession of the grantor or grantee will not pass title to lands outside of the boundaries given." But little weight can be ascribed to a statement of the quantity of land in the deed, as that is followed by the words "be the same more or less," and according to settled rules, cannot be held to affect the quantity of land included within specified boundaries, when those are clearly and certainly ascertainable. *Jackson v. McConnell*, 19 Wend. 174. The rule as stated in *Jackson v. Moore*, 6 Cow. 708, is as follows: "When the quantity is mentioned, in addition to a description of the boundaries or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity, being the least certain part of the description, must yield to the boundaries or number (of lot) if they do not agree." This rule is peculiarly applicable to this case, for the quantity of land is incorrectly described, whether the wood lot be held to be included in the deed or not, although the difference is greater in one event than the other. A leading rule in the construction of deeds is that what is most material and most certain shall control that which is less material and less certain, and that courses and distances yield to natural visible and ascertained objects. *Arden v. Thompson*, 5 Cow. 371; *Jackson v. Moore*, *supra*. By the express language of the description, the parties have set visible and known limits to the land intended to be conveyed; and it is not the province of construction to enlarge this de-

scription and embrace within it other lands not included therein. A number of cases are cited in the opinion of the court below, but we are of the opinion that the principles laid down in them were incorrectly applied to this case. When ambiguity or imperfection exists in the description of land contained in a conveyance, it is competent to refer to general language as well as to all parts of the deed to locate and identify the property intended to be conveyed. Such are the cases of *Jackson v. Barringer*, 15 Johns. 471; *Child v. Fickett*, 4 Me. 471; *Marr v. Hobson*, 22 id. 321, and *Grandin v. Hernandez*, 29 Hun, 399. So too, where by proof *aliunde* the deed, it is shown that no property answering the description belongs to the grantor at the place indicated, but other lands in the vicinity, corresponding in some particulars to such description, did belong to him, a latent ambiguity was created, which may be solved by the further indications afforded by the deed or by extraneous evidence. The case of *Grandin v. Hernandez*, in one of its aspects, was of this character. We think the error of the court below consisted in the assumption that the description of the premises in question was ambiguous and uncertain, whereas there was not a suggestion on the trial but that the boundaries stated in the deed were capable of exact ascertainment, and described precisely and exactly two specific pieces of property conveyed by Coons and wife to Mrs. Thayer. There is no indication in the deed that Thayer intended to convey three pieces of land, or indeed any other land than that included in the description by boundaries. Feb. 28, 1888. *Thayer v. Finton*. Opinion by Ruger, C. J.

**EASEMENT—CONSTRUCTION OF GRANT—RIGHTS OF THE OWNER OF THE LAND—GATES.**—A reservation in a deed by a grantor of land "to himself, his heirs and assigns, forever, a free ingress and egress across the above-described premises where the road now is," secures nothing more than a right of way over the land at a particular place, and as incident thereto, whatever may be necessary to its reasonable enjoyment. The owner of the land is under no obligation to keep up fences along the sides of the way or in any other manner obstruct the enjoyment of his lands in common on both sides of the easement. (2) The right of the owner of land to maintain gates across an easement over the land is a question of fact as to whether they unnecessarily interfere with the use of the easement. Feb. 28, 1888. *Brill v. Brill*. Opinion by Danforth, J.

**EMINENT DOMAIN—BRIDGE COMPANIES—RELOCATION OF LINE.**—A bridge company was authorized by its charter (Laws of New York, 1871, chap. 897), in case of failure to agree with owners of land desired for its approaches, to acquire it in the manner provided for railroads in like cases under the New York General Railroad Law of 1860, and it was further provided in the charter that before constructing the bridge and approaches the company should make and file a map and profile, which was done, and it thereupon commenced the construction of the bridge. The company afterward made and filed a map of a new approach. *Held*, that lands included in the second map could not be acquired by the company, there being no express power in its charter authorizing it to relocate its line, and the sections of the General Railroad Act incorporated in the charter not including the sections authorizing railroads to relocate their lines, with power to acquire title to lands embraced in the altered or changed route. This we think exhausted its power of choice, and the location so made was final, and could not be changed in the absence of legislative authority. This view is supported by judicial opinions and decisions. *Canal Co. v. Railroad Co.*, 9 Paige, 323; *Mason*

*v. Railroad Co.*, 35 Barb. 381; *Morehead v. Railroad Co.*, 17 Ohio, 349; *Railroad Co. v. Naylor*, 2 Ohio St. 235. The company might have originally selected the line of 1887. But it selected another line; and the choice once made was final, in the absence of statutory authority to make a change. See 2 Wood Ry. Law, 752 *et seq.*, and cases cited. Feb. 28, 1888. *In re Poughkeepsie Bridge Co.* Opinion by Andrews, J.

**EVIDENCE—BEST AND SECONDARY—DEED—EXEMPLIFIED COPY—OPINION—COMPARISON OF HANDWRITING—TRIAL—INSTRUCTIONS—FAILURE TO REQUEST CHARGE.**—(1) An exemplified copy of a deed is admissible under the Code of Civil Procedure of New York, §§ 935, 936; 1 Rev. St. N. Y. 759, § 16—as presumptive evidence of the truth of the record itself, and of the conveyance of the title, although the execution and acknowledgment of the deed is in dispute. (2) The plaintiffs, while denying the genuineness of the signatures to a deed, testified that they bore a resemblance to their signatures and to those of two deceased grantors, and also compared them with signatures conceded to be genuine. *Held*, that the defendants could introduce evidence of an expert as to whether the signatures were genuine or simulated imitations. *Kowing v. Manly*, 49 N. Y. 192, distinguished. In *Miles v. Loomis*, 75 N. Y. 288, it was decided that it was competent for experts, upon a comparison of signatures, without any other knowledge of testator's writing, to express an opinion as to whether the disputed writing appeared a natural or simulated hand. Since the decision in *Kowing v. Manly*, chapter 36 of the Laws of 1880 was passed, by which the rules of evidence in respect of disputed handwritings were enlarged beyond what had been permitted under then existing rules. *Peck v. Callaghan*, 95 N. Y. 73. (3) Where counsel fail to avail themselves of an opportunity, given at the close of the charge, to look over the requests previously handed to the trial judge, and to see if there is anything they desire to be further charged, no exception will lie to the judge's refusal to charge them without a further request. Feb. 28, 1888. *Sudlow v. Warshing*. Opinion by Gray, J.

**FIXTURES—BETWEEN VENDOR AND VENDEE—PARTITIONS—GAS AND WATER PIPES—RIGHTS AND REMEDIES—DAMAGES FOR BREACH OF CONTRACT.**—(1) Partitions, gas-pipes, water-pipes, wash-basins and water-closets are such fixtures as in the absence of a contrary intention between vendor and vendee will pass by a contract of sale and conveyance of the stores and premises containing them; and it is immaterial that such fixtures were put in by a tenant of vendor, who would have a right to remove as against his landlord. (2) Where a vendee refuses to comply with his contract of purchase on account of the removal of certain fixtures from the property, the vendor cannot recover, in an action at law, damages of the vendee for such refusal, because the vendee has done all he contracted to do; and the vendor, in order to recover, must be able to show a complete performance on his part. If the vendor had sued in equity for a performance of the contract, it is not improbable he would have succeeded; for it seems apparent that compensation might have been made in money for the altered condition of the buildings caused by the removal of the fixtures. There might be inconvenience and delay arising from the dismantling of the stores, but not beyond the power of money to relieve; and in such a case a court of equity is not prevented from enforcing performance as to the principal subject-matter. Some such case is put by the court in *Richardson v. Smith*, L. R., 5 Ch. 654, and it was held that the value of certain undeliverable articles might be deducted from the price agreed to be paid for the whole property.

That exception related to furniture; and although in this case there is a difference growing out of the character of the articles which, as fixtures, might, under certain circumstances be deemed essential to the enjoyment of the principal thing (*Darbey v. Whitaker*, 4 Drew. 134; *Jackson v. Jackson*, 1 Smale & G. 184), they are not necessarily so here. The vendor, having two remedies—one damages and the other performance—chose the former. His right, if any, to damages he assigned to the plaintiff, and the plaintiff has sued. In such an action the vendor must be held strictly to the very terms of his engagement, and show the performance of all the conditions on his part necessary to be performed to put the other party in default. In the present instance the defendant was entitled to the stores in the condition in which they were when bargained for; and his refusal to take them in an altered and inferior condition was not a breach of his contract. By his own failure to perform therefore the vendor lost his right of action at law, and could convey none to his assignee. Feb. 23, 1888. *Smyth v. Sturges*. Opinion by Danforth, J.

**MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—VALIDITY—RECEIVING BIDS—PUBLICATION OF NOTICE—ACTION TO VACATE—RIGHT TO MAINTAIN.**—(1) The charter of the city of Albany, title 11, section 2 (Laws of New York, 1883, chapter 298), authorizes the vacating of an assessment upon property, for municipal improvements, for errors committed therein. *Held*, that errors committed in proceedings by the municipal authorities in letting contracts for work on streets, to pay for which an assessment is made, are errors in proceedings "relative to an assessment." (2) The charter of the city of Albany, title 9, section 8 (Laws of New York, 1883, chapter 298), provides that one week's notice of the receiving of bids for work proposed to be let shall be published. *Held*, that under the law of 1858, as amended by law of 1874, chapter 312, which authorizes the vacating of an assessment for substantial error, an assessment, made without such notice, may be set aside, though no damage is shown. (3) Petitioner had purchased the property assessed, covenanting, as part of the consideration, to pay the assessment, which had not then been made. *Held*, that he is presumptively injured by an illegal assessment, his covenant imposing upon him no liability beyond the payment of legal assessments, and can maintain an action to vacate such assessment. Feb. 23, 1888. *In re Pennie*. Opinion by Ruger, C. J.

**RAILROADS—MUNICIPAL AID—RESTRAINING COLLECTION—EQUITY JURISDICTION—VALIDITY OF BOND—PETITION—MAJORITY OF TAX PAYERS—ESTOPPEL—PAYMENT OF ONE YEAR'S COUPONS—LACHES.**—(1) Where the complaint, in an action to restrain the collection of bonds in aid of a railroad, alleges that the plaintiff has no adequate remedy at law against the collection of the bonds and coupons (which are invalid, because issued upon a petition insufficient for want of the consent of a majority of the tax payers); and the answer does not deny the jurisdiction, but for a defense relies upon the validity of the bonds, and an equitable estoppel of plaintiff by the payment of one year's interest on the bonds before defendant purchased—the objection to the jurisdiction is waived by the answer and not covered by an objection that the complaint does not state a cause of action. (2) Where a statute, authorizing the issuing of certain bonds upon the verified petition of a majority of the tax payers, defines "tax payers" to be "tax payers, exclusive of those taxed for dogs and highways only," the definition is confined to the use of "tax payers" in the act; and a petition which fails to aver that the petitioners are a majority of the tax payers, "exclusive of those

taxed for dogs or highways only," is fatally defective, and bonds issued upon such petition are invalid. The fatal character of the defect has been so adjudged in this court as to end further discussion. *Green v. Smith*, 55 N. Y. 135; *Town of Wellsboro v. Railroad Co.*, 76 id. 182; *Metzger v. Railroad Co.*, 79 id. 171; *Hills v. Savings Bank*, 101 id. 490. The payment by the town officers, without authority, of the first year's coupons of certain bonds in aid of a railroad, is no estoppel of the town to contest the validity of the bonds; and, where the action to contest is begun immediately after such payment, the town cannot be said to be guilty of laches. Feb. 23, 1888. *Town of Ments v. Cook*. Opinion by Finch, J.

**SALE—WHAT CONSTITUTES—ACCEPTANCE—USE AFTER KNOWLEDGE OF DEFECTS.**—Where the vendee, with full knowledge of its defects, keeps and uses machinery for nearly three months, without the consent of the vendor that it should be so used on trial, there is an acceptance of the machinery; and in an action by the vendee to recover for a breach of the contract to furnish the machinery, the vendee may recover, as a counter-claim, the agreed purchase price. The continued use of the machine in the promotion of his own business interests, with knowledge of its imperfections, was an unequivocal act of acceptance which no words of his own could qualify. *Reed v. Randall*, 29 N. Y. 358; *Beck v. Sheldon*, 48 id. 385; *Dutchess Co. v. Harding*, 49 id. 321. Nor can he, as is suggested, elect to have his use of the machine after complaint made, treated as a trespass. He had received the consideration on which his promise to pay depended, and the obligation so incurred could be discharged only by performance. If an omission of that duty gives occasion for an action, its nature cannot be determined at his choice. He could not require the defendant to treat the use of the machine as a tort and be satisfied with damages as for a conversion. Feb. 23, 1888. *Brown v. Foster*. Opinion by Danforth, J.

**WILLS—ACTION TO CONSTRUCT—STATUTES—REPEAL BY IMPLICATION—INTEREST TO MAINTAIN ACTION—CONTINGENT REMAINDER—CLAIM HOSTILE TO WILL—WHEN ACTION MAY BE MAINTAINED—CONSTRUCTION—NATURE OF ESTATE TRUSTS—VALIDITY—ACCUMULATIONS—CONDITIONAL LIMITATIONS—SUBSTITUTING "HER" FOR "MY."**—(1) The Laws of New York of 1879, chapter 316, providing for the determination of the validity of any devise of real estate by the Supreme Court, in an action in which all persons interested might be made parties, was impliedly repealed by the Code of Civil Procedure of New York, title 3, article 3, providing (section 1866) for the determination of the validity, construction or effect of a testamentary disposition of real property, or of an interest therein, which would descend to the heir of an intestate, in an action brought for that purpose, in like manner as the validity of a deed purporting to convey land may be determined; and (section 1867) that the provisions of the article should have retrospective effect. (2) Under the Code of Civil Procedure of New York, section 1866, a remainder contingent upon the death of a beneficiary without children, or the representatives of children, is not such an interest as will enable the beneficiary to maintain an action for the construction of the will. (3) The heir at law of a testatrix, claiming that a bequest of a life-interest to her is void, claims in hostility to the will, and cannot maintain an action for the construction thereof. (4) In a suit for the construction of a will, brought by the heir at law of the testatrix, it appeared that there was no practical or present controversy to be determined, and that the contingency might never arise in which the question could become a practical one; and even then there



was no certainty that there would be any contest with regard to it. *Held*, that the suit could not be maintained. (5) Testatrix devised her estate to her executors in trust to receive the income during the life of her infant daughter, during her minority, to apply so much as might be necessary for her support, and afterward to pay over to her the rents and profits. *Held*, there being no direction for an accumulation, that the trust was valid. (6) Testatrix made a will providing, *inter alia*, as follows: "If my said daughter shall at her decease leave issue, then, from and after her decease, I give, devise and bequeath the whole of said real and personal property to her children in equal proportions, share and share alike, if all her children then shall be living, or if none of them shall have died, leaving issue, at the time of my death; but if any of her children shall have died, leaving issue, then such issue to take the share or part of such property and estate which the parent of such issue would have taken by this will if living at the time of my death." *Held*, that as the context made it clear that the death spoken of was the death of testatrix's daughter after her own decease, and not the death of any issue of the daughter during the life-time of the testatrix, the clause should be read as if the word "her" were substituted for the word "my." Jan. 24, 1888. *Horton v. Cantwell*. Opinion by Peckham, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**MARRIAGE—DIVORCE—EVIDENCE OF INFORMERS.**—In action for divorce, evidence was admitted by witnesses who had contracted with plaintiff to watch defendant, who swore on the trial they caught him *in flagrante delicto*, one of whom, a female, admitting she had had sexual intercourse with him. *Held*, that it was incompetent. The main testimony, upon which the decree herein was granted, comes from the mouths of two persons who contracted with her to watch the old man, and who swear that they caught him *in flagrante delicto*; and a shameless female came upon the witness stand and tacitly admitted that she had had sexual intercourse with him. Such kind of evidence disgraces judicial proceedings. A person who would engage himself for hire to spy out affairs of that kind and make proof of them is entitled to no credit whatever; and a woman so devoid of modesty and delicacy as to confess to her having had such connection, in order to enable a party to obtain a divorce, is too abandoned to be believed under oath. This evidence was refuted by the direct testimony of the appellant, and by cogent facts and circumstances, and in my opinion, was not sufficient, either under the decalogue or modern legislation, to justify the granting of a divorce. If the law enacted by the Legislature, which provides for granting divorces, were administered in accordance with its reason and spirit, there would be less cause to deplore its liberality. The law is too often misused. It is employed to carry out mercenary schemes, frequently designed before the marriage relation was entered into. Courts should never give countenance to any such contrivance, and when such purpose is indicated in the slightest degree in a divorce proceeding, the affair should be examined with the closest scrutiny. It requires a good deal of credulity to believe that a man past seventy-four years and in poor health would be engaged in the amorous affairs Jacob was charged with. It was highly improbable on the face of it, and the testimony produced to establish it, in order to have any weight, should have come through witnesses who were entitled to full credit. The evidence of an informer, who

was to share in the property through its means, or of a person hired to ascertain the facts and swear to them, would be insufficient, unless corroborated by other proof of an unexceptionable character. Sup. Ct. Oreg., Nov. 9, 1887. *Chine v. Chine*. Opinion by Thayer, J.

**MASTER AND SERVANT—WHEN RELATION EXISTS—CONTRACTOR—SUPERVISING ARCHITECT.**—Under a written contract by which the contractor agrees to demolish a building, but containing a clause that the "work of demolition is to be carried out according to the directions of the supervising architect, whose decisions on all points I agree to accept as final," *held*, that this operated such a reservation of control over the work as prevented the contractor from being independent and created the relation of master and servant. Both parties quote and accept the exposition of the doctrine of independent contractor, given by Mr. Wood in his work on Master and Servant, viz.: "When a person lets out work to another to be done by him, such person to furnish the labor, and the contractee reserving no control over the work or workman, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor." Wood Mast. & Serv. 593. This is a sound and conservative principle, but the element essential to the discharge of the contractee from responsibility is that he shall not reserve control over the work. This does not mean that he may not reserve a certain kind of power of direction as to the things to be done, provided the methods and instruments of doing the thing are left under the exclusive control of the contractor. "The simple test is," says Mr. Wood, "who has the general control over the work? And if the person employed reserves this power to himself, his relation to his employer is independent, and he is a contractor; but if it is reserved to the employer or his agent, the relation is that of master and servant." Wood Mast. & Serv. 614. In the leading case of *Camp v. Church Wardens*, 7 La Ann. 322, the contract was for the reconstruction of a cathedral, according to certain plans, the contractor agreeing to act "under the direction and superintendence of the architect appointed by the wardens." The court found that the injury resulted from defects in the plan pursued in prosecuting the work, as well as from negligence in the contractor, and held both liable *in solido*, on the ground that the plan or method of prosecuting the work was under the control of the architect. In another case before the Supreme Court of the United States the contract was for the building of a whar by the contractor for a railway company, and the contract contained the clause: "It is understood and agreed that the said G. W. Bayley, division engineer of the company, shall supervise and direct the work herein to be done, and that the said work shall be done to his said satisfaction." Considering the nature of the work, the court held that this clause operated a reservation of control over the method of conducting it, which rendered the company responsible from injury resulting from defect in such method. *Railroad Co. v. Hanning*, 15 Wall. 650. A recent case, perfectly analogous to the instant one, arose before the Supreme Court of Massachusetts, where the contractor entered into a written contract with the trustees, by which he agreed "to take down the entire building known as the 'A. House,' or so much thereof as the trustees may request," and which also provided: "All of said work to be done carefully, and under the direction and subject to the approval of the trustees." The court held that his reservation of control implies that the contractor "was subject to their orders as to



the times and manner and mode of doing the work; that they had the right to step in and say to him: "You are not doing this as we directed you to do it; we direct you to do thus and so, and we direct you to do this in the other way;" and that this "brought the case within the relation of master and servant," and rendered the trustees responsible for injuries resulting from the negligence of their employee. *Linnahan v. Rollins*, 137 Mass. 123. In the present case, two things are apparent on the face of the contract: (1) That the work referred to in the contract embraced the entire demolition of the internal framing of the building, including removal of braces and purlines; (2) that the entire order, method and plan of this work of demolition was subjected to the control of defendants, through their agent, the supervising architect, whose directions Lynch was bound to obey, under penalty of forfeiting all his rights. The nature of the work was such that nothing else but the method of doing it required the supervision of an architect, and we can see no other plausible construction of the language employed. If the architect had directed or permitted Lynch to strip the building, as actually done by defendants, before removing the spans, Lynch would have been the servant of defendants *quoad* the adoption of this method, and they would have been responsible for any injury resulting therefrom. *A fortiori* are they responsible when they themselves adopt this method and do this part of the work themselves. All authorities agree that the immunity of a contractor depends on his entire abstinence from control, and that if he personally interferes in the work and assumes control of it, or of some part of it, and through such interference, whether as a direct result or as a consequence thereof injury results to a servant, he is responsible. 2 *Homp. Neg.* 213, No. 40; *Wood Mast. & Serv.* 837; *Whart. Neg.*, §§ 186, 206; *Cooley Torts*, 548; *Gilbert v. Beach*, 16 N. Y. 608; *Hefferman v. Berkard*, 1 Rob. 437. It is perfectly clear that the stripping of the building, by the removal of the purlines and braces, was an essential part of the work covered by the contract; that the time, order and manner of their removal formed important elements of the method to be adopted in effecting the demolition; that the adoption of the particular method here pursued was the direct act of defendants themselves; that it was a vicious, faulty and dangerous method; and if the injury to Faren happened as a direct result or consequence of this fault, defendants cannot shield themselves from responsibility under the doctrine of independent contract. *Sup. Ct. La.*, Dec. 5, 1887. *Faren v. Sellers*. Opinion by Watkins, J.

**SALE—DELIVERY—GOODS IN HANDS OF WAREHOUSEMAN—NOTICE—BILL OF SALE—RECORDING.**—Howard's Statutes of Michigan, §§ 6190, 6193, provide that every sale of goods or mortgage of personal property, in the possession of the vendor or mortgagee, unless accompanied by immediate delivery, followed by actual and continued change of possession, shall be conclusive evidence of fraud as against creditors, unless, in the one case, it shall be made to appear that the sale was made in good faith, without fraudulent intent, and in the other, unless the mortgage or copy shall be filed in the office of the township or city clerk where the mortgagor resides. In an action of replevin wherein plaintiff claimed title under a bill of sale of property in the hands of a warehouseman, against the attaching creditors of the vendor, who claimed the instrument to be a mortgage, an instruction that if the bill of sale was made in good faith, and without fraudulent intent, plaintiff may recover, and that even though the bill of sale be a mortgage, the property being in the hands of a warehouseman, it is not

necessary to file the bill of sale in the clerk's office, is erroneous, in the absence of notice to the warehouseman of the change of ownership. The warehouseman was not such a third party as dispensed with delivery and actual change of possession. The vendor had control of the property while it was stored in the warehouse. The warehouseman in one sense was an agent of the vendor, and his possession was that of his principal. To constitute a change of possession, the warehouseman must at least be notified of the sale or security, and he must thereafter hold it for the vendee or mortgagee. *Wheeler v. Nichols*, 32 Me. 283; *Blackb. Sales*, 23; *Bentall v. Burn*, 3 Barn. & C. 423; *Cushing v. Breed*, 14 Allen, 376; *Boardman v. Spooner*, 13 id. 353; *Appleton v. Banoroff*, 10 Metc. 236; *Wood St. Frauds*, § 338; *Browne St. Frauds*, § 318. The point hitherto has been only inferentially passed upon by this court. In *Sheldon v. Warner*, 26 Mich. 403-407, it was contended that when the mortgagee got his mortgage, the property was actually out of the possession of the mortgagor, and in that of the boom company, and that thereafter no change of possession or delivery was needed to enable him to hold against third parties. The court said: "But whatever view of this point may be admissible where a party other than the mortgagor has a hostile or complete and absolute possession, which excludes the exercise by the mortgagor of control, and disables him from doing any thing tantamount to an actual delivery, it appears to me that in a case circumstanced as this is, there is no room for raising the question. The possession which the boom company appears to have had up to the time of the agreement with the defendants was measurably that of Burt. The nature of the property made it necessary to handle and move it through the action of the company. But whatever they did was not done strictly in the exercise of any dominion over the property. Their doings were not in contravention of any right of property, control or possession of Burt (the mortgagor), but were subservient to his authority and purpose. They did not hold adversely to him or independent of him. In a limited sense they were his agents; and so far as the nature of the property and its position permitted a change of possession, the custody of the boom company was no obstacle to a change from Burt to the plaintiff." *Carpenter v. Graham*, 42 Mich. 191, was a case of an absolute sale of goods stored in a warehouse. The vendors gave a written bill of sale and notified the warehouseman of the sale. He was also notified by the purchaser, and agreed thereafter to hold the goods for the purchaser. It was held that this was a sufficient delivery and change of possession of the property, as against an execution creditor of the vendors. These cases, and those referred to in the case last cited, settle the doctrine that the delivery must be such as the articles are capable of, and if in the possession of an agent, such agent must be notified of the sale, and unless he consents to act as the agent of the vendee or mortgagee, the property ought actually to be taken possession of by the purchaser or mortgagee, for the agent cannot be permitted to hold them as agent of the vendor or mortgagor. To hold that a person may place his property in the hands of his agent, and then, by secret conveyances, bid defiance to his creditors, would afford an easy evasion of the statute and promote the evils it was intended to prevent. When it is said that a sale or mortgage of goods in the hands of a third person is good, without an actual delivery, it must be understood as referring to cases where such third person is in possession, and holding adversely to the vendor or mortgagor, so that no better delivery can be made. This was the case in *Nash v. Ely*, 19 Wend. 523, cited on plaintiff's brief. Some text-writers have failed to notice the distinc-

tion, and have laid it down broadly, from the language used by Chief Justice Nelson in that case, that if the purchaser or mortgagee finds the property in the possession of a third person when the sale or mortgage is made, he may suffer it to remain until he chooses to take the personal charge of it. And this case has been followed in *Goodwin v. Kelly*, 42 Barb. 194. I do not intend to be understood as holding that the consent of the agent or bailee to hold the property for the purchaser or mortgagee is essential to a valid delivery. If he is notified of the transfer, he will cease to hold as the agent of the vendor, and if he still retains possession, he will become the agent of the vendee by operation of law. *Hodges v. Hurd*, 47 Ill. 363. The facts of this case do not bring it either within the reason or authority of those cases of grain or other commodity in a warehouse, which by the usages of trade, in commercial transactions, is treated as delivered by passing from vendor to purchaser the written evidence of title and ownership. The property sought to be sold and conveyed here were not articles of trade, but parcels of property designed for use, and which had been used by the owner in carrying on its business, and which had been stored in the warehouse for future use, when the season when it could be employed should again open. In this case there was no such delivery and change of possession as the statute requires. Sup. Ct. Mich., Jan. 5, 1888. *Buhl Iron Works v. Teuton*. Opinion by Champlin, J.

## CORRESPONDENCE.

## THE CRAG CARVING.

*Editor of the Albany Law Journal:*

In the crag-carven inscription is not "*Mercati*" the contracted genitive of *Mercatius* (proper name)? Put a period after *Mercati* and read "*Mercatius filius Fermii*" as the signature. Thus the inscription records the advent of the battalion (*vezzilatio*, not *vezzilarius*) of the second legion [armed?] "from the armory of *Mercatius*," ("*ex officina Mercati*"): which is attested by the signature of "*Mercatius, son of Fermius*."

Respectfully,  
WM. H. HALE.

## MR. DAVIES AND THE STEWART WILL CASE.

*Editor of the Albany Law Journal:*

I have read the communication of Julien T. Davies, Esq., published in the ALBANY LAW JOURNAL of April 14th, in which reference was made to my allusions to the Stewart will case and some of the counsel engaged therein.

I hasten to disavow any intention of doing the slightest injustice to the memory of Mr. Davies' distinguished father, the late ex-Judge Davies. Mr. Davies truly says that it needs no defense. That goes without saying, first, because his reputation as an upright judge and honorable lawyer is too firmly established and too fondly cherished by the members of our bar throughout this State, and second, because it has not been attacked, so far as I know — certainly not by myself. I intended only to record the history of the progress of the case, and if Mr. Choate's words were inaccurately reported, as I assume they must have been from what Mr. Davies says, I profoundly regret that any one could have found any thing in the sentence of mine, quoted by Mr. Davies, which could have been construed as reflecting upon the reputation of a departed jurist, whose memory is held by all who knew him as a blessed inheritance.

DEMOT ENMOT.

NEW YORK, April 16, 1888.

## NEW BOOKS AND NEW EDITIONS.

## BLACK ON TAX TITLES.

*A Treatise on the Law of Tax Titles*, their creation, incidents, evidence and legal criteria. By Henry Campbell Black. St. Louis: William H. Stevenson, 1888. Pp. xxix, 425.

This is a very concise, and seems a well ordered and practically useful manual. The author's purpose, to present a work giving "an accurate view of the state of the law as it exists at the present moment," and "of practical utility to the working lawyer in the office and in the court-room," is apparently realized. He cites some 2,000 cases. We have been struck however by the great paucity of citations from this State, and hardly know how to account for it, for our jurisprudence seems not to have been unproductive in this branch of litigation. The volume is handsomely printed.

## LLOYD ON BUILDING AND BUILDINGS.

*A Treatise on the Law of Building and Buildings*, especially referring to building contracts, leases, easements and liens, containing also various forms useful in building operations, a glossary of words and terms commonly used by builders and artisans, and a digest of the leading decisions on building contracts and leases in the United States. By A. Parlett Lloyd. Boston: Houghton, Mifflin & Co., 1888. Pp. ii, 618.

This is a decidedly novel and interesting subject, and the author correctly says the absence of any specific work on the subject hitherto is "the most remarkable omission in the literature of law in this country." The work is well arranged, and the treatment is exhaustive and precise. On the particular points of leases, negligence, nuisance and mechanics' liens, of course, fuller information may be obtained elsewhere, but the subject has many phases of its own only to be found conveniently commented on in this volume. We think it will be a very useful addition to our libraries. The book is beautifully printed, and bound in an unaccustomed "suit of solemn black." For sale in Albany by Banks Brothers.

## CODE OF PUBLIC INSTRUCTION.

*Code of Public Instruction of the State of New York*, containing the laws and decisions relating to common schools, with comments and instructions. Edited by James E. Kirk, counsellor-at-law, under the supervision of Andrew S. Draper, State Superintendent of Public Instruction. Albany: Weed, Parsons & Co., 1887.

This volume of nearly 1,100 pages, bearing the stamp of official approbation, is the most complete and authoritative work on this subject. It has been prepared with a view to the information not only of school teachers and officers, but of the legal profession. It has been distributed among the school districts at the expense of the State. It contains every statute, general or local, applicable to the subject, and all the decisions of the superintendents of common schools. The compiler is entitled to credit for the intelligent manner in which he has performed a very laborious task.

## TASCHEREAU'S CANADA CRIMINAL ACTS.

*The Criminal Statute Law of the Dominion of Canada*, relating to indictable offenses, with full text as revised in 1886, and put into force by royal proclamation on the 1st day of March, 1887, and cases, notes, commentaries, forms, etc. By Henri Eliezer Taschereau, one of the

Judges of the Supreme Court of Canada. Second edition, revised, rearranged and enlarged. Toronto: Carswell & Co., 1888. Pp. liii, 1157.

This is the entire Criminal Code of Canada as to felonies, comprising both the principles and the practice. It is a very complete embodiment, and convenient arrangement of the statutory law and the leading decisions of England and Canada on the topics in question. The notes are judicious and concise, and in themselves form a convenient elementary textbook based on the adjudications, and in this respect, although addressed particularly to practitioners in Canada, it will be valuable to others. The publishers' work is well done.

#### NOTES.

"Volapuk" seems to have been adopted in the very last line of the last volume of Walt's "Actions and Defenses." That line reads: "Wills—court will nivetan abstragat opinior."

The death of Chief Justice Waite removes a sound and conscientious lawyer from the bench of the Supreme Court of the United States, and a genial member of the society of Washington. When presiding in his court of nine judges, his broad features and short stiff beard gave him a somewhat stern look, but he had all the Irishman's good humor. He did not illuminate the law like Story or Marshall, but the independence of his attitude in matters of judicial propriety will mark him in the history of the great court over which he presided for eighteen years. The end of the year 1876 was a critical period in the history of the American people, when the contest for the presidency between Tilden and Hayes ended in what would be called in English parliamentary life a double return. Patriotic men seized on every occasion for some arrangement which would not leave in doubt who was the head of the executive when the new year arrived, and the success of the principle of periodical changes in the personal representative of the sovereignty of the people was in some peril. Questions of intimidation and frauds in voting and counting in Louisiana and elsewhere were raised, but the Constitution provided no remedy like an English election petition for trying whether a president had been duly elected. It was thought that if the matter could be referred to the Supreme Court of the United States, or if the chief justice would preside over a tribunal to be appointed, the public would be satisfied with the result. It required some resolution in Chief Justice Waite to give a refusal. In dignified terms he declined to take part in the trial, and his position was supported by the attitude of Chief Justice Cookburn when it was proposed that English judges should try election petitions. Chief Justice Cookburn's forebodings have not been verified, but the trial of an election petition approaches much more closely to the decision of purely private questions than the decision which of two candidates shall fill the presidential chair of the United States.—*London Law Journal*.

The death of a chief justice of the Supreme Court of the United States must always be an event deserving the sympathetic notice of the legal profession in this country. In the case of Chief Justice Waite the event appeals to us with special force, for he took a prominent part in the flattering hospitality extended to Lord Coleridge and the other representatives of the English judiciary who visited America two years

ago, and it is only a few months since he himself was present in our own courts, and making the personal acquaintance of many English lawyers, who will long remember his visit with pleasure. The Supreme Court of the United States, from the very nature of its constitutional functions, scarcely affords to English courts so abundant a stream of authority upon the common law of both countries as many American tribunals of inferior jurisdiction. But whenever its decisions have been in point they have always been received in England with the highest respect, to which they have gained a title not only by the dignity of the court itself, but by the high individual character of the judges who compose it. The chief justices of the United States indeed form a line of distinguished lawyers who may well claim a place beside the holders of any equally high judicial post in this country, and the highest praise bestowed on Chief Justice Waite is that by universal consent he unfailingly maintained the traditions of his office.—*London Law Times*.

At the opening of the Supreme Court at Newburgh recently, before proceeding to his regular charge to the grand jury, Judge Dykman, in a few fitting and graceful words, evidently dictated by deep and sincere feeling, referred to the allusions which had been made in the newspapers in reference to his coming here to hold the April Circuit, and spoke of the pleasant relations which have always existed between him and the people and the bar of Orange county. Judge Dykman renewed the highly favorable impression that he has always made upon the bar and upon the public. His manner toward the younger members of the bar is especially kind and reassuring, and he carefully avoids any expression calculated to unnecessarily confuse or embarrass them. Some judges treat the members of the bar as natural enemies, whom it is their mission to subdue by terror and insult. Judge Dykman, on the other hand, has never forgotten that when a man becomes a judge he need not cease to be a gentleman. He treats the members of the bar as though he and they were really, as they are in theory, brethren of the same profession, though acting at the time in different capacities, conferring and counseling together to arrive at the exact truth and right of the case. It will be remembered that Judge Dykman some years ago inaugurated a series of Special Terms in this county to accommodate the public, and to save parties and witnesses the expense of travelling to other counties in the district to try their equity cases. was the first judge in the district to give Orange county the accommodation it needed, and he continued to do so until the election of Judge Brown. In connection with this subject it is not amiss to say that the reason why the judges who come from other parts of the district find the Circuit calendars so small and the cases upon them so insignificant is that nearly all of the cases which arise in this county involving large interests and intricate questions of law are tried before Judge Brown at the Special Terms held by him at Newburgh. It is the supreme test of a judge's purity, impartiality, independence and ability, when the members of the bar of the county in which he has always lived not only unite in trying before him the cases properly triable before the court, but go further, and prefer to take his judgment as final in cases which are triable before a jury. The people of Orange county take a just pride in the reflection that they have contributed to the bench of the Supreme Court of the State a judge of whom no higher praise can be spoken than that he perpetuates and keeps fresh the memory of his distinguished father.—*Middletown Daily Argus*.

# The Albany Law Journal.

ALBANY, APRIL 28, 1888.

## CURRENT TOPICS.

THERE is an unmistakable tendency of late years on the part of Legislatures and courts to extend the doctrine of police intervention for the protection of the citizen. Its latest expression is in the recent decision of the United States Supreme Court upholding the constitutionality of the Pennsylvania oleomargarine law, which substantially denies to the citizen the privilege of a cheap substitute for butter, although honestly and openly sold. This decision is hailed by some of the southern newspapers as a recognition of the doctrine of "State rights." In one sense it is so, but not in the sense generally attached to that expression. It is undoubtedly a recognition of the doctrine that the State police power may declare what the citizen may and may not sell and eat for the purpose of butter, but it does not recognize any right of the State to legislate in conflict with the Federal Constitution. To the same effect would be a decision holding that the States may each make their own laws of marriage, but such a decision could not reasonably be hailed as a recognition of the familiar doctrine of "State rights." It may be that the States have no intrinsic right to make a law that a man shall not eat oleomargarine instead of butter, nor marry a person of another race, but still the Federal Constitution may give no right to interfere with it. The same doctrine which upholds the Pennsylvania oleomargarine law must uphold the opposite construction by our Court of Appeals of the oleomargarine law of this State in the *Arensberg* case. Our State has a right to take that opposite view, *pace* Judge Earl, who as a citizen of the greatest butter-producing county of the State, naturally believes in the right of the Legislature to deny oleomargarine to the people. We think the Pennsylvania doctrine manifestly unsound. We believe in the constitutional right of the citizen to have a cheap substitute for butter, provided it is not obviously deleterious and is openly sold as a substitute. We see no reason why the consumer should be compelled to pay a farmer forty cents for butter when he can get a satisfactory substitute for twenty. We hope the Pennsylvania doctrine will never prevail in this State, and judging from the recent leaning of our courts in the cigaret-tenement-house and tea-adulteration cases, we infer that it is not likely to be adopted here. We are not a "personally conducted" people, and will not tamely submit to such petty and tyrannical interference, under the pretense of paternal tenderness, for the emolument of a class of producers. The most ridiculous instance of such sumptuary laws is the recent penal statute of our State providing that no person offering food for sale shall offer to give

away any thing as an inducement to buy it; for example, one offering tea for sale shall not offer to throw in a cup and saucer. This statute was enacted in the interest of a few tea dealers and monopolists. The question of its constitutionality is now pending before the Court of Appeals, and we have no doubt that they will pronounce the law invalid. It is easy to see that such a transaction is simply a sale of the tea and a cup and saucer, and that if one can afford to do this his neighbor can afford to sell the tea cheaper without the cup and saucer. Such pretenses of tenderness for the public health are too shallow for acceptance. We do not need to be told what we shall eat, or what we shall drink, or wherewithal we shall be clothed. We may not be compelled to buy silk underwear because woolen may scratch our skin.

In our review of Lord Justice Bowen's translation of the "*Æneid*," an error of the transcriber from the book has led to an undeserved reflection against the translator's accuracy. The *London Law Journal* says: "A reliance on the literal accuracy of our contemporary, the ALBANY LAW JOURNAL, or its own too great confidence in the fact that a reporter is necessarily exact, has made these columns guilty of reproducing a misquotation of Lord Justice Bowen in the paragraph headed 'Virgil through Coke's Glasses' the week before last. The lord justice did not write 'slumbering eye' for *vigiles oculi*, but 'unslumbering eye,' which phrase has been so strangely reversed. The object of the quotation was the amusement to be extracted out of Mr. Edwin F. Palmer's lawyerlike insistence that Lord Justice Bowen should take his Virgil from Coke; but our learned reviewer of the week before last writes that Virgil's expression is a paraphrase of Homer's *Iliad* iv. 448, *Οὐρανὸς ἐρρίπτει κεφαλήν*, which Liddell and Scott render, 'she lifts up her head to heaven.' In the description of Fame, the antithesis to earth is heaven, not the clouds, and if Homer makes Fame 'lift up her head to heaven,' Virgil expresses Homer's fancy by '*inter nubila condit*, and Lord Justice Bowen by 'with her forehead touches the heaven.'" The translator did write "unslumbering eye," and the fault was ours. But we think that a literal rendering of "*inter nubila condit*" would be more expressive than "with her forehead touches the heaven," because the former not only points the height of stature but calls attention to the vagueness of a figure whose head is hid in the clouds. It is hardly necessary to say that neither Lord Justice Bowen nor we wrote "*Aleris*" for "*Alexis*." We regret missing the article on "Virgil through Coke's Glasses." Such mistakes emphasize the danger in dealing with rumor.

Our readers may add to the list of cases of contracts avoided for "spiritual" fraud, *Connor v. Stanley*, 72 Cal. 556. It strongly resembles the New York case, as the contract was for a marriage and the gift of property—a case of Cupid and cupidity.

The current number of the *Harvard Law Review* — decidedly the ablest college periodical ever published in this country — gives an excellent article on "The Principle of *Lumley v. Gye*, and its Application," by William Schofield. The doctrine of that celebrated case was that an action lies against A. for maliciously inducing B., an actor, to break his contract to act for C., a theatrical manager. The latest attempted application of this doctrine was in a case which will be peculiarly interesting to lawyers. *Ensor v. Bolgiano*, 87 Md. 190, an action by a lawyer against a stockholder of a corporation for maliciously inducing one who sued the corporation for damages to compromise the action, and thus deprive the lawyer of the benefit of a contract which he had with the plaintiff for a contingent fee. The majority of the court held that the evidence failed to sustain the allegations, but Bryan and Yellott, JJ., dissented in learned opinions, urging the application of the doctrine of *Lumley v. Gye*. A recent number of the *Harvard* had an admirable article on Henry George's theories, by Paul Ransom of Buffalo. — In the April number of the *Columbia Law Times* is a list of "Fifty Leading Law Books" recommended to students by Prof. Dwight, some notes of which sound like a voice from the tombs. Why should the learned professor recommend the obsolete Reeves on Domestic Relations, when Schouler's modern work is attainable? Or Angell on Statute of Limitations, when there is Wood? Or Angell and Ames on Corporations, when there is Field? Or Sedgwick on Damages, when there is Sutherland? (The excellent text of Sedgwick has been overgrown by the notes, and should be rewritten.) Why Pollock and Addison on Contracts, and not Parsons? Why Redfield on Railways, when there is Wood? Why both Phillips and May on Insurance? (The latter is the best of all.) Why both Lindley and Parsons on Partnership? Why both Perry and Lewin on Trusts? Why Taylor on Evidence, and not Greenleaf? And why no work on Carriers, when there is the unrivalled Hutchinson? If the *Columbia* must use the abominable "co-temporary," at least let it eliminate the hyphen.

It is a mortifying reflection that our late chief justice, after so many years spent in the public service, should have left no property for his family to speak of. He maintained the dignity of his high office in a modest way; nobody could accuse him of extravagance; but the capital is an expensive place, and no man in public life with a family can lay up any thing on \$10,000 a year. Mr. Waite could have made more money and lived more cheaply elsewhere. We heartily approve the bill before Congress providing \$5,000 a year for his widow for her life. This is not generous; it is nothing more than decent. The salaries of that bench should be increased to \$25,000 for the chief and \$20,000 for each of the associates. Our Court of Appeals judges now get \$12,000, and the Supreme Court justices in the city of New York get

\$15,000. Even a police justice in that city gets almost as much as a justice of the Supreme Court of the United States!

A correspondent writes us: "Allow me to thank you very sincerely for many pleasant as well as instructive hours spent over the pages of the *ALBANY LAW JOURNAL*, which has in my humble eyes but one fault — if you will permit me so to express it — viz: A decided if not an avowed intention to make the bar of this State accept the Field Code, if for no other reason, in order to rid the pages of the most charming periodical that they know, of the tiresome controversy." Now this shows how people will differ — we thought our advocacy of a code was our greatest virtue. This is the first expostulation we have ever received on the subject. We fear that our brother entertains the City Bar Association notion that laws should be made exclusively for the convenience, pleasure and profit of the lawyers of the city of New York, their successors and assigns. Now we never bet, but we are going to make our brother a one-sided offer in good faith and good nature. We don't believe he ever read the Field Code, but if he will assure us that he has read it through as it now stands, which is just as it was a year ago, we will gladly send him this journal for one year for nothing, and publicly acknowledge that we have at last found an opponent of the Code who has read it.

A bill is pending in our Legislature to prohibit attorneys from advertising for divorce business. We have not seen the bill, but the idea is perfectly proper. An attorney who would do such a thing could only do it from base motives, and should be criminally punished and disbarred. Such a prohibition would be especially commendable in this State, where adultery is the only cause for absolute divorce, and where necessarily the defendant is gravely stigmatized if a man, and ruined if a woman. The argument that such a restriction would be an unconstitutional interference with the liberty of the citizen may satisfactorily be answered by the reflection that attorneys are officers of the court, and only exercise their special privileges by the authority of the State, and consequently are amenable to police regulation. They are constantly subjected to such regulation in respect to admission, and may even be required to pay a license fee.

#### NOTES OF CASES.

*IN Williams v. Pullman's Palace Car Co.*, Louisiana Supreme Court, Feb. 13, 1888, it was held that the obligation of a sleeping-car company for injury to a stranger who enters the car for the purpose of asking the privilege of washing his hands, and is there wantonly and without provocation assaulted and beaten by the porter of a car, is not governed by the principles regulating the liability

of common carriers, under the contract of carriage, for like assaults committed by servants on their passengers. The court said: "The evidence in this case establishes that the porters employed in defendant's service are mere menials, employed to clean up the car and keep it in order, and to wait upon the passengers; having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor. Any thing more completely outside of 'the functions in which he was employed' than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and in performing this duty he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privilege, and that in addressing the porter he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has the right to enter a bank for the purpose of collecting a check and to present it to the paying teller for payment; but if on such presentation the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but if on some dispute the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one on lawful business should knock at the door of any private house, and on asking the servant who answered the call for permission to see the master, the servant should assault and beat him, would the master be responsible? Clearly in all such cases the lawfulness of the party's conduct, and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master, unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant. We cannot distinguish this case from the ones above indicated. The evidence exonerates the defendant from any fault in the employment of Wiley as a porter. He had been in the employment for three years, and during all that time had borne a good character for sobriety, amiability and politeness. A case quite similar to this is found in our own reports, where the lock-keeper of a canal, whose duties were to keep the locks, to open and close them, and to collect the tolls, assaulted and cruelly beat an oyster trader, under the pretext that he had not paid his toll, and the canal company was sued for these tortious acts; but this court rejected the demand, saying: 'When an agent, losing sight of the object for which he is employed, com-

mits wrong and causes damage, the principal is no more answerable for them than any stranger. As to such wrongs the agent must be considered as acting of his own will, and not in the course of his employment, or under any implied authority of his principal.' *Ware v. Barataria*, 15 La. 169. In another case it was said: 'The rule seems to be that when the agent, acting in the capacity bestowed upon him by the corporation, and in the discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage, the corporation is responsible; but where the agent does any act of his own free will, without reference to his functions as a corporate agent, the corporation is not responsible.' For example, if a person should go into a banking-house or an insurance office, and there get into difficulty or dispute in relation to business of the corporation with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank was answerable in damages, unless there was some express recognition of the act. *Etting v. Bank*, 7 Rob. (La.) 459; *Dyer v. Rieley*, 28 La. Ann. 6; *Pierce Railr.* 279; *Field Corp.*, §§ 524, 623; *Isaacs v. Railroad Co.*, 47 N. Y. 122; *Railroad Co. v. Baum*, 25 Ind. 72; *Railroad Co. v. Harrison*, 48 Miss. 112; *Flower v. Railroad Co.*, 69 Penn. St. 210. Under these views, while we share plaintiff's indignation at the outrage committed on him, we cannot fix the duty of reparation on the innocent defendant, upon whom it is not imposed by the letter or spirit of the law." The *Isaacs* case above cited has been overruled.

In *Nelson v. Johnson*, Minnesota Supreme Court, March 5, 1888, the defendant, upon selling out his business and stock in trade, agreed with the plaintiffs, upon sufficient consideration, not to engage in the same business at the same place again, either directly or indirectly, for five years, and stipulated large damages in case of a breach of the contract. *Held*, that such a contract is not to be extended, by construction, beyond the fair and natural import of the language used, and in this instance did not extend to isolated acts or occasional services in good faith rendered for the accommodation of another dealer by defendant, nor to employment in some subordinate capacity not affecting the management of the business or influencing custom, but did prohibit him from engaging in business with another, or in his name or for him, in any such capacity (whether foreman, salesman or manager) as would result in the mischief which it was the plain purpose of this agreement to prevent. The court said: "The words 'directly or indirectly' emphasize the agreement, and permit no evasion of its purpose and object. To engage his services to or in assisting a rival dealer in the same business, to solicit and make sales and to influence buyers in that market, including his old customers, would we think be fairly within the terms of the contract. But it refers to engaging in business; it does not extend

merely to isolated acts which might tend to interfere with the plaintiff's business, or to occasional services voluntarily rendered for the convenience or accommodation of another in good faith. Nor do we think it would include subordinate employment, not affecting the management or control of the business, or directly influencing custom. In *Whitney v. Slayton*, 40 Me. 224, a covenant not to engage in the business of iron-casting within certain limits was held broken by the obligor's becoming a stockholder in a corporation carrying on that business, or being employed by such corporation in conducting it. In *Finger v. Hahn*, 42 N. J. Eq. 607, the defendant sold out his butcher business, and agreed 'not to carry on the business on his own account, or to operate any butcher business.' The evidence showed that he was operating a department of the butcher business in a grocery store kept by another, and for the latter, and that he did the buying and selling, as well as cut the meats, and the contract was held broken. In *Newling v. Dobell*, 19 L. T. (N. S.) 408, where the defendant, in selling out, agreed not to carry on or be concerned in or interested in the business of a tailor, held that the contract was broken by working as a journeyman for another. The covenant clearly embraced the exercise of his trade or skill for an employer as well as for himself. So in *Hill v. Hill*, 55 L. T. (N. S.) 769, the covenant was 'not to engage in, or be in any way concerned or interested in the same business, and the defendant was not permitted to engage as employee on a salary.' In *Vincent v. King*, 13 How. Pr. 235, the seller covenanted 'not to exercise, carry on, or in any way pursue his trade in the village;' and in *Ewing v. Johnson*, 84 id. 202, the seller covenanted 'not to in any manner interfere with the prosecution of the business of the purchaser.' So in *Boutelle v. Smith*, 116 Mass. 118, the covenant was 'not to directly or indirectly engage in any business, or to do any act that shall interfere with the business purchased.' But it seems that the use of the words 'be concerned in,' or 'interested in,' 'do any act,' etc., in addition to the terms 'carry on' or 'engage in,' showed that the parties intended to extend the contract further than the latter terms alone would do. The cases of *Grimm v. Warner*, 45 Iowa, 106; *Allen v. Taylor*, 39 L. J. Ch. 627; and *Clark v. Watkins*, 9 Jur. (N. S.) 142 — cited by respondents — substantially support his contention, and hold that a contract 'not to engage in or carry on' the same business does not include employment in the same business for another unless the contract expressly so stipulates. But the court must consider the nature of the business which the party abandons, and agrees not to undertake, 'directly or indirectly,' and the natural and reasonable effect of the said employment upon it in determining whether the contract has been violated directly or indirectly, for if there has been an indirect violation or fraudulent evasion of it, resulting in damage, it could hardly be material that he was receiving wages in-

stead of profits." See *Bowers v. Whittle*, 63 N. H. 147; S. C., 56 Am. Rep. 499.

In *Robbins v. Robertson*, Circuit Court, S. D. New York, Jan. 19, 1888, it was held that whether articles made of cut steel, steel, brass, copper or mother-of-pearl, used as ornaments for belts, dresses, and sometimes for the hair, are dutiable as "manufactured articles not specifically provided for, composed wholly or in part of iron, steel," etc., or as "jewelry of all kinds," depends upon the meaning attached by the trade to the phrase "jewelry of all kinds," with reference to which Congress is presumed to legislate in the tariff acts. The court said: "The word 'jewelry' is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. A belt of cowry shells, a necklace of bears' claws, a head ornament of sharks' teeth, though possessing no value in themselves, are esteemed valuable in the communities where they are worn; and we therefore constantly find them referred to in books written in the English language — books of travel, standard works, encyclopædias and scientific dissertations upon sociology — we find those articles described in those books as 'jewelry.' The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals — gold and silver, to which, I think, platina is now generally added — and what are known as precious stones — the diamond, sapphire, ruby, etc. Articles manufactured from those for the purpose of personal adornment are known, as the witnesses on the stand told you, as articles of jewelry, and such testimony is accordant with your own knowledge as to what is the ordinary use of the term 'jewelry.' We have found however that besides jewelry there is such a thing as imitation jewelry. Jewelry of course is an expensive article, and as many people desire to wear ornaments without being able to pay the price required for real jewelry, the manufacture and the use of imitation jewelry have come into existence. Now what is an imitation piece of jewelry? It need not necessarily be a counterfeit — that is, it need not be an exact simulation of a particular article which it is intended to take the place of. If by a pleasing combination of appropriate materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called imitation jewelry. Nor does the fact that the original jewelry of which it is an imitation has become obsolete prevent its being considered, in the ordinary use of the English language, as imitation jewelry. We all know from our reading that three or four hundred years ago articles of jewelry were used to ornament the head-gear and to ornament the dress. If their use has entirely ceased to-day, that fact would not make articles now reproduced in imitation



of them any the less imitation jewelry because real jewelry of the same kind is not now worn. If therefore we had only to deal with the ordinary use of the terms of the English language in disposing of this case, I should leave no question to you for your consideration. \* \* \* It matters not therefore here what may be the ordinary meaning of the words 'imitation jewelry,' or the ordinary meaning of the words 'jewelry of all kinds,' if you arrive at the conclusion, from the testimony introduced before you, that those words have in the trade and commerce of this country acquired a distinct meaning different from their ordinary meaning. If they have acquired such meaning, and these goods are not within the scope of that meaning, then they cannot be considered as jewelry, although were it not for that custom of trade and system of trade nomenclature, they might be so considered."

**RAILWAY—PASSENGER'S LUGGAGE—DELIVERY TO PORTER TO BE PLACED IN CARRIAGE—LIABILITY OF COMPANY.**

HOUSE OF LORDS, FEB. 24, 1888.

**GREAT WESTERN RAILWAY CO. V. BUNCH.**

A woman arrived at a station on the appellants' railway forty minutes before the time at which the train by which she intended to travel was to start. The train was not at that time drawn up in the station. She had with her a bag and two other articles of luggage, which were delivered to a porter to take into the station. She saw the two other articles labelled, and told the porter that she wished to have the bag in the carriage with her, and asked if it would be safe if left with him. He replied that it would be. There were notices in the station that porters had orders not to take charge of luggage, and that the company would not be liable for luggage taken in the carriages. The bag was lost through the negligence of the porter.

*Held* (affirming the judgment of the court below, Lord Bramwell dissenting), that there was evidence that the bag was delivered to the porter for the purpose of transit, and not of deposit, and that the company were liable for the loss.

**T**HIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M. R., and Lindley, L. J., Lopes, L. J., dissenting), reported in 55 L. T. Rep. (N. S.) 9; 17 Q. B. Div. 215, reversing a judgment of the Divisional Court (Day, J., and Smith, dissenting) on appeal from the County Court.

The action was brought by Mr. Bunch and his wife to recover 18s., the value of a Gladstone bag and its contents, which Mrs. Bunch had intrusted to one of the company's porters at Paddington station for safe custody while she went to meet her husband, who was getting her ticket in the booking-office.

It appeared that Mrs. Bunch arrived at the station at 4.20 P. M., on Christmas eve, 1884, having with her a portmanteau, a hamper, and a Gladstone bag belonging to her husband, intending to go to Bath by the 5 P. M. train. As she alighted from the cab a porter took the luggage on a trolley, and she saw the portmanteau and hamper labelled, and told the porter that she wished the Gladstone bag to be put into the carriage with her, the train not being alongside the platform at the time. She asked the porter if it would be safe with him, and he assured her that it would, and that he would guard the luggage and put it into the train. She then went away to the end of the

station to meet her husband, who had come from the Moorgate street station by train, and was to travel with her, and she came back with him in ten minutes, he having taken his ticket at Moorgate street station and her ticket at Paddington. It was then found that the portmanteau and the hamper had been placed in the luggage van, but that the Gladstone bag had disappeared. The plaintiffs brought an action in the Marylebone County Court, and his honor Judge Stonor gave judgment for the plaintiffs for 18s. On appeal to the Divisional Court, Day, J., held that the company were not responsible; Smith, J., held that there was evidence to support the finding of the County Court judge that the porter was holding the bag on behalf of the company. Smith, J., as junior judge, withdrew his judgment, and judgment was entered for the defendants, with leave to the plaintiffs to appeal. The Court of Appeal reversed the decision of the Divisional Court and restored the judgment of the County Court judge.

Sir H. James, Q. C., and R. S. Wright, for appellants.

C. C. Scott, for respondents.

**LORD CHANCELLOR (Halsbury).** My Lords: The form in which the question arises for your lordships' decision is one which precludes any consideration of the propriety or impropriety of the decision of the learned County Court judge as to any question of fact, as to which there was legal evidence before him. I must observe that both the learned judges in the Divisional Court appear to me to have treated questions so conclusively found as nevertheless open to review. It is perhaps not surprising that when questions arise upon what either are, or are assumed to be, matter of daily experience, even a judge is tempted to import his own knowledge, and so give a color to facts which he ought to treat as finally and conclusively decided by the tribunal to whom they have been remitted. Now in this case the facts have not been specifically found; but the learned judge has found a verdict for the plaintiffs, and has stated that finding, together with the evidence. If therefore it is impossible to find a verdict for the plaintiffs upon that evidence, the plaintiffs are entitled to maintain their verdict. It seems to me that the two contentions which have been in debate before your lordships would resolve themselves into a question of fact, upon which there might be a difference of opinion if the facts were here open to review. Your lordships in the first place have to ascertain, not from any written instrument, nor from any express words of contract, what were the contract relations between the plaintiffs and the defendants. I confess I should have been better satisfied if some evidence directed to what was the practice of the particular railway company had been before us; but in this, as in other parts of the case, I must content myself with saying, that if there was enough to enable the learned judge to infer what was the practice, and from thence to infer what was the contract, I am not at liberty to review his decision. There are of course some facts which both sides have assumed to be proved, and with respect to which it would be mere pedantry to suggest that they were not formally proved. That the defendants, for instance, were a railway company carrying on the business of common carriers for hire; that the premises upon which the plaintiffs' luggage was deposited were premises belonging to and in the exclusive control of the defendant company; that the arrangement of the trains, the bringing of them to the platform, the arrangements by which the luggage, whether hand luggage or van luggage, was to be distributed, were all under the superintendence and di-

rection of the defendant company, are matters as to which no formal evidence is to be found in the report of the County Court judge, but are also matters as to which no one has or can suggest and real doubt. I do not think that any of your lordships entertain any doubt that if the plaintiffs' luggage were intrusted to the porter for deposit and custody, as distinguished from the physical handing over for the purpose of transit, the defendants would not be liable. The question really in debate is somewhat obscured by the existence of the cloak-room system; and that system, I think, is expressly guarded by the company not permitting any of their servants to undertake the guardianship of any property whatsoever except under the circumstances and upon the conditions which the company prescribes; but I think the same question would arise, and should be decided upon precisely the same principles if the company had no cloak-room system, and gave no authority to their servants to receive luggage at all, except as incidentally to their contract of carriage. It is worthy of remark that Day, J., and Lopes, L. J., upon an assumed state of facts, at which I think the County Court judge was at liberty to arrive, lay down the law very much as I should agree it ought to be laid down. Day, J., says: "If a passenger requires him (the porter) to delay a reasonable time, while, for instance, a passenger takes a ticket, he (the porter) is responsible during all reasonable time that should elapse between the arrival at the station and the arrival on the platform of the passenger taking the ticket, time being allowed for the little journey to the platform. During all that time he is the agent of the company, as bailee of the luggage which is intrusted to him. He is acting in the ordinary discharge of his duty;" and Lopes, L. J., says: "I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably—I should say reasonably necessary for this transit"—the words of the lord justice "this transit," referring to the transit of the goods from the cab or outside of the station. The admissions of counsel have rendered it unnecessary to rely upon mere inference in this case, as to the question of whether the train had been drawn up to the platform or not, and we must now accept it as a fact that neither the van nor the carriages for the passengers were in a position to enable the hand luggage or the van luggage to be placed where they were intended to be deposited for the purposes of the journey. If I were myself to be drawing inferences as to the reasonableness in point of time of the period of plaintiffs' arrival before the departure of the train by which she intended to travel, I am not certain how I should decide that question. On the one hand, forty minutes seems a long time before the departure of the train to call upon the servants of the company to take charge of luggage for the purpose of the journey. On the other hand, the fact that it was Christmas eve, that the railway officials were within a very short time of the arrival of the plaintiff issuing tickets for that journey, and that they were receiving without objection or demur van luggage, with respect to which it is not denied that they were in so doing acting in pursuance of the authority conferred on them by their employers, are all circumstances from which, I think, it might be inferred that the time was not too long. But in truth I am not entitled to speculate upon the matter; this is essentially a question of fact, and the learned judge has in this instance specifically found that the time of the intrusting the luggage to the porter was a reasonable and proper time before the departure of the train. It seems difficult to say that with the evidence before him to which I have adverted, it was not open to him to arrive at that conclusion. Now while I entirely agree that the duty of

the porter, as disclosed by the evidence, is either to take the luggage to the cloak-room, if intrusted to him for the purposes of deposit, or to the train if for the purposes of the journey, I am at a loss to understand how the circumstance that the train is not at the platform can affect the liability of the company. Assume that the company are receiving luggage for the purposes of the journey, and that they do so receive luggage for the purposes of the journey, the presence or absence of the train at the platform is a matter within the control of the company, and not of the passenger; and I cannot understand what evidence there is in this case from which it could be reasonably inferred that the porter would be acting within the scope of his authority in receiving the plaintiffs' luggage if the train were at the platform, and beyond it if the train had not come up. Doubtless a company might make a regulation if they thought fit, "We will not receive luggage for a train forty minutes before it starts;" they might say, "We will not receive luggage to be put on a train which has not yet arrived at the platform." I should very much doubt whether any railway company has any uniform practice as to the period of time which they allow to elapse between the arrival of the train at the platform and its departure. It is enough however to say that in this case no evidence of any such practice was given. If a possible inference to be derived from the facts as proved is that what the porter did in this case was the ordinary practice of the company, then I should say it would follow that the mode in which the company carried on its business was to accept the passenger's luggage at the entrance to the station, and to take it to its intended designation, whether van or passenger carriage, at the option of the passenger, and that during the period of what Lopes, L. J., describes as "this short transit" it would be in the custody of the company for the purposes of, and as part of the journey. If the train were at the platform it would, I suppose, in ordinary course be distributed, some to the van and some to the passenger carriage, as directed, but when once the porter has received and accepted it as luggage to be received and forwarded by the train about to start, it seems to me impossible to contend, and I do not understand Lopes, L. J., or Day, J., to contend, that it is not in the custody of the company for the purposes of the journey. If the porter refused to take charge of the luggage, the company might be liable for refusing to carry according to their professed mode of carriage, but might not be liable for loss of goods which they refused to carry; but whether the porter would be doing his duty in refusing to take charge of the luggage during the short transit, or acting in pursuance of his master's orders, is the very question in debate. If one assumes that it was contrary to his duty, of course the company would not be liable; if it was his duty the company would be liable. But why am I to assume upon the facts here put in proof that the porter was acting contrary to his duty, and in hopes of personal gain to himself, undertaking a course of business not imposed upon him by the orders of the railway company? I confess for myself, I should draw the same inference that was drawn by the County Court judge; but what the defendants, in order to succeed, must establish, is that the County Court judge could not by law have drawn such an inference. It is suggested that Mrs. Bunch's phrase, in asking the porter whether her bag would be safe, exhibited a consciousness that she was asking a favor, and not insisting on her rights as a passenger. I admit that the word "it" grammatically, as the evidence is reported to us, appears to refer to the bag, but I think what Mrs. Bunch meant was the luggage, both van and hand luggage, upon the trolley.

But whatever Mrs. Bunch meant, I think she might have asked with equal force whether the train would arrive safely at its destination, and I do not think either her question or the porter's reply would have affected the contract relations of the parties. The truth is, that in the conduct of business more contracts are made by the understood course of business than are ever reduced into writing, or even into spoken words at all; and I think that when people hold themselves out as carriers and receive luggage at a place regularly appointed to receive luggage for the purposes of a journey, they must be understood to receive it as carriers, unless they give notice to the persons from whom they receive it that they receive it in some other capacity. It may be said that I ought not to disregard the existence of the cloak-room system, and that the receipt by the company's servants is susceptible of two interpretations. I admit that this is so, but in this case Mrs. Bunch at once informed the porter that the portmanteau and the hamper, as well as the Gladstone bag, were to be put into the train; and I agree with Lindley, L. J., that the company's notices and directions to their servants are intended to apply, and upon their true construction do apply, to luggage received for purposes of deposit, and not for purposes of transit, and it is upon this part of the case that I think the finding of the learned judge is conclusive against the defendants when he finds that the time of intrusting the luggage to the porter was a reasonable and proper time before the departure of the train. If once that proposition is accepted as conclusively found, it seems to me that the law that would be laid down by the minority of the Court of Appeal would amount to this: that a passenger bringing his luggage for carriage a reasonable and proper time before the departure of the train by which the luggage is to be carried, can enforce no liability upon the company in respect of his luggage unless it is placed in the cloak-room as a preliminary to the transit, and a receipt given for the same. And even this inadequately represents the difficulty of the contention, since it is obvious from the notices put in evidence, that the cloak-room tickets and receipt import that the passenger who has deposited his luggage in the cloak-room is expected to get it out again from the same cloak-room, and if he wishes to travel he must again commit it to the custody of the company after he has so taken it out. It would seem therefore to involve this proposition, that for parcels carried in the passenger carriages the railway company never can be liable at all. I do not know that it is absolutely necessary in this case to determine what is the exact contract between the company and the passengers, since the learned judge has found negligence against the company, and I do not understand that there is any difference of opinion among us, that if there was any contract to take care of the bag, there is sufficient evidence of negligence. But I must express my opinion that the views expressed by Lord Truro, Jervis, C. J., Williams, Crowder, Willes, Keating and Montague Smith, J.J., do not appear to have had sufficient weight given to them (see *Richards v. London, Brighton & South Coast Ry. Co.*, 7 C. B. 839; *Talley v. Great Western Ry. Co.*, L. R., 6 C. P. 44; *Butcher v. South-Western Ry. Co.*, 16 id. 13) by the judgment of the Court of Appeal in *Berghelm v. Great Eastern Ry. Co.*, 38 L. T. Rep. (N. S.) 160; 3 C. P. Div. 221. All these learned judges appear to me to adopt the view that a railway company, in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which

are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default. In *Berghelm v. Great Eastern Ry. Co.*, *ubi supra*, the Court of Appeal, commenting upon the case of *Talley v. Great Western Ry. Co.*, do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley v. Great Western Ry. Co.* the judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such negligence. The negligence in question was leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey out open, and its contents rifled, in a carriage which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the refreshment room at that station. It is obvious that if the court were right that the general liability of the company was modified by the undertaking of the passenger to look after his own luggage while it was in the passenger carriage, he had omitted that duty. But suppose the loss had happened by reason of some circumstance which would have been no breach of that modifying stipulation, could it have been contended that the company were not responsible as common carriers because they were carrying for hire in one part of the train and not in another? If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van or hand luggage, they received for carriage to Bath all the luggage of the passengers; they received the van luggage to be put into the van, they received the hand luggage to be put into the passenger carriage; and I think the learned judge was entitled to infer that their practice, and therefore their contract, in receiving hand luggage, was to put it into the passenger carriage, or if the railway company did not then bring up the train to the platform, to take care of it until the carriage was drawn up, and in a position to receive the hand luggage, which in my view the porter, as the agent of the railway company, had accepted and received for that purpose. For these reasons I am of opinion that the judgment of the Court of Appeal was right, and I move your lordships that the judgment be affirmed, and that this appeal be dismissed, with costs.

LORD WATSON. My Lords: This appeal brings up for consideration the decision of a County Court judge, which the higher courts and this House have no jurisdiction to review, except in so far as it involves principles of law. It is impeached upon the ground mainly, that there was no evidence before the learned judge from which it could be reasonably inferred that at the time when it disappeared the respondent's Gladstone bag had been delivered to and was in the possession of the appellant company for the purpose of carriage. The evidence, it is said, points to and only warrants the conclusion that the bag was in the custody of a railway porter as bailee for the respondents. In *Butcher v. London & South-Western Ry. Co.*, 16 C. B. 13, Jervis, C. J., observed in reference to luggage which had been conveyed in the same carriage with its owner, "that though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers that their luggage shall be delivered at the end of the journey by the porters or servants of the company into the carriages or other means of conveyance of the passengers from the station." What was thus said of the termination applies equally to the commencement of a railway journey. In the ordinary course of business a passenger's luggage is received at the entrance to

the station by the servants of the company, and is by them conveyed either to the van or to the carriage in which he intends to travel. I do not mean to say that railway companies are under any statutory or other obligation to provide that accommodation; but they find it for their interest to do so; and in taking charge of luggage for these purposes their servants act within the scope of their implied authority. Their duty is, according to prevailing usage, limited to the transport of passenger luggage from the vehicle which brings it to the station to a train which is about to start, and does not extend to their taking charge of luggage which cannot, in any reasonable sense, be considered as in actual course of transit. It may be that railway porters do sometimes undertake the charge of luggage which is merely intended for future transit; when they do so they exceed the limits of their implied authority, and in that case their possession cannot be regarded as the possession of their employers. If the respondents had gone to Paddington station at noon of the 24th of December, 1884, and had then left their Gladstone bag with a porter, in order that it might accompany them on their journey to Bath by the 5 P. M. train, I should have had no hesitation in holding that the appellant company had not become responsible for its safe custody during the interval. In that case it would have been in accordance with well known practice, and therefore an implied term of the subsequent contract between the parties, that the company was not to be liable unless the luggage was duly deposited in the office provided for that purpose. On the other hand, if the respondents had arrived at the station at 4.55 P. M., I entertain as little doubt that the delivery of their Gladstone bag to a porter for the purpose of its being conveyed to the carriage in which they were about to travel, would have made the possession of their porter that of the appellant company. Whether passengers' luggage delivered to a railway porter is in his possession for present or merely with a view to future transit is necessarily a question of degree, depending upon the circumstances of the case; railway companies, as a matter of fact, frequently provide for the travelling public, not only booking-offices, but refreshment-rooms and other conveniences, and passengers who merely avail themselves of such accommodation as incidental to their use of the railway cannot be held to have temporarily ceased to prosecute their journey. *Berghelm v. Great Eastern Ry. Co.*, 38 L. T. Rep. (N. S.) 160; 3 C. P. Div. 221, is a clear authority to that effect. It is impossible to fix any precise limit of time prior to the starting of a particular train within which the company are to be liable for passengers' luggage delivered to their servants for conveyance by it, and beyond which they are not to be so liable. In my opinion the company are responsible for luggage delivered to and in the custody of their servants for the purpose of transit, whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail, and is not merely waiting in order to begin its prosecution at some future time. In the present case the evidence shows that the female respondent arrived at Paddington forty minutes before the train by which she and her husband travelled was timed to start; she gave her luggage into the charge of one of the appellant company's porters, saw part of it labelled, and directed the porter to place the Gladstone bag, which was not labelled, in the same compartment with herself. The respondent then left the platform and went to the booking-office for the purpose apparently either of taking her ticket or of seeing that her husband procured it for her. She there met her husband, who had taken a ticket, and on their return to the platform, about ten minutes after her arrival, they found

that the labelled luggage had been placed in the van, and that the porter and the Gladstone bag had both disappeared. In these circumstances I think the County Court judge might reasonably come to the conclusion that the bag continued to be in the custody and possession of the appellants for the purposes of present, and not of future, transit, from the time when it was delivered to their porter until its disappearance. In the argument for the appellants considerable stress was laid upon the fact that at the time when Mrs. Bunch left her luggage upon the platform the 5 o'clock train had not come alongside it. That circumstance does not seem to me to be very material, because a passenger can have no personal knowledge of it until he reaches the platform. What appears to me to be a matter of more consequence in the present case is that it was Christmas eve, that there was a great crowd of passengers intending to travel by the train in question, and that the servants of the company, as might have been anticipated, were at the time when Mrs. Bunch arrived at the station, inviting passengers to take tickets, and receiving their luggage for the purpose of its being put in the train. I attach no importance to the question put by Mrs. Bunch to the porter, or to his assurance in reply that her luggage would be quite safe, and that he would put it in the train. A conversation of that kind could not alter the contractual relations between her and the company. On the assumption that the appellant company became responsible for the safe-keeping of the bag in question, it was argued in their behalf that there was no evidence before the County Court judge to justify the inference that its loss was due to their negligence. Upon that point I am of opinion that the evidence was sufficient to sustain the inference, but I am by no means satisfied that in order to entitle them to judgment the respondents were bound to prove that the appellants had been negligent. That depends upon the nature of a railway company's contractual liability for hand luggage, including in that term heavier articles, such as are commonly put in the van, when these are placed, or are intended to be placed, with the assent of the company's servants, in the carriage in which their owner intends to travel, as well as lighter articles, which are generally, if not invariably, carried beside him. It does not admit of question that passengers' luggage duly delivered to the company's servants for carriage in the railway van remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand luggage is carried, some being of the opinion that it is from first to last a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care; others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that in many instances the resulting liability of the company will be precisely the same; but according to the second of them, the full responsibility of the company may revive on occasions when from causes incidental to his journey the interference of the passenger ceases for a time, and his hand luggage is committed to the exclusive charge of their servants. At present the ruling authority upon this point is *Berghelm v. Great Eastern Ry. Co.*, *ubi supra*, where it appears to have been decided by the Court of Appeal, consisting of Bramwell, Brett and Cotton, L. J.J., that the contract of the company with respect to hand luggage is merely to carry with ordi-

mary care. Cotton, L. J., who delivered the judgment of the court, said: "The company therefore must, according to ordinary principles, be held liable in respect of the goods as bailees for hire, and contractors to carry, and therefore liable for loss or injury caused by negligence, but not otherwise; the company have in fact the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle." The observations there quoted were directed to the special case of a passenger's luggage, which had been placed, at his request and with the assent of the company, in the carriage in which he was to travel, and the learned judge possibly did not intend to extend the principle to luggage in the exclusive custody of the company's servants for conveyance to or from the carriage. However that may be, I prefer the principle which appears to me to have been adopted in *Richards v. London, Brighton and South Coast Ry. Co.*, 7 C. B. 839, and *Butcher v. London and South-western Ry. Co.*, 16 id. 13. I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. I am therefore of opinion that the order of the Court of Appeal ought to be affirmed with costs.

LORD BRAMWELL. My Lords: It is the custom for English railway companies, at all events for the appellants, to have porters at the entrance of their railways to receive the luggage of passengers and convey it to the van or carriage in which it is to be carried. Whether this is a duty imposed on the companies or a voluntary act on their part, is immaterial. It is a duty they undertake, at least this company does, and must like other duties be performed with skill and without negligence. What is this duty? I have said to carry the passenger's luggage to the van or carriage in which it is to be carried. We all know that large packages are taken to the luggage-van, smaller packages (often much too large for the comfort of other passengers) are, if requested by the passenger, taken to the carriage in which the passenger is to be carried, either that he may make use of it or take personal care of it, or more frequently that he may hasten away with it without waiting for it to be given out of the luggage-van. There is no further duty or professed duty that I know of. If the passenger arrives before the train is at the platform, whether of a terminal station or not, the porter may certainly refuse to do more than take the luggage on to the platform, and leave it there in charge of the passenger. Of course, if the passenger wants to get his ticket, and says so, the porter must take the luggage on to the platform, and wait and see to it till the passenger has got his ticket, and comes to see to it himself. If there is any duty beyond this, it is more than I know of or ever heard of—I mean any ordinary duty. There can be no duty on the company or the porter when the train is not at the platform to take care of the luggage till it comes. If there is an obligation to do this for five minutes, there is an obligation to do it for so many hours. Every one knows it is not so; every one knows that a cloak-room is provided for the custody of luggage that the passenger wants to have taken care of till it can be put in the carriage in which it is to be carried. If this is true of luggage to be carried in the luggage carriage, and that is not there, it is equally true of luggage to be carried in the passenger carriage when the passenger is not there. If the luggage carriage is not there, the porter is not bound to take charge of the luggage till it comes. Of

course, if he says nothing, but takes it, and it is labelled for its destination, and left in his charge, the passenger may well suppose, and has a right to suppose, that the company has taken charge of it for the journey. The passenger cannot tell whether the luggage carriage is there, or if not, whether the company is not content to take it to a place where it will be in readiness for the train when it comes, and be taken care of meanwhile. So with respect to an article to be put in the passenger carriage, if the passenger should suppose a train he meant to go by was at the platform, and walked to it, and the porter said nothing, I should say that the passenger would have a right to suppose that the company had taken charge of the parcel, and was taking it to his intended carriage. But if the porter said of luggage intended for the luggage carriage: "That carriage is not here, you must look after your luggage yourself," and the passenger does not look after it, there would be no pretense for saying the company was liable. The same thing is true of luggage to be put in the passenger carriage. It must be remembered that luggage to go into the passenger carriage is to go in the same carriage as its owner, the passenger. Suppose a train at the platform, the passenger says: "I want this in the carriage with me;" the porter proceeds with the parcel to the train, the passenger goes somewhere else, not for a minute or so, but for some sensible time, five or ten minutes, perhaps half-an-hour. Would he have a right to complain if his parcel was placed near the train the passenger said he was going by or taken to the lost luggage room? I say no. If he would, on what grounds? He must know that by not following and taking his seat, he was attempting to put a burden on the company's servant which he had no right to impose. Mrs. Bunch knew that. She did not say: "You must take care of this," or "I want to go and meet my husband," but asks whether the bag will be safe. It will be said that it is not to be expected that she would speak with the precision of a lawyer or know the law. I agree, but I say that treating this practically, she knew, everybody knows, that she was asking for a favor—for something for which she had no right. Does anyone believe that if the porter had said, "I can take your luggage to the luggage carriage, and it will be taken care of, but you must take care of what is to go with you till you have taken your place"—I say, if he had said this, as he ought to have done, would any one believe she would have had any right to complain or have been surprised, always let it be remembered that she knew that it was necessary to get some promise or engagement from the porter other and more than the ordinary engagement of a porter when he takes luggage? Now a word as to what he said. Of course, it was not a promise or contract by him for himself or the appellants. Certainly there was no consideration for it. All it amounted to was a statement of intention—a holding out of an expectation. "Will it be safe?" "Oh yes, I will look after it." All that this means is: "It will be safe, for I shall look after it." I say then that what the porter said did not impose a duty on the appellants which did not otherwise exist—that no duty existed in the appellants other than to carry the bag to the carriage in which she took her place, if she took it forthwith; that if she did not take her place so that the porter could not give the parcel into her charge there, she left it in the care of the porter at her own risk. I say she knew this, as is shown by her question to the porter, and by her acceptance of his statement. A word on the judgment below. Lord Esher, M. R., says: "Now comes the case of luggage which is not to go into the van. The porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or the carriage. Dur-

lug the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company." Be it so, but that is just what this bag was not. There was a time during which it was not in process of conveyance, a time during which it was stationary, during which the porter had said he would guard it. Lord Esher says: "The question is whether there was evidence upon which the County Court judge might reasonably find for the plaintiffs." Evidence of what? "Evidence of some fact on which he might reasonably so find?" What fact? We know all the facts. Lindley, L. J., says: "It seems to me a simple case of transit, not of intrusting to the porter in any sense than that in which every thing put into his hands is intrusted to him. It is very true there was some short time during which it would not be necessary for him actually to keep walking or rolling his trolley. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential to say more than this: the porter was acting within the scope of his employment in taking the luggage in the way he did from the cab to the train." Now that is precisely what he did not do. He did not take it from the cab to the train. He put it down and said he would guard it, and did not. As to the time being short, it was to be as long as the lady was away, and might have been forty minutes or more, if the husband had not arrived. I agree with Lopes, L. J., "It was not part of the employment of a porter to take charge of baggage, except during that transit, i. e., from the cab to the train." I mean by that during the time which is fairly and reasonably necessary for that transit. I make no remark on other authorities beyond this, that they show a generous struggle on the one hand to make powerful companies liable to individuals, and on the other hand, an effort for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly. I have not used a technical expression, not a word about bailments, etc. I have used plain and practical language. The appellants were under no duty to take care of the bag while Mrs. Bunch went to look for her husband. The porter could and ought to have refused to do so. Had he done so, Mrs. Bunch would have had no cause of complaint. By doing as he did, he could impose no duty on the appellants which did not otherwise exist. Before the respondent can complain of negligence, he must make out a duty of care. He has not done so. Not that I am sure it is a question of negligence. The sum in dispute is small, but I believe the question is of considerable importance. If the appellants are liable in this case, I do not know how they can avoid it in similar cases. It is certain that the porter exceeded his duty if he made the appellants liable, and I suppose other porters, from good nature or the hope of a tip, will do the same again, though expressly forbidden, as this man was. The result is that the appellants are made liable for not taking care of the bag during the time it did not suit Mrs. Bunch to do so. I cannot pretend to a doubt on the case. Nor can I understand the repeated expression that the County Court judge might find as he did—an expression that imports he might have found otherwise. How can that be, when the actual facts are not in dispute nor the conclusion to be drawn from them? I hold that the judgment is wrong and should be reversed.

**LORD HERSHELL.** My Lords: No appeal lies in this case from any conclusion of fact arrived at by the County Court judge. It is only if he has erred in law that his judgment can be questioned. The single point therefore which has to be determined is, as it seems to me, whether there was any evidence to warrant the

conclusion that the plaintiffs' luggage was lost, owing to a breach of obligation on the part of the appellants. It is not necessary for me to state the facts. They have been fully brought before the House by those of your Lordships who have preceded me. I will only say that I do not think that the question put to the porter by Mrs. Bunch, or the answer given by him, really affects the case. If the company were under an obligation toward the plaintiff, in respect of the bag, I cannot think that this question and answer diminished or destroyed it. If they were not under any such obligation, I do not think it was imposed upon them by the statement of the porter. I concur entirely in the opinions which have been expressed by the Lord Chancellor and Lord Watson, and think it necessary to add but little. Although there was a difference of opinion amongst the judges in the court below, and your Lordships do not all take the same view, I think the difference is confined within somewhat narrow limits. I believe that all the judges who have dealt with the case and all your Lordships are agreed, that if luggage is brought to a railway station and handed to a porter so long before the time appointed for the starting of the train that it cannot be reasonably said to be intrusted to him for the purpose of its transit with the passenger to its destination, but must be considered as so intrusted for the purpose of being taken care of until the time for the departure of a passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company would not be liable for its loss. Railway companies have provided cloak-rooms or left luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances. On the other hand, I do not understand Lord Bramwell to doubt that a porter who receives a passenger's luggage at the entrance of the station for the purpose of conveying it to the train does act as the servant of the company, and that they are liable as well for the luggage which the passenger intends to take with him in the carriage as that destined for the van, in case it is lost during its transit to either carriage or van owing to the porter's negligence. And I understand him further to entertain the view, that though the traveller does not proceed direct to the train with his luggage, but stops for the purpose of taking his ticket, the company are nevertheless liable during the time so occupied. Now I do not think it can be laid down that procuring a ticket is the only act incidental to the journey for which the passenger may pause on his way to the train without the company being free from liability in case the luggage is lost in the meantime. Would not the case be the same if he waited to meet a person who had promised to take his ticket for him, provided always he does not come unreasonably early, and does not wait an unreasonable time? Does then the fact that the train by which the passenger is to depart is not at the platform when he arrives make any difference? It may, no doubt, be an element in determining whether the passenger has arrived so early that the transit to his destination cannot properly be said to have commenced. But I do not think that it is conclusive of the point, or that the obligation of the company is necessarily different from what it would be if the train were alongside the platform. It is a matter of common knowledge that the practice of different railway companies, and indeed of the same company at different times, varies greatly as to the length of the period prior to the departure of the train during which it is drawn up at the platform. Sometimes, after being at the platform, the train is shunted out of the station, and only returns immediately before its departure. Under these circumstances it is impossible even for a passenger who arrives very



shortly before the time fixed for the departure of the train to know, when he alights at the station and intrusts his luggage to a porter, whether the train is at the platform or not. The question whether the luggage can fairly be said to be in the custody of the company's servant for the purpose of transit, or of what I may term warehousing, will not, I think, be generally difficult of solution; though, as it is not possible to lay down any strict line of demarcation, there will always be cases on the border where opinions may differ as to the proper conclusion to be drawn. In the present case Mrs. Bunch arrived forty minutes before the time of departure. She was about ten minutes waiting for her husband, who was to take her ticket. On the other hand, it was Christmas Eve, when the trains are notoriously crowded, and prudence dictates an earlier arrival than usual. We have not to determine what would be our view of these facts. I concur with those of my noble and learned friends who think that the County Court judge was warranted in point of law in arriving at the conclusion which he did with respect to them. I have only to add, that although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect of luggage carried, or intended to be carried, in the same carriage with the passenger, I am disposed to agree with my noble and learned friends in preferring the view of this duty to be derived from the case of *Richards v. London, Brighton and South Coast Ry. Co.* to that enunciated in the judgment of the Court of Appeal in *Berghem v. Great Eastern Ry. Co.*

LORD MACNAGHTEN. My Lords: I concur in the motion which has been proposed. Everybody who travels by railway knows, that as a general rule, persons arriving at a station with luggage are met at the entrance of the station by railway porters ready to receive their luggage, to take it to the platform, and to put it into the train. Everybody too knows, that while in ordinary course the heavier articles of luggage are labelled and placed in a van under the sole control and custody of the railway company, it is common practice for passengers to take the lighter articles of luggage, or "hand luggage" as it was called, into the carriage with themselves. This practice is recognized by the railway companies, who provide suitable receptacles for hand luggage in passenger carriages; and it is a practice as much for the convenience of railway companies as it is for the convenience of passengers. It was contended by the appellants that in receiving a passenger's luggage railway porters, though in the service of the company, and forbidden to accept any payment from the public, must be acting on behalf of the passenger and as his agents, and that this relation continues as regards van luggage until it is labelled for the journey, and as regards hand luggage until it is placed in the carriage in which the passenger intends to travel. Further, it was contended that the contract as regards van luggage is altogether distinct and different from the contract as regards hand luggage; that in fact there are two separate contracts, and that whatever may be the case as regards van luggage the railway company comes under no liability of any sort as regards hand luggage until it is placed in the passenger's carriage. I cannot think this view correct. The services rendered by railway porters in receiving passengers' luggage, in taking it to the platform and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to perform. These services are covered by the fare which the passenger pays for his journey. They are offered in view

of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from or relates back to the commencement of the journey, and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely. The contract, no doubt, becomes modified as regards that part of the luggage which is put into the passenger's carriage. At the passenger's request, or at his instance, the company dispense with precautions which they think necessary for the safety of the goods they have undertaken to carry, and so the passenger relieves the company from some of the risks which otherwise would fall upon them. But for all that the contract is one contract, and in ordinary course, except so far as it may be modified by the acts or conduct of the passenger, it remains in force during the continuance of the journey from its commencement to its end. If the reasoning in *Berghem v. Great Eastern Ry. Co.*, 38 L. T. Rep. (N. S.) 160; 3 C. P. Div. 221, seems to lead to a different conclusion, with all deference I am unable to concur in it. I prefer the view expressed by Willes, J., in *Talley v. Great Western Ry. Co.*, L. R., 6 C. P. 44. Your Lordships are familiar with the evidence in the case, and I do not propose to repeat it. It is enough for the present to say that on the 24th of December, 1884, Mrs. Bunch went to Paddington with a Gladstone bag and some other luggage, meaning to travel with her husband by the 5 P. M. train to Bath; that on her arrival at the station the luggage was received by a porter in the employment of the company, and taken by him to the platform for the purpose of the journey, and that the Gladstone bag was last seen on the platform with the same porter a few minutes afterward. From that time all trace of the bag is lost. The porter and the bag vanish from the scene. It was suggested by the learned counsel for the appellants, by way of explanation, that the porter was possibly one of a number of men picked up by the company for the day to meet the pressure of Christmas traffic. But I may observe in passing, that so far as the public was concerned, there was apparently nothing to distinguish the casual helper, of whom little if any thing is known, from the regular and trusted servants of the company. On these bare facts standing alone it seems to me that there would be evidence upon which the County Court judge might reasonably find for the plaintiff, even if it were held that the company was not under the liability of common carrier as regards the lost bag. But then it was contended with much earnestness that it ought to have been inferred from the circumstances of the case and from Mrs. Bunch's conduct that at the time of the loss the bag was not in the custody of the company for the purpose of the journey. It was said that Mrs. Bunch came to the station too soon; that she came before the train was drawn up; that she broke the journey, if the journey is to be taken as having begun, and left the bag in the charge of a porter who was then not acting as the servant of the company within the scope of his authority as such, but acting as her agent in his individual capacity, and that if this is not what she meant, it was an attempt on her part to saddle the company with a liability which they were not bound to undertake. It seems to me that there is no substance in any of these ob-



jections. Mrs. Bunch, no doubt, came to the station somewhat early. But the one thing railway companies try to impress on the public is to come in good time; and considering the crowd likely to be attracted by cheap fares during the Christmas holidays, and the special bustle and throng on Christmas eve, it does not seem to me that Mrs. Bunch came so unreasonably early as to relieve the company who received the luggage from the ordinary obligations flowing from that receipt. It is impossible to define, within the extreme limits on both sides, the proper time for arrival; every thing must depend upon the circumstances of the particular case. But among those circumstances the least important, as it seems to me, is the time when the train is drawn up at the departure platform. That is, as everybody knows, a very variable time, and a matter over which the passenger has no control, and of which he can have no notice before he comes to the station. Then I think there is nothing in the conversation which took place between Mrs. Bunch and the porter. Mrs. Bunch's question was a very natural one. The answer she received was just what might have been expected. Nine women out of ten, parting with a travelling bag on which they set any store, would ask the same question, and in ninety-nine times out of a hundred the same answer would be returned. I do not think that this conversation altered the relation between the parties in the least degree. It seems almost absurd to me to treat it as a solemn negotiation by which the lady abdicated such rights as she possessed against the Great Western Railway Company, and constituted this ephemeral and evanescent porter in his individual capacity the sole custodian of her Gladstone bag. Nor can it, I think, be said that Mrs. Bunch broke the journey by leaving the platform to meet her husband and get her ticket. To take a ticket is a necessary incident of a railway journey. It is at least a very common incident in railway travelling for persons who intend to travel in company, whether they be members of the same family or not, to meet by appointment in the railway station from which they mean to start; and it is certainly not unusual in such a case for the purchase of tickets to be deferred until the meeting takes place. It may be that a passenger who has delivered his luggage to a porter at the entrance of the station, though the delivery is in proper time for the intended journey, is not entitled as of right, and under all circumstances, to consider the company responsible for the safe-keeping of his luggage before it is put into the train. A passenger knows that he is not the only person to be attended to, and it might not be unreasonable to hold that there is an implied agreement on his part that he will be ready to resume possession of his luggage if the exigencies of the traffic require that it should be handed back to him in the interval before the time comes to put it into the train. No such question however arises here. The lost bag was not left unguarded owing to the exigencies of traffic or neglected by the porter who took it in consequence of conflicting duties. But I desire to say, that for my part, I am not satisfied that a passenger's luggage which has been received by the company's servants and taken to the platform lies there at the risk of the passenger if he is not ready forthwith, or the moment he has got his ticket, to step into the train. It was said, that if everybody acted as Mrs. Bunch acted in this case, railway companies would require an army of porters, and that it would be almost impossible for them to carry on their business. I quite agree; but I am not much impressed by that observation. I apprehend, that if all travellers acted precisely alike—if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined—there

would be no little confusion and perhaps some consternation among the railway officials. Whatever may be the result of your Lordships' judgment, there is no fear that it will have the effect of making everybody act alike; some passengers will still give more trouble at the station than others, but no one will give any more trouble because of it. This will go on just as usual. The fidgety and the nervous will still come too soon; the unready and the unpunctual will still put off their chance of arrival till the last moment; and the prudent may have their calculations upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed. In the result therefore I am of opinion that the majority of the Court of Appeal were right in the view they took. The nature of the case requires that a broad view should be taken. The contract between the company and the passenger is not a contract in writing defining with mathematical accuracy the precise limits of the incidental services which the company are prepared to render, and punishing every transgression, every attempt on the part of the passenger to exact more than his just measure of attention, with the loss of that security which belongs to a contract by common carriers. Railway companies do their best to adapt the conduct of their business to the habits of the travelling public, who resent nothing so much as petty and vexatious restrictions and regulations; and so the contract becomes moulded in matters incidental to its main purpose by that which is and is known to be the ordinary and everyday practice of railway companies. A narrow, technical and jealous view of the rights of individual passengers might perhaps enable railway companies to escape liability in some few cases. I much doubt whether it would tend to their advantage in the long run.

Order appealed from affirmed and appeal dismissed with costs.

#### LANDLORD AND TENANT—RIGHTS AND LIABILITIES—ESTOPPEL TO DENY LANDLORD'S TITLE.

NEW YORK COURT OF APPEALS, FEB. 23, 1888.

TILYU V. REYNOLDS.

A tenant may not deny his landlord's title, although it appears upon the lease itself that the lessor has no valid title to a part of the term demised, and it is recited in the lease that he demised only such interest as he had in the premises.

APPEAL from General Term, City Court of Brooklyn.

George P. Avery, for appellant.

William Sullivan, for respondent.

DANFORTH, J. This action is for rent alleged to be due from the defendant, an under-lessee, to the plaintiff, whose title as landlord was derived from the town of Gravesend, through a lease executed to him by its commissioners of common lands. The original lease by its terms ended on the 1st of May, 1883, but on the 27th of January, 1879, the commissioners, by an indorsement under their hands and seals, extended the same for the term of ten years. The plaintiff, at the execution of the original lease, took possession of the whole of the demised premises, and continued in possession thereof until the 27th day of February, 1883, when by indenture of that date, executed by himself, and also by the defendant, he demised to the defendant a portion of the premises for the term of ten

years thereafter, at the annual rental of \$150, which the defendant agreed to pay the plaintiff each year in advance. He paid the first year's rent at the execution of the lease, went into possession of the premises, and has had peaceable and undisturbed possession ever since, without let or hindrance from any quarter. The rent claimed in this action is for the year beginning February 27, 1874. The lease from the plaintiff recited that it was "understood and agreed on the part of the party of the second part (defendant) that the party of the first part (plaintiff)" only demised and granted "such right, title and interest in and to the right of occupancy of said lands, and only for such term and time as the first part has under the lease executed to him by the commissioners of common lands, dated January 28, 1873, and the renewal of said lease, dated January 27, 1879."

The defendant by answer alleged that the plaintiff's leasehold, right and title to the premises ceased on the 1st day of May, 1883; that when he paid the first year's rent in advance he supposed the plaintiff's interest had been renewed, and had ten years to run from the said 1st of May, whereas the renewal, as the defendant alleges, was invalid, and he therefore not only denies his liability to pay the rent demanded, but asks an affirmative judgment requiring the plaintiff to repay to him so much of the rent as purported to accrue after the 1st of May, 1883, to the 27th of February, 1884. This claim is put upon the ground that the extension on the 27th of January, 1879, was void, because in excess of the powers of the commissioners, it was executed more than a year prior to the expiration of the then-existing lease. It was so held in *Tilgou v. Town of Gravesend*, 104 N. Y. 358.

The material question upon this appeal is whether this defect in the plaintiff's title is available as a defense to this action. It is obvious that the extent and nature of that title was exhibited to the defendant when he took upon himself the relation of tenant, and that he entered upon the premises, and has since enjoyed the use bargained for without interruption. Under these circumstances it would seem but just and reasonable, that having had the consideration of his promise, he should be precluded from refusing to perform it. By the terms of his own lease he had not only constructive, but direct, notice of the provisions of the plaintiff's lease, an opportunity to ascertain the powers of the commissioners who granted it, and neither concealment nor fraud is alleged against the plaintiff. It has been laid down as a rule that a purchaser must be wise in time; that a lessee is a purchaser within the rule and is equally bound to look into the facts connected with the subject of the lease, as a purchaser is to look into the matters connected with his purchase. *Cosser v. Collinge*, 3 Mylne & K. 283; *Besley v. Besley*, 9 Ch. Div. 109. Moreover he is within the general rule that a tenant may not dispute his landlord's title, for as it is said, he is estopped from changing by his own act the character and effect of the tenure. It is conceded by the learned counsel for the defendant that if the plaintiff had no interest in the premises when the lease was executed and delivered, and it had been silent as to the title of the lessor, the lessee would have been estopped from controverting his title, but the claim is that as the lessor had an interest in the premises under the original lease, although for a period of less than one year from the time of giving the lease to the defendant, and as the lease was not silent in relation thereto, a different result follows. In other words, the plaintiff is said to be in a worse condition than he would have been had he concealed the truth, and had no title at all. It would seem however that this circumstance takes away all equity from the defense, and that in view of the mutual understanding of the real interest

of the plaintiff as it existed at the time of the creation of the relation of landlord and tenant between the parties, the nature and extent of the plaintiff's legal estate is unimportant. The agreement was made with that in mind, and it is impossible to find any equity in favor of defendant's claim to enjoy, without compensation, premises which he obtained from the plaintiff as landlord upon a promise to pay rent as tenant.

There are cases in which the lessee is not estopped from denying his landlord's title, as in the case of eviction by superior title; but it is well settled, that if a party enters as lessee of another, and the right of the lessor is in no way altered, the lessee is estopped from denying that relation, or that the legal estate and reversion is in the lessor. The title he then acknowledges and accepts he must abide by while the relation lasts. The result is the same, although on the face of the lease it should appear that the landlord had no legal estate. If the parties agree that the relation of landlord and tenant shall be created, and this agreement is carried out by one being let into possession, then as between them the relation of landlord and tenant is created, and they are just as much estopped as if there had been no such statement. The foundation of the estoppel is the fact of the one obtaining possession and enjoying possession by the permission of the other. And so long as one has this enjoyment, he is prevented by this rule of law from turning round and saying his landlord has no right or title to keep him in possession. *Nellis v. Lathrop*, 22 Wend. 121; *Morton v. Woods*, L. R., 3 Q. B. 667; same case in Exch. Ch., L. R., 4 Q. B. 298.

In the case before us, the state of facts upon which the possession was given, and the agreement to pay rent was made, continues the same as when the lease was made, and nothing has occurred to change the relation of the parties. The fact therefore that the lease contains the truth as to the real title of the lessor should be no objection to the plaintiff's recovery, and so far as the cases cited by the defendant are to the contrary, they are inconsistent with later decisions, and the doctrine on which they rest was in fact overruled by *Jolly v. Arbuthnot*, 4 De Gex & J. 224, where the lord chancellor says: "It appears to me however that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel, to prevent their denying the right to do the acts which they have authorized to be done." So in *Morton v. Woods*, *supra*, when by writ of error that case was before the Exchequer Chamber, it is said: "It is the creation of the tenancy, or the estoppel which arises from the creation of the relation of landlord and tenant by agreement between the parties, that makes the actual legal estate unnecessary to support the distress (for rent), and not the consent of the third party in whom the legal estate is."

In the case before us the plaintiff's title rested upon the lease and its extension. It did not rest upon either standing alone, but the demise to the defendant was upon both. They were not more valid when the defendant took his lease than when he refused to pay rent. Nothing had occurred to weaken or impair either. By accepting the lease he recognized the title as it then existed, in substance agreed to accept it as a good title, and a good foundation for the term bargained for; and he cannot now convert one part more than the other. His defense is not that he has been evicted or disturbed in the possession, nor that any one but the plaintiff claims title to the demised premises during the term, but simply that one branch or strand of the plaintiff's title has dropped off. The recital in his own lease showed that it would do so dur-

ing the first year of his term. He now says, not that any thing has occurred to defeat or change its character or impair its validity, but simply that it never was valid. In other words, that his landlord's title was good as to part of the term and bad as to another part of the term. In effect the plaintiff said: "I have this lease and its extension; here they are. I will let you a portion of the term described in them." The defendant accepted, agreed to pay the rent, and was put into possession. He was put in under one as much as the other. He now refuses to pay rent, saying to his landlord, "Your title is not good." To allow such a defense to prevail would create an anomaly not called for by any precedent or rule of law or justice.

The case referred to by the court below, and again cited by the respondent, is *Lamson v. Clarkson*, 113 Mass. 348. In that case the landlord's estate in the premises was for the life of one Laney. He died during the term, and the court held that the landlord could not recover for subsequently accruing rent. There the event on which the plaintiff's entire title depended occurred after the defendant took possession, and by setting it up he denied nothing which he had once admitted. He simply showed that the title under which he entered had expired. It also appeared that the reversioner had given him notice to pay rent to his landlord. In the case before us it is quite different. The defendant, when he took possession, admitted the plaintiff's title to be good—the whole title; the title for the extended term. Now he proposes, and has been allowed, "to pick a hole" in that branch of it. This he cannot do, since it remains as it was at the time the tenancy commenced. By signing and sealing the deed, he accepted as good the landlord's title, not in part only, but as a whole, actually paying rent for a period beyond the expiration of the original lease of his landlord, and he cannot be heard to deny that the term bargained for passed to him by the lease. The rule which precludes him from contesting it has been long settled. It is founded in good policy, and in public convenience. *Vernam v. Smith*, 15 N. Y. 829. There is nothing in this case to make its application inequitable. The defendant has enjoyed what he bargained for, and there is no suggestion even that any other party makes any claim for that use. If there were any one he might have avoided the danger of being compelled to make a double payment, by causing the parties to interplead. *Vernam v. Smith*, *supra*. He did not do so.

The case of *Balls v. Westwood*, 2 Camp. 11, decided in 1800, lays down the rule applicable here. In that case it was found that the defendant entered upon the premises in question (a copyhold tenement) under the plaintiff, to whom he had paid rent till within the then last two years, and that he still continued in possession. The defense was that about two years before the copyhold tenement had been seized as freehold into the hands of the lord of the manor, and moreover that the defendant had since paid rent to him. Lord Ellenborough asked: "Did you by any formal act renounce the plaintiff's title? Did you divest yourself of the possession you obtained under the plaintiff, and commence a fresh holding under another person?" The counsel for the defendant answered, that such a form had been thought unnecessary, and contended that as the defendant did not dispute the plaintiff's original title to the premises, he was at liberty to show that that title no longer existed. The court replied: "You may as well attempt to remove a mountain. You cannot controvert the continuance of the title under whose demise you continue to hold. \* \* \* Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now inquire into the validity

of the seizure, and consider who is legally entitled to the premises; but the same tenancy continues which was created by the original demise, and the tenant must still pay rent to the lessor, whose title he then recognized." This case is cited with approval by *Savage, C. J.*, in *Eversten v. Sawyer*, 2 Wend. 507, and there the defendant succeeded because he brought himself within its rule. He had disclaimed the title under which he entered, and had taken a new lease. The defendant's case is not so strong as was that of the defendant in the original case cited; there has been no eviction, no disclaimer, no acquiescence in another title, no claim by any other person that a superior title was to be enforced or insisted upon, or even that one existed. The defendant alone asserts it. He has, and has at all times had, all that the lease offered, and upon the offer of which he accepted the benefit of its provisions. He cannot, under the circumstances in evidence, repudiate the contract, nor has he a right to raise an issue upon the plaintiff's title. To that effect are the cases already cited, and also *Ingraham v. Baldwin*, 9 N. Y. 45; *Woodruff's case*, 93 id. 609; *Prevot v. Lawrence*, 31 id. 222. Those cited by respondent require no other conclusion. Judgment was improperly given in his favor. It should be reversed, and a new trial granted, with costs to abide the event.

All concur.

#### NEW YORK COURT OF APPEALS ABSTRACT.

ANIMALS—INJURIES BY VICIOUS DOG—EVIDENCE—OFFER OF COMPROMISE.—(1) In an action to recover damages for injuries resulting from being bitten by a dog, the evidence was that plaintiff was bitten by a dog, which was then killed; that after its death it was identified by several persons, who swore that they believed it to be defendant's dog; that the dog had also bitten defendant's servant and the latter's wife; the defendant testified that he had a lot of dogs which were kept chained all the time; that he did not attend to them personally, and had not heard that any of them had been killed or his servant bitten; but none of his servants were called as witnesses. *Held*, that the evidence tended to establish that the dog belonged to defendant and that it was of ferocious disposition, which being known to defendant's servant, was known to defendant. In *Baldwin v. Casella*, L. R. 7 Exch. 325, it is said: "All dogs may be mischievous, and therefore a man who keeps a dog is bound either to have it under his own observation and inspection, or if not to appoint some one under whose observation and inspection it may be, and that person's knowledge is the knowledge of the owner." In the case before us, Robinson was one of the servants to whose care the dog was intrusted, and Robinson was himself bitten by him before the plaintiff suffered. It is not material that the fact was not communicated to the master. Again, if the dog was the defendant's dog, the very purpose for which the defendant kept him charges him with knowledge of his character, and he is therefore chargeable with negligently keeping him, although it did not appear that he had actually bitten another person before he bit the plaintiff. *Worth v. Gilling*, L. R., 2 C. P. 1. In that case the court say: "The defendants admitted that the dog was purchased for the protection of their premises. Unless of a fierce nature, he would hardly have been useful for that purpose." In *Buckley v. Leonard*, 4 Denio, 500, an action for damages for injuries inflicted by a dog, it appeared among other things "that for the most part the defendant had kept his dog chained up in the day-time, and in his store nights," and the defendant, having had a ver-

dict, it was reversed, the court saying, aside from proof that the defendant had notice of the dog's disposition: "The fact that he usually in the day-time kept him confined, and in the night kept him in his store, is strong evidence that he was fully aware that the safety of his neighbors would be endangered by allowing him to go at large." The case of the defendant therefore is that of one who has in his possession and under his control an animal, dangerous, unless reasonable precautions are taken to prevent injury to third persons. In such case it is obvious the injury must have occurred by his neglect, and for the consequences he should be held responsible. *Muller v. McKesson*, 73 N. Y. 185. (2) A conversation was sought by defendant with plaintiff, and after a talk about the injuries received by plaintiff from defendant's dog, an offer to pay plaintiff a certain amount was made, and declined as not sufficient in amount. There was no statement that the conversation was to be confidential nor that the offer was made for the sake of peace. *Held*, that such conversation was admissible in an action for damages resulting from such injuries, to show defendant's liability. In such a case even the offer of a sum by way of compromise is held to be admissible unless stated to be confidential or made without prejudice. *Wallace v. Small*, 1 *Moody & M.* 446; *Thompson v. Austen*, 2 *Dowl. & R.* 358. Feb. 28, 1888. *Brice v. Bauer*. Opinion by Danforth, J.

**CONTRACT—ACTION ON—REFERENCE—FINDINGS OF REFEREE.**—Where a complaint alleged as a cause of action the performance of work and labor in preparing plans by an architect for the defendant, at his request, and an agreement to pay for them what they were reasonably worth, and the defendant answered that the work was done for the defendant and others, who were about to form a club to build an apartment house, under an agreement that other architects were also to present plans; that if the club was formed, and the building erected, the plans accepted would be paid for by the club; but if the club was not formed, or the plans not accepted, they were not to be paid for; findings by a referee that it was part of the contract between the plaintiff and defendant that the building should be built by the defendant or a club to be formed by him; that if plaintiff's plans were not adopted, either by such club if formed, or by defendant, if such club were not formed, plaintiff should receive no pay for his services; but if said plans were adopted by said club or by defendant, plaintiff should be paid for such services what they were reasonably worth; that defendant adopted such plans in case the club was not formed, and that the club never was formed and the plans never used—do not support the allegations of the complaint, and on defendant's exceptions to such findings a new trial should have been granted. Feb. 28, 1888. *Romeyn v. Sickles*. Opinion by Ruger, C. J.

**FACTORS—ASSIGNMENT OF CLAIMS DUE CONSIGNOR.** Consignees, under advances, assigned to plaintiff before its maturity defendant's open account with them for goods purchased at a time when the consignor was not in default and had not been called upon to repay them for advances. *Held*, that the plaintiff acquired no title to the account as against the consignor. As factors, Vanuxem, Wharton & Co. had no title to the consigned goods. The consignor, upon a consignment of goods to be sold on commission, does not part with his title by the consignment, but he continues to be the true owner of the consigned property until sold by the consignee, and the rule is the same whether the consignee is a *del credere* factor or is under advances for the principal, or is simply an agent for sale, assuming no responsibility except that usually appertaining to the position of an agent. *Baker v. Bank*, 100 N. Y.

31; *Mellish, L. J., Ex parte White*, 6 Ch. App. 408. But a factor under advances for his principal, or who guarantees the sale, has a lien on the goods and their proceeds for his advances, and an interest in the debts arising upon sales to protect his guaranty. He is entitled to retain possession of the goods and their proceeds to protect his lien, and to collect and sue the debts in his own name—rights of which the principal cannot deprive him except by reimbursing the advances, or in case of a *del credere* factor, by relieving him from his guaranty. *Hudson v. Granger*, 5 Barn. & Ald. 27; *Story Ag.*, §§ 398, 407, 408, 424. But such factors are nevertheless agents, and cannot deal with the property or proceeds as their own. They cannot pledge the goods for their own debt (*Buckley v. Packard*, 20 Johns. 421), and an unauthorized pledge by a factor did not at common law transfer any right as against the principal, even to the extent of his lien. *McComble v. Davies*, 7 East, 5; *Graham v. Dyster*, 6 M. & S. 1; *Leake Cont.* 515. A factor, although under advances to his principal, is bound nevertheless to obey the principal's instructions, and cannot dispose of the goods in violation thereof, even to repay advances, until at least he has called upon the principal for reimbursement. *Marfield v. Goodhue*, 8 N. Y. 62; *Hilton v. Vanderbilt*, 82 *Id.* 591. The precise question in the present case is whether a factor, having advanced generally on the goods in his hands, can, in the absence of special authority, sell out and out a debt existing in open account, arising on a sale of a portion of the consigned goods, so as to transfer a good title to the claim, and this too before the maturity of the debt, and when the principal is not in default and has not been called upon to repay the advances, and there are no special circumstances. The question depends, we think, upon the general doctrine of agency. The agent is invested with such authority as his commission confers, and as to third persons, such as he is held out as possessing; and in construing his authority, the custom or usage of the business is frequently a mutual consideration. The transaction between Vanuxem, Wharton & Co. and the bank was not a sale of goods or a collection of a debt. By the general rule a factor cannot bind the principal by a disposition of his property out of the ordinary course of business. *Easton v. Clark*, 35 N. Y. 225. We have been referred to no authority holding that a factor possesses the authority exercised by Vanuxem, Wharton & Co. in the case in question. Such a construction of his power would be inconvenient, and might lead to great abuses. It would enable the factor to put his principal's property out of his hands before any default on the part of the principal, thereby depriving the latter of the right to the possession of his property on discharging the factor's claims. Assuming that the transferee would himself be held to account, it subjects the principal to the embarrassment of calling third parties into the settlement of his transactions with his agent. The transaction in this case was out of the ordinary course of business, and has all the earmarks of an irregular transaction. It was not an assignment to the bank of the factor's lien, accompanied with a delivery of the property of the principal, to keep possession for the factor in order to preserve the lien. *Urquhart v. McIver*, 4 Johns. 103. We think it would be unwise to extend the factor's authority to embrace this transaction, and that the bank acquired no title to the claim. Feb. 28, 1888. *Commercial National Bank of Pennsylvania v. Heilbronner*. Opinion by Andrews, J.

**MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE.**—(1) In an action against a municipal corporation it appeared that earth had been thrown upon defendant's side-

walk by an adjoining owner building a trench, and post-holes for a fence. The street was muddy, and in attempting to pass over the obstruction plaintiff fell and was injured. *Held*, that she was not guilty of culpable imprudence as a matter of law. *Pomfrey v. Village, 104 N. Y. 459.* (2) Defendant's superintendent of streets was present and saw the dirt thrown upon the sidewalk and made no objection. There was evidence tending to show that it had been thrown there upon Friday and Saturday before the accident, which occurred on Sunday. There was no proof of a necessity of the deposit. *Held*, that the deposit must be presumed wrongful, and that the question of the sufficiency of time for removal was for the jury. Feb. 10, 1888. *Shook v. City of Cohoes.* Opinion by Earl, J.

— POLICE DEPARTMENT — POWERS OF POLICE BOARD — SPECIAL GRADES OF PATROLMEN. — Under the Laws of New York, 1870, chapter 77 (as amended, Laws of 1873, chapter 496), which vest the powers and duties of the government of the police of the city of Albany in a board of police commissioners, and provide that said board shall establish rules for defining the powers of the different ranks of said force, and shall prescribe the manner of appointing and removing members of the force, and the method of discipline, and that no one shall be dismissed without written charges being preferred and due notice and trial; and Laws of 1886, chapter 443, which provide that each patrolman shall receive an annual salary not exceeding \$900—the police commissioners have no power to establish a veteran grade of patrolmen, and place therein men who have been on the force ten years or more at a reduced salary, as Laws of 1885, chapter 298, which provide that the force shall consist of one chief, seven captains, twelve sergeants and one hundred and fifteen patrolmen, does not establish such a rank. It seems to us that the authority as to patrolmen which is granted to the board by the statute is one by which the board can define or enumerate generally the powers and duties of the patrolmen as a class, and adopt rules and regulations as to their discipline, but that under an assumed exercise of such powers, the board cannot in effect establish a separate and distinct grade of patrolmen not recognized by the statute, and formed only by the vote of a majority of the board and attach a lower salary to such office than is given to a patrolman who is not placed in such separate grade. We do not mean to question the power of the board to adopt such rules and regulations defining the duties of the members of the force or providing for their discipline, as in the judgment of the board shall be deemed proper; nor the right to detail any patrolman or set of patrolmen to any special or general work or duty coming within the fair range of police duty. This right is essential, and is fully given by the above statutes. But the right to discriminate as to the amount of the salary to be given to the patrolmen, as between themselves, we do not think is granted by the statute, even though the board should first establish this veteran grade, into which a patrolman may be put against his will and in spite of his remonstrance. By this resolution any patrolman, after ten years' service, in good health, perfectly capable of discharging the duties of the office, whose behavior has been excellent, and against whom no charges are made, may yet by a majority vote of the board be placed in the veteran grade and his salary reduced one-third, and then assigned (as relator says he was) to precisely the same duties he discharged before he was placed in such grade. We think this cannot be justly said to be the exercise either of the power to regulate and define the duties of patrolmen or of the simple power to fix their salaries. If so, I do not see why the defendants would

not have power to fix a different sum for each patrolman as in their judgment they should think proper, not exceeding the maximum sum, without going through the form of establishing a separate grade, into which they could place any patrolman against his will. It seems to me it is the discrimination which is unlawful, and it is not made any the less so by the establishment of a grade the duties whereof may be precisely the same as the regular patrolman. Feb. 23, 1888. *People ex rel. Waldorf v. Police Commissioners.* Opinion by Peckham, J.

PLEADING—DEMURRER—MISJOINDER OF ACTIONS—SLANDER OF TITLE—TRESPASS—JURISDICTION—LANDS OUTSIDE OF STATE.—(1) In New York it is no cause for demurrer on the ground of improper joinder of causes of action, that a transitory action, of which the court has jurisdiction, is joined with one for trespass on lands in another State, of which the court has no jurisdiction. (2) Upon demurrer to a complaint in an action for slander to title, which contains an allegation that the defendant falsely and maliciously stated that plaintiff's title had been examined by four lawyers and pronounced to be bad, the court cannot refer to the statement as showing that it was made in good faith, the demurrer admitting that it was false and malicious. (3) The courts of New York have no jurisdiction over an action for trespass committed on lands in the State of Georgia. Feb. 23, 1888. *Dodge v. Colby.* Opinion by Ruger, C. J.

#### UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—INTOXICATING LIQUORS.—The Code of Iowa, § 1553, as amended by the Laws of Iowa of 1886, chap. 66, § 10, forbidding any common carrier to bring within the State of Iowa, for any person or persons or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate under the seal of the county auditor of the county to which such liquor is to be transported, or is consigned for transportation, certifying that the consignee, or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell intoxicating liquors in such county, is void, being in conflict with the provisions of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. March 19, 1888. *Bouman v. Chicago & N. W. Ry. Co.* Opinion by Matthews, J. Waite, C. J., and Harlan and Gray, J., dissenting.

— REGULATION OF COMMERCE—LICENSING FOREIGN CORPORATIONS.—The act of Pennsylvania of June 7, 1879, prohibiting foreign corporations, except insurance companies, which do not invest or use their capital in that State, from keeping an office in that State for the use of its officers, stockholders, agents, employees, unless it shall have first obtained a license therefor by paying one mill on each dollar of its authorized capital stock, is not in violation of the Federal Constitution, vesting in Congress power to regulate commerce among the States, there being no attempt to prohibit the transportation or sale of the corporation's products in the State. (1) It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders,

agents, or employees. The tax is not for their office, but for the office of the corporation; and the use to which it is put is presumably for the latter's business and interest. For no other purpose can it be supposed that the office would be hired by the corporation. The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot—with some exceptions to which we shall presently refer—do business in another State, without the latter's consent, express or implied. *Paul v. Virginia*, 8 Wall. 168. A qualification of this doctrine was expressed in *Telegraph Co. v. Telegraph Co.*, 96 U. S. 12, so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress. And undoubtedly a corporation of one State, employed in the business of the general government, may do such business in other States without obtaining a license from them. Thus to take an illustration from the opinion of Mr. Justice Bradley in a case recently decided by him, "if Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union," and we may add, without the permission and against the prohibition of the State. *Stockton v. Railroad Co.*, 32 Fed. Rep. 9, 14. These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or inter-State commerce, or not employed by the government. As to these corporations the doctrine of *Paul v. Virginia* applies. The Colorado corporation does not come within any of the exceptions. Therefore the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents and employees, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State. *Bank v. Earle*, 13 Pet. 519; *Insurance Co. v. French*, 18 How. 404; *Ducat v. Chicago*, 10 Wall. 410; *St. Clair v. Cox*, 106 U. S. 350. (2) Nor does the clause of the Constitution declaring that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul v. Virginia*. In that case it appeared that a statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose, and that no license should be received by the corporation until it had deposited with the treasurer of the State bonds of a designated character and amount, the latter varying according to the extent of the capital employed. No such deposit was required of insurance companies incorporated by the State for carrying on their business within her limits. A subsequent statute of Virginia made it a penal offense for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an agent for a New York insurance company, without a license, was indicted and convicted in a Circuit Court in Virginia, and sentenced to pay a fine of \$50. On error to the Court of Appeals of the State the judgment was af-

firmed, and to review that judgment the case was brought to this court. Here it was contended, as in the present case, that the statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But the court answered that corporations are not citizens within the meaning of the clause; that the term "citizens" as used in the clause applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the Legislature, and possessing only such attributes as the Legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the clause in question are those privileges and immunities which are common to the citizens in the latter States, under their Constitution and laws, by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporators, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent. In the subsequent case of *Ducat v. Chicago*, 10 Wall. 410, the court followed this decision, and observed that the power of the State to discriminate between her own domestic corporations and those of other States desirous of transacting business within her jurisdiction, was clearly established by it and the previous case of *Angusta v. Earle*, 13 Pet. 519, and added that "as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." *Fire Ass'n v. New York*, 119 U. S. 110, 120. (3) The application of the fourteenth amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of "person" there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall: "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." *Bank v. Billings*, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the



office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had any thing within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction of such corporations of inter-State or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction, or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may therefore require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the fourteenth amendment. As to the meaning and extent of that section of the amendment, see *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, id. 708; *Missouri v. Lewis*, 101 id. 22, 30; *Railway Co. v. Humes*, 115 id. 512; *Yick Wo v. Hopkins*, 118 id. 356; *Hayes v. Missouri*, 120 id. 68. The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, inter-State or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority. March 19, 1888. *Pembina Consolidated Silver Mining & Milling Co. v. Commonwealth of Pennsylvania*. Opinion by Field, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**NUISANCE—PUBLIC PICNICS AND DANCES—ORDINANCE TO RESTRAIN.**—Public picnics and public dances are not, in their nature, nuisances; and a village ordinance, in so far as it seeks to declare them to be nuisances, regardless of their character, is void. They are not in the list of common-law nuisances enumerated in the text-books. See 4 Bl. Com. (Sharswood's ed.) 168, \*167 *et seq.*; 1 Hawk. P. C. (Curwen's ed.) 694; Wood Nuis., p. 35, § 23 *et seq.* Now is there any thing necessarily harmful in the nature of either, more than in that of any other public amusement? When conducted with proper decorum and circumspection, and remote from public thoroughfares, it is impossible to conceive how any public injury or annoyance can result. That the manner of conducting them may be productive of annoyance and injury to the public, is not to be questioned; but since the nuisance must consist in this, and not in the picnic or dance, of itself alone, the ordinance should be directed only to it. While the rights of the people to be free from disturbance and reasonable apprehension of danger to person and property is to be respected and jealously guarded, the equal rights of all to assemble together for health, recreation or amusement, in the open air, is no less to be respected and jealously guarded. That a privilege may be abused is no reason it shall be denied. Sup. Ct. Ill, Jan. 19,

1888. *Village of Des Plaines v. Porter*. Opinion by Scholfeld, J.

**OFFICER—ACTION AGAINST CLERK FOR WRONGFUL ISSUE OF WRIT—DAMAGES.**—An action for damages does not lie against a circuit clerk wrongfully issuing a writ of *venditioni exponas* commanding the sheriff to sell certain lands in the possession of the plaintiff, on which an execution against another person has been levied—the wrongful levy and sale not affecting his right, title or possession; and the costs, expenses and attorney's fees incurred in defending a suit brought against him by the purchaser, alleged as special damages, not being the natural and proximate cause of consequence of issuing the writ. When an individual suffers damages by any act of negligence or misconduct of a public officer in respect to any ministerial duty annexed to his office, he is answerable to such individual in a civil action; but in such case a wrong committed by the officer, and resulting damage to the party complaining, must concur to give title to a remedy. *Bollinger v. Glenn*, 80 Ala. 190. While actual or specific damage is not indispensable, the party complaining, however amiss may be the act, must have suffered injury, either actual or implied or presumed from an invasion of his rights or from a breach of duty owing to him. In respect to the judgment or process thereon, the clerk owed no official duty to the plaintiff, and no damages resulted to her such as the law implies from the wrongful issue of the writ. The act of the clerk, though illegal and unauthorized, did not confer on plaintiff any legal claim—any right of action—against him, unless on the facts averred she sustained special damages, which are recoverable. *Dehn v. Heckman*, 12 Ohio St. 181; *Ware v. Brown*, 2 Bond, 267; *Harrington v. Ward*, 9 Mass. 251. The only title or right to the lands shown by the averments of the complaint is such as the law implies from plaintiff's possession at the time the writ was issued and the lands were sold. The levy of an execution on the lands, unlike a levy and seizure of personal property, confers no right or title on the sheriff, and such levy does not constitute him a trespasser, though the lands may not belong to the defendant in execution, and may be in the possession of a third person. The issue of the *venditioni exponas*, and the sale thereunder did not operate to impair or affect the title or right of the plaintiff, nor to injure or disturb her possession. The utmost that can be said is that the purchaser is thereby armed with the power to bring suit. The damages claimed are not the natural and proximate consequences of issuing the writ, but of the institution of the suit. However groundless may be the claim, no action lies at the suit of the defendant to recover costs and expenses incurred in the defense of an action in any of the ordinary forms—for a mere wrongful resort to legal process. To constitute the misuse or abuse of legal process in the common-law or ordinary remedies actionable, malice and want of probable cause must conjoin. *Tucker v. Adams*, 52 Ala. 254; *Bolling v. Tate*, 66 id. 417. Though the *venditioni exponas* was a nullity, and the purchaser acquired no title by the sale, the plaintiff could not maintain an action against him to recover the costs and expenses paid by her in defense of the suit to recover possession of the lands. The bringing the suit was the act of the purchaser, the intervention of another cause, by which the plaintiff cannot pass and maintain an action against the clerk to recover damages for which the immediate actor is not suable. Though the illegal and unauthorized act of the clerk may have furnished the occasion, it was not the efficient and dominant cause which put the intervening and immediate cause in operation. The issue of the *venditioni exponas* is, as to the plaintiff, dam-



*num absque injuria.* Sup. Ct. Ala., Dec. 21, 1887. *Eslava v. Jones.* Opinion by Clopton, J.

**SHIP AND SHIPPING—GENERAL AVERAGE—PASSENGER'S BAGGAGE—RIGHT TO BE CONTRIBUTED FOR.**—Passenger's baggage in daily use does not contribute in general average. Baggage stored in the ship's compartments and not in use does contribute. As respects the obligation of passengers' baggage to contribute in general average, no adjudication in this country or in England has been cited by counsel; nor have I been able to find any. In Abbott on Shipping, 508, it is said: "Neither in this country do the wearing apparel, jewels or other things belonging to the persons of passengers or crew and taken on board for their private use contribute." Kent in his Commentaries (vol. 3, §241) repeats this as the law of England. It would seem to rest upon the practice of average adjusters, which as just seen does not determine the law. *Whitecross v. Savill*, *supra*. 1 Pars. Shipp. & Adm. 322, 323, and note, refers to the practice but sees no reason for it on principle. The question has been much discussed by many of the continental authors. Most of the ancient authorities are cited by Emerigon, Tr. des Assur., vol. 1, pp. 642, 646. From the extracts last quoted it is evident that the passage cited by counsel from Kent's Commentaries (vol. 3, p. §241), in which it is said that Boulay-Paty thinks that passenger's baggage "ought to be exempted, and that the existing French usage is proper," is quite erroneous and misleading, except as regards the comparatively unimportant item of clothes in daily use or necessary changes during the voyage; and that as regards trunks put like these in a baggage compartment for transportation and not for use during the voyage, the high authority of Boulay-Paty, Valin, Pothier and Emerigon is strongly to the contrary. Phillips concludes that "no reason has been given why passenger's baggage should not contribute as a part of the contributory interest; and Parsons says the same. 2 Phil. Ins. 153; 2 Pars. Shipp. & Adm. 322. Desjardins, a member of the French Court of Cassation, in his treatise (1886) on Maritime and Commercial Law (vol. 4, p. 472,) concludes that "what the passenger wears upon his person should be exempted, like the clothes of seamen, on the ground that the general average loss, while it may have saved the ship and the cargo, does not determine necessarily the preservation of the persons on board;" "nor consequently of what is accessory thereto." Beyond this he "does not hesitate to hold that the trunks of passengers should contribute." By the express provisions however of the great majority of the recent Maritime Codes the baggage of passengers does not contribute; but if sacrificed, it nevertheless must be paid for in general average. Considering then the undoubted universal rule to pay for baggage sacrificed, and the quite general exception of such articles from assessment, it is necessarily to be inferred that this exemption is based upon grounds that do not affect the justice and the equity of compensation for such articles when sacrificed for the rest, though they may not be called on to contribute when saved. The reasons for this exemption in the case of passengers' baggage I have not found stated any further than its insignificance, as Loundes suggests, and the reason above indicated, viz., that what is upon the person is not subject to the same risk that attends the cargo and may be saved with the person though the cargo be lost; but that suggestion would apply only to what is strictly attached to the person, not to trunks in the baggage compartment. But aside from that, when we consider how great annoyance and inconvenience to passengers would attend the long detention of their trunks and clothing until a general average adjustment could be had or an average bond be given; the practical impossibility of

either where passengers with their baggage are taken on and off at intermediate ports in the course of the voyage; the difficulties attending the valuations to be put upon such articles in average adjustments and in the collections thereon; the inquisitorial and offensive nature of such examinations; the small value of many of such packages, such as those of steerage passengers; the insignificant sums to be derived from most of the trunks and boxes, often perhaps less than the cost of adjustment; and the difficulty of making any distinction in the mode of dealing with the baggage of the different classes of passengers and the natural desire to accommodate travellers in the rivalries of competing lines—in all these considerations there seem to be practical reasons enough without reference to the legal right to have led, first to the omission in practice of any assessment on passengers' baggage, and next to the adoption of that practice in many of the recent codes. Whether this be the true account of the matter or not, in the light of the above authorities, and the general usage of maritime nations, it is clear that the absence of reciprocity in the right to compensation and the obligation to contribute is not sufficient to exclude passengers' baggage from compensation. The same authorities show, as it seems to me, that by the general maritime law, aside from the provisions of recent codes, the only baggage exempt is apparel and such other articles as the passengers wear, with the usual changes for the voyage and such as they actually take with them for use, which in that sense are attached to their persons; not trunks delivered into the exclusive charge of the ship, and which are neither in use nor in the passengers' possession during the voyage. The modern codes above cited differ as to the extent to which this exemption is allowed. Where as in this country there is no statutory provision on the subject, and no adjudication, the omission of the baggage from assessment, beyond that actually in possession of the passenger and in use on the voyage, must be regarded as a favor or courtesy to passengers, or as being a waiver for practical reasons rather than a strict legal right to exemption under the general maritime law; unless indeed the practice not to detain and hold baggage for a general average adjustment were proved to have been so long settled and acted upon as to form one of the implied terms and conditions upon which passengers embark. Though such a practice, if established and well understood, might possibly entitle the passenger, in cases of a general average loss, to a delivery of his baggage without detention, it would not relieve him from the obligation to contribute by a *pro rata* deduction, according to the usual rule in general average upon the amount allowed to him for his particular loss, when the passenger himself is seeking compensation; because in that situation none of the practical reasons for omitting passengers' baggage from assessment are applicable. Upon this point I follow the principles universally affirmed, and the united authority of the French authors above cited; and as none of these trunks was in daily use, or "attached to the person," I shall hold them bound to contribute, when the owners are seeking compensation, as in this case, by a *pro rata* deduction according to the general average charge. Dist. Ct., S. D. N. Y., Nov. 30, 1887. *Heye v. North German Lloyd.* Opinion by Brown, J.

#### CORRESPONDENCE.

##### NEGOTIABLE INSTRUMENT—FAILURE OF CONSIDERATION.

*Editor of the Albany Law Journal:*

D. executed his bond or promissory note under seal to W. & S. for the sum of \$500 due one day, the ex-

pressed consideration of the note or bond being retainer fee to W. & S. as his attorneys (D.'s) on a charge of homicide.

D. was imprisoned at the time of the execution of the note under the charge of murder, having been committed by a magistrate. In a short time after he was so imprisoned, and before he was indicted, and before W. & S. had any opportunity to do or before they did do any legal services for D., he was taken out by a mob and hung. W. & S. sued D.'s administrator for the \$500 on the bond. We are for defendant. The authorities seem to conflict. Can W. & S. recover? Give us some cases if you have any in point. The case is in our Supreme Court.

Truly,

C. DANIEL.

CENTRE, Ala., April 14, 1888.

### NEW BOOKS AND NEW EDITIONS.

#### HOTCHKISS ON BANKS AND BANKING.

*Banks and Banking, 1171-1888*—an historical sketch based upon official records, together with a few episodes connected with the subject which have come under the observation of the writer during an experience of twenty-five years as a banker and merchant in the city of New York. By Philo Pratt Hotchkiss. G. P. Putnam's Sons, New York. Pamphlet. 51 pp.

This is a gossiping and pleasant sketch, containing a good deal of useful information conveyed in a readable manner. The writer evidently believes in the credit system, for he carelessly credits "Truth crushed to earth" and "Lives of great men" to their respective authors. An amusing anecdote, new to us, is told under the head of "barter," of a famous *prima donna*, who gave a concert in the Society Islands for a third part of the receipts, and this consisted in "three pigs, twenty-three turkeys, forty-four chickens, five hundred cocoa-nuts, besides considerable quantities of bananas, lemons and oranges." There is a good steel engraving of Alexander Hamilton fronting the title-page, and the author's business advertisement may be found at the end. Price 75 cents.

#### HAMILTON'S MEDICAL JURISPRUDENCE AND SPITZKA ON INSANITY.

*A Manual of Jurisprudence*, with special reference to diseases and injuries of the nervous system. By Allan McLane Hamilton, M. D. With illustrations. E. B. Treat, New York, 1888. 12 mo. Pp. 390.

*Insanity*, its classification, diagnosis and treatment. A manual for students and practitioners of medicine. By E. C. Spitzka, M. D. E. B. Treat, New York, 1888. 12 mo. Pp. 423.

These are exceedingly interesting and convenient manuals, and are important to lawyers as presenting the views of two celebrated experts and alienists. Both of the writers adopt the modern medical idea of the proper rule of responsibility of the insane to the criminal law. Dr. Hamilton gives concise statements of the celebrated recent cases where insanity has been pleaded as a defense for crime. Dr. Spitzka's book is a second edition. It is interesting to observe how these contemporaneous works, while substantially agreeing in theory, differ in style, illustrations and general treatment, each being excellent in its way and both being equally readable. They are not luxuriously

printed, but are offered at the low price of \$2.75 each.

### ELEVENTH ANNUAL REPORT OF THE STATE BAR ASSOCIATION.

The demand for the Eleventh Annual Report of the New York State Bar Association has been so great that a second edition has been published.

Members desiring additional copies will promptly receive them by notifying the Secretary.

CAPITOL, ALBANY, April 28, 1888.

### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, April 24, 1888:

Order of General Term reversing judgment of court below affirmed, and judgment absolute ordered against plaintiffs—Hester J. Todd and another v. Isaac Nelson.—Judgment affirmed with costs—Jane Kellogg v. Jacob Stout and another.—Judgment of General Term affirmed—John T. Williams and another v. George M. Whedon.—Both appeals dismissed with costs of each appeal—Farmers' Loan and Trust Company, as trustees, v. Bankers and Merchants' Telegraph Company and others (two cases).—Judgment of General Term reversing and that of Special Term affirmed, but with leave to defendants, upon payment of costs of demurrer, to plead anew or amend within twenty days after a notice of this judgment—Walter L. Thompson, receiver, v. Edward Norton, appellant, and others.—Judgment affirmed—People v. George W. Willson, the Medina wife murderer.—Judgment affirmed with costs—Helen Carlson v. Oceanic Steam Navigation Company.—Judgment affirmed with costs—Agnes King v. George H. Van Vleck.—Judgment affirmed with costs—Andreas Graff and others, respondents, v. Mary Cunningham, impleaded, etc., appellant, v. Samuel Self, impleaded, respondent.—Order of General Term reversing judgment of Special Term and granting new trial reversed, and judgment of Special Term affirmed with costs in both courts—John Renners and another v. John N. Young.—Appeal dismissed with costs—Delaware, Lackawanna & Western Railroad Company v. John M. Buckard and others.—Order affirmed and judgment absolute ordered against plaintiff with costs—Anson C. Kennebec v. John Parmelee.

### NOTES.

"I cannot tell a lie" (Washington).—The editor of that excellent periodical, the ALBANY LAW JOURNAL, thus soliloquizes: "We seldom read our journal—after reading the proofs. But casually taking up the last number and glancing over its contents, it struck us as a remarkably interesting number—no vanity, now, for it is not our fault—but it seemed to us to chronicle and comment on an unusually large number of novel and striking cases, to say nothing of the current topics, for which we are too modest to take any credit." We are glad we came across this precedent. A similar thought struck us as we casually glanced at the last number of our journal. But for the simple candid boldness of our contemporary, our view of ourselves would have perished with us.—*Canada Law Journal*.

# The Albany Law Journal.

ALBANY, MAY 5, 1888.

## CURRENT TOPICS.

GOVERNOR HILL has now an excellent opportunity to do the people of this State some good, or at all events to enable them to accomplish what they think is for their good, by showing himself superior to party slavery. The people of this State, by their representatives in the Legislature, have now for the second time declared their serious purpose to try the experiment of high license. The governor, like every other good citizen, should feel a sympathy with the object of this measure. To decrease poverty, pauperism and crime is a consummation devoutly to be wished, and should commend itself to the judgment of every man in public power who is one whit more elevated than the common pot-house politician. We have no doubt that the governor is sincerely desirous of the greatest prosperity and happiness of the people who have intrusted him with his high office, and that he is not to be swayed from this beneficent and honest purpose by the entreaties and threats of the swinish part of the community whose main purpose is to live without work and whose god is their belly. We are not going to preach a temperance sermon. But the governor can read the signs of the times, and he cannot fail to see that there is a tremendous and continually-increasing sentiment in favor of overthrowing or diminishing the deadly power of the greatest curse that ever afflicted mankind—all the more deadly because it is voluntary—the suicidal mania for alcohol. We are informed that the Crosby bill as it stands has been amended to obviate the objections which led the governor to veto it last year. Meantime he has had an opportunity to observe the current of public sentiment in this State, and in others, and to note the result of the similar experiment in other States. We think he must come to the conclusion that our people are determined to have this law now or something like it as soon as they can get it, and that the measure in other States has proved highly successful. We know the opponents of this measure have denounced it as a "monopoly"—a hateful word well chosen to prejudice the people against it. The phrase is cunningly chosen. It is to be conceded that the business will fall into fewer hands by the execution of the determination to compel those who make the mischief to pay for it. But the real question is, will alcohol do as much hurt in this city, for example, when the groceries are reduced from twelve hundred to four hundred? Sensible men will consider that question and not be led astray by a sophistical phrase. None of the men who shout "monopoly" have a word to say against a similar restriction of the sale of opium, which is no worse and not half so common. We hope the governor will see his way either to sign this bill or to

let it alone. He has the power to defeat it, and with it to accomplish the deep and earnest wish of every bad man in the State. We say that there is not a bad man in the State who is not in favor of free and easy rum. We go no further than that. We are not so narrow as to believe that there are not some good men opposed to the Crosby bill. We know some good men so egregiously in error as to advocate the opening of the "gin-mills" on Sunday, and to let a widow sell unlicensed because she cannot afford to pay. But nobody will dispute our proposition that all the worst elements of society are banded in favor of the unrestricted sale of intoxicating drinks. Does the governor want to help these? Or does he prefer to advance the cause of humanity and decency, of prosperity and virtue?—to let us have a measure prayed for in our churches and in thousands of happy as well as wretched homes, approved by the judgment of wise statesmen and the example of other States, and now for the second time demanded by our long-suffering and rum-cursed people?

There is evidently a sensible man at work on the editorial columns of the *Denver Republican*. He is that *rara avis*, a journalist capable of treating lawyers fairly. A recent number of that newspaper comes to us enriched with some lively comments on Mr. Phillips Snyder as a law reformer, and on Mr. Luther Marsh as "a reformed lawyer," as he calls himself. Some personalities in the former we do not relish, but there are some other remarks in it so excellent that we are led to quote them, inasmuch as we ourselves have already said something of Mr. Snyder's notions, and especially as the sword is double-edged, and cuts at short-comings in our profession as well as at Mr. Snyder's unjust aspersions. The *Republican* says: "The lawyers constitute but a small number in the aggregate, and as the great mass is in pursuit of wealth by other methods than the practice of law, it must be conceded that the mass rather than the lawyers find the law a necessity. \* \* \* The abuses enumerated may be conceded and many added, but Mr. Snyder utterly fails to lay the abuses at the door where they belong. The laying of the blame upon the bar and the bench is just where it should not be placed; they work with the tools given them by the people, not tools of their own making. \* \* \* We dare say the lawyers can claim as fair a share of integrity in the desire for the public good as any other class. But in the eyes of Mr. Snyder, because the lawyers have to do directly with the law, they, as a class, must be condemned because of the imperfections of the law. In this he overlooks the fact that the law has to do with the business and the shortcomings and the crimes of his fellows, and even with the weaknesses of Mr. Snyder himself. There can be no question that reform is needed and that the necessity for reform is daily becoming more imperative. The reluctance of the lawyer to enter upon radical changes arises not from opposi-

tion to reform, but from a dread of experimenting with edged tools, of whose viciousness he is ignorant. The dread is not for himself, because no so-called reform has ever yet been inaugurated that did not redound to the lawyer's pecuniary benefit. This reluctance is about as unselfish as falls to the lot of humanity to enjoy. Nevertheless, men like Mr. Snyder, who travel in mental ruts, while possessed of the notion that they are taking in the horizon, place the meanest possible construction upon an opposition which experience has taught to be safe as well as profitable for the community of which Mr. Snyder may be counted as one. If the lawyers were like Mr. Snyder we should have chaos; the lawyer would become rich while everybody else would grow poor. This is not what the gentleman desires, but to this his suggestions, if adopted, would directly lead us. \* \* \* The gentleman named has evidently had no experience as a builder. His suggestions of remedies for some of the evils he exaggerates are refreshing in their simplicity. Instead of progressing we would return to the days of the patriarchs. \* \* \* Like most reformers, so-called, Mr. Snyder is simply a fault-finder, a very unjust and ungenerous one, and a very silly one withal. \* \* \* The wonder is that effusions like Mr. Snyder's should find place in a magazine of the dignity of the one in question."

• It was perhaps Mr. Oscar Wilde who complained that there were no ruins in this country. He could not make that accusation now, when an appropriation of several hundred thousand dollars is asked to save the capitol from tumbling down. But we had supposed that modern ruins were only to be found in America under the reign of Buddensiek and the capitol architects. Little did we dream that a great public building in England, which so vaunts herself on her thoroughness and conscientiousness, should threaten to tumble down on the wiggled pates of judges and lawyers. But the *London Law Journal* affords us a disillusion. It says: "Queen's Bench Court IV has at last succumbed to the atmospheric conditions to which it and some of the other courts are subjected. Under the influence of the temperature the beams shrank and gave signs of refusing to support the roof, the stability of which the superintendent declined to guarantee, so the court hurriedly adjourned, not to resume elsewhere, which would have resulted in a certain cold. The fiery trial to which it is exposed does not however excuse the building, which ought to have timber capable of standing the most rapid shrinkage. The only hope of the handiwork of Mr. Robert Lowe and Mr. Ayrton is that it will not last. Already the floors of the corridors are wearing away, forming traps to hurrying feet, stones of unequal friability having been cunningly put alternately, and flights of dip and rise in succession provided. The corridors reserved for the lawyers and the seats for the bar are given up to the miscellaneous hangers-on of the courts, while the great hall

is a desert. If the real remedy, that of pulling it all down and building anew, is impracticable, the courts should be pulled down and put on a level with the hall as a compromise."

We called attention recently to a decision that where a man sued for an injury to his spine, it might be shown that the next day he walked several miles to keep an assignation with a colored woman. Now in *McVoy v. Mayor of Knoxville*. 85 Tenn. 19, it was held that where a man was hurt by falling into an excavation in a street, it was no defense that he was at the time returning from a bawdy-house. No *obiter dictum* gives us a hint as to what the court would have held if he had been on his way thither. But these two cases illustrate the singular fact that the queerest cases frequently travel in couples.

Our readers who are fond of Shakespeare will be glad to know of a new critical edition, the first volume of which is now at hand. The edition is published by the Shakespeare Society of New York, and each play is to form a separate volume. The opening volume is devoted to "The Merry Wives of Windsor," and is edited by Mr. Appleton Morgan, a well known legal and literary writer, who furnishes a learned introduction, and gives the text of the first folio of 1623 on one page, and that of the players' quarto of 1602, wherever it differs from the former, on the opposite page, the "deadly parallel column" test, as the editor calls it. His opinion is that this play and several others are not "monographs" but "growths," the later text being much the fuller and more finished. We suppose Mr. Morgan means that the text was not written all at one period, but the word "monograph" is hardly expressive of that. We do not understand that he believes in a separate authorship. Indeed, he says: "To those who find ciphers and verse tests in the plays as we have them to-day, it must be perplexing to find that the texts have been so rudely handled since the pen they essay to detect by their respective processes was in the required vicinity." If this edition should be completed on this plan it would be invaluable. We understand the other plays are now in preparation by different competent hands, under Mr. Morgan's general and very competent superintendence.

#### NOTES OF CASES.

I *N Rogers v. Elliott*, Massachusetts Supreme Judicial Court, March 2, 1888, it was held that a person who by reason of a sunstroke was peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the

custodian of such church for sufferings caused by the ringing of such bell. The court said: "If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of the effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those on the other who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to every thing about them. That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house—not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. *Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Mass. 289; S. C., 43 Am. Rep. 519; *Walter v. Selfe*, 4 De Gex & S. 323; *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Smelting Co. v. Tipping*, 11 H. L. Cas. 642. In *Walter v. Selfe*, Vice-Chancellor Knight-Bruce, after elaborating his statement of the rule, concludes as follows: 'They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age or state of health.' It is said by Lord Romilly, master of the rolls, in *Crump v. Lambert*, L. R., 8 Eq. 408, that 'the real question in all the cases is the question of fact, viz., whether the nuisance is such as materially to interfere with the ordinary comfort of human existence.' In the opinion in *Sparhawk v. Railway Co.*, 54 Penn. St. 401, these words are used: 'It seems to me that the rule expressed in the cases referred to is the only true one in judging of injuries from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence.' In the case of *Westcott v. Middleton*, 43 N. J. Eq.—; 87 ALB. LAW JOUR. 88 (decided Dec. 9, 1887), it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects

were visible and other work was going on, which affected the tender sensibilities of the plaintiff and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: 'The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or nuisance to him, or destructive to his comfort, or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. \* \* \* A wide range has indeed been given to courts of equity in dealing with these matters, but I can find no case where the court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike.' If one's right to use his property was to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate, or with an arrival or departure of a guest or boarder at a house near by, or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial. In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used. The plaintiff in his brief concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his

exercise of his legal rights. How far, and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider."

In *Bell v. City of Platteville*, Wisconsin Supreme Court, Feb. 28, 1888, the city had the control of all its property and the management of its financial concerns. Held, that it had the power to let the city hall for the purposes of theatres and general entertainments. The court said: "From what has been said it will appear that the question so fully argued by the learned counsel for the plaintiffs as to whether the municipality had any legal authority to build a coliseum, a theatre, a circus, a beer garden, or any structure for mere amusement, recreation or culture, is not involved in the case nor pertinent to any of the issues raised. So far as this case is concerned, it must be assumed that the city had authority to build a city hall, and built it. Such authority having been given without restriction included, by necessary implication, the right to determine the plan of the building, and the mode in which it should be constructed. *Konrad v. Rogers*, 86 N. W. Rep. 261; *Ely v. City of Rochester*, 26 Barb. 183; 1 Dill. Mun. Corp., § 140; *Poillon v. Brooklyn*, 101 N. Y. 182. Human wisdom is not infallible, and it may be that the plan of this building was unwise; that it extended beyond the immediate, or even prospective municipal wants of the city. Nevertheless it was the plan determined upon by the only officials vested with the authority to determine the same. The lower part of the building seems to be adapted to the municipal purposes to which it is devoted. Whether prior to such construction the courts had power to confine the city authorities to some plan measured by or limited to the municipal necessities or wants of the city, is a question not here presented. It may be said however that courts of high authority have, in effect, held that such questions are largely within the discretion of the municipal authorities, and that courts should not interfere with such discretion except in a plain case of its abuse. *Greeley v. People*, 60 Ill. 20; *Torrent v. Muskegon*, 47 Mich. 115. In this last case such intervention was asked upon the ground that the proposed building was more expensive than needed by the fire-department, and that there was no authority for building a city hall. In the language of Lord Chancellor Selborne, 'this doctrine (of *ultra vires*) ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*.' *Attorney-General v. Railway Co.*, L. R., 5 App. 473; 83 Moak Eng. Rep. 773. As indicated, the city is the lawful owner of the building with the opera hall in it. \* \* \* Have the city authorities the lawful right to let or use the opera hall for the purposes mentioned? As observed, the charter expressly gives them 'the man-

agement and control of the finances, and of all property of the city.' They are moreover charged with 'the government of the city, and the exercise of its corporate powers and management of its financial, prudential and municipal concerns.' With the city owning the lots and building, and the city authorities possessing the powers thus expressly granted, it seems to us they have, by necessary implication, and as incident to such ownership, the lawful right to let or use the opera hall for the purposes mentioned. In fact this seems to be the logical result of former decisions of this court. *Attorney-General v. Eau Claire*, 37 Wis. 400. \* \* \* This doctrine was reaffirmed in the recent case of *Canal Co. v. Water-Power Co.*, 35 N. W. Rep. 529, 535. The decisions in other States in cases similar to this confirm the same rule. Thus in *Spaulding v. Lowell*, 28 Pick. 71, 'a town built a market-house two stories high, and appropriated the lower story for a market, which was *bona fide* their principal and leading object in erecting the building,' and 'it was held that the appropriation of the upper story to other subordinate purposes was not such an excess of authority as to render the erection of the building and the raising of money therefor illegal.' In *French v. Quincy*, 3 Allen, 9, it was in effect held that in the erection of a town-house the municipality might 'make suitable provision for its prospective wants, and if the building contains rooms not wanted for the time being for municipal business, the town may let them temporarily, or allow them to be used gratuitously.' To the same effect, *Camden v. Corporation*, 77 Me. 530; *Worden v. New Bedford*, 131 Mass. 23; *The Maggie P.*, 25 Fed. Rep. 202. The cases relating to powers of school-districts and towns cannot be regarded as authority for limiting the powers of cities as claimed, since their powers are very much more restricted, being at most *quasi* corporations, or corporations *sub modo* only. *Cathcart v. Comstock*, 56 Wis. 606-608. We must hold that the letting and use mentioned was not unauthorized."

#### THE DOG, IN LAW AND ELSEWHERE.

WHILE it cannot be asserted that the dog has ever figured very prominently in the law, nevertheless statutes have been enacted for and against him; and though seldom appearing personally in court, he has yet had some part and parcel and been directly interested in a large number of reported cases. His rights and duties in reference to other dogs, in reference to his owner, and in reference to third persons, have been almost as carefully considered, and become as well established, as the corresponding relations between principal and agent, or master and servant. All this however has not been accomplished until recently, and it is perhaps a matter of some interest to note how the dog's standing in law has gradually advanced from *nil* to the present status, where he is recognized as possessing undoubted rights, privileges and duties. To go back to the time of Blackstone, for example, it will be remembered that in his Commentaries (book iv, 236), he says: "As to those animals which do not serve for food (for the omnivor-

ous sausage machine was then unknown), and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny." So the dog stood, or rather so low he lay, at common law like a paste diamond, considered not worth the stealing, until the statute 7 and 8 George IV, chap. 29, § 25, came to his relief, and imposed fines or imprisonment and whipping upon him who should steal one; and the statute 8 and 9 Victoria, chap. 47, which amended the same. Here in the United States no special statute amending the common-law rule as to dogs was enacted, but he was held to come under the protection of the general statutes applicable to "personal property," and to be included in that term. *Mullaly v. People*, 86 N. Y. 385, in which case the court observes with great justice and horse sense, that a system for the taxation of dogs having been enacted at the same time with the general statute against larceny, "it can scarcely be supposed that the Legislature meant to regard dogs as property for the purposes of taxation, and yet leave them without protection against thieves." Thus do we learn, that although "the law does not concern itself over trifles," none the less can no duty and no burden be imposed even upon a despised and "yaller" dog, or vicariously, upon his owner, without carrying with it corresponding rights and privileges which all men are bound to regard; and that therefore as "it is a sin to steal a pin," even so it is larceny to steal a dog.

Among the first of a dog's rights to be established by the common law was the principle that "every dog shall have his bite," a sort of legal paraphrase of the accepted doctrine that "every dog shall have his day." To us human kind this means that before you can hold your neighbor responsible for the injuries to you or your property inflicted by his dog, you must show that the dog had previously displayed a vicious disposition, and that your neighbor had knowledge of the same. To the dog himself it means far more. It gives him privileges like the "benefit of clergy," and greatly surpassing the presumption of innocence in favor of a two-legged criminal. For were a man indicted for mayhem, the present biting being proved, the fact that he had always borne a good character, and had never bitten any one before, would aid him not a whit, while to a dog, in the same grievous stead, it would be a complete defense. "Is thy servant a dog, that he should do this thing?" Yes, but he has not a dog's license to bite. But more recent decisions have somewhat limited (I am tempted to write curtailed) this canine privilege, and in the case of *Rider v. White*, 65 N. Y. 54, it was somewhat paradoxically held that the defendant was liable for injuries caused by his dog, although it was the dog's first offense, because the evidence showed that the defendant knew the dog to be vicious and ferocious. That is to say—and the case can be authority for nothing more—other evidence than that a dog had previously bitten people is admissible to show that his owner knew that the dog was vicious. Which principle might go without saying, but it unfortunately leads straight back to the question of how one is to know that his dog will bite, except by proof that he has bitten, or at least offered to. *Ex parte credo*. I should not assume to answer the question though, unless it may be that the breed and variety of the dog, as for instance, that he is of the bulldog or bloodhound stripe (or spot), or that he is prone to bark at street cars, snap at the inoffensive postman, or snarl at the guileless messenger boy, "hastening on his way," is sufficient to charge his owner with notice of his propensities to mayhem.

But beside the tendency of recent decisions to limit the notice of a dog's vicious disposition, which must be brought home to his owner in order to make him liable for the consequences, there is a statute which provides that "the owner of any dog that shall kill or wound any sheep or lamb shall be liable \* \* \* without proving notice to the owner or knowledge by him that his dog was mischievous or disposed to kill sheep." 2 Rev. Stat. 1000. Surely a notable illustration this of the Legislature's regard for the innocent countryman and his precious flocks. Or was it but a bid for the Granger vote, or but the expression of the natural desire of any one owning good Southdowns to "return to his muttons" with the assurance that he would find them still grazing peacefully, and growing "fat and well-liking," all unmolested by his neighbor's dog? Be that as it may, the statute so stands, and is to be heeded. So if you have a grudge against your neighbor, bear the law well in mind and "call off your dog" from his sheep, unless you want to answer in damages; and perchance some fine day, all quietly and slyly, you cau "sick" Jack or Ponto, whose character is as yet unblemished, on to your aforesaid neighbor's shins, and thus wreak your vengeance without that either you or your dog shall suffer blame. Verily it is a great thing to know the law. The statute last cited, I must add, is of course strictly construed; and in the event if any injury to sheep other than killing or wounding, as for instance, chasing or worrying them to their injury, knowledge of the dog's vicious propensity must be proved. *Ostinsip v. Nichols*, 49 Barb. 145. And this may seem so delicate and refined a distinction, that again I exclaim, Verily it is a great thing to know the law!

So much regarding dogs in what may be termed their relationship to third persons; and if more information is wanted by the inquiring student, he may be referred to the seventy-third volume of New York Reports, where he may find much dog law, and connected therewith some curious propositions in moral ethics.

I have mentioned that there are several cases reported where a dog was virtually plaintiff or defendant. Such a one is *Wheeler v. Brant*, 23 Barb. 324. Here the defendant's dog, of bad and vicious reputation, attacked and bit the intestate (so to speak), the dog of W., so that the bitten dog died of the injuries. The defendant was of course held liable to W. for the damages, but what is more, and what really amounted to sentence of death or imprisonment upon the real defendant, the criminal dog, the court held that "vicious dogs are a nuisance, and their owners must either kill them or confine them, or answer in damages." Merely a legal paraphrase again of the old saw, "Give a dog a bad name, and hang him."

The case of *Wiley v. Slater*, 22 Barb. 506, was of similar character, but the remarks and observations of the court were so witty and happy that I would gladly quote them in full. Judge Allen may have written more weighty and important opinions when he afterward came to the Court of Appeals, but I am sure that into no case did he ever infuse more spirit, wit and humor, and in no opinion did he ever leave behind him more bright and entertaining reading for the poor, weary law student. His final holding on the questions raised in the case was that "If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly if they go uninvited, they must be content to have them put up with dog-fare, and that their reception and treatment shall be hospitable or inhospitable, according to the nature or the particular mood and temper at the time, of the dog visited. The courtesies and hospitalities of dog-life cannot well be regulated by the judicial tribunals of the land."



Contenting ourselves with Judge Allen's views on the complicated relationship of dog to dog, and the duties and obligations arising therefrom, let us briefly consider the dog in his relations to man in a practical and useful way.

I am aware that to us in this country it comes a little strange to view the dog as useful in any other way than as the guardian of our property or the assistant of the sportsman. But in many of the countries of Europe he is used as a beast of burden quite as much as the donkey, if not the horse. It is well known to what an extent throughout Europe the wives and daughters of the humbler households perform the hardest manual labor, and bear more than their share of "the burden and heat of the day." In Holland, France or Germany the spectacle of a woman pulling around a heavily-laden cart, or even dragging a small canal-boat, is most familiar, if least edifying. It is mainly accounted for, if not justified, by the military system there dominant—the maintenance of standing armies. The men being so extensively taken from their natural occupations, their labor is left for the women. And for this labor the dog has proved a veritable helpmeet and brave ally. Yoked together, woman and dog, as you frequently see them, they may perhaps shock your finer sensibilities; but they can certainly pull, and it is doubtful if the team of a man and a horse could do much better work.

In this connection I cannot but recall one of the market fairs of Berlin and the curious array of dogs and dog-carts there to be seen around the square in which the fair was held. There were dogs of every age, size, breed and color; some humanely blanketed, and resting after their work; others, lean and cold, snarling and snapping at their neighbors; and others again in weary or impatient mood, lifting up their voices in doleful, melancholy howls. All were muzzled; all, or almost all, quite large and apparently strong and spirited. The carts too were of every size and guise; some well-nigh load enough for a horse, some mere toy, narrow-gauged vehicles; some were for one, some for two, and some for three dogs, though four-in-hands were lacking; to some the dogs were harnessed in front, to some on the side, and to some underneath; even a tandem might be seen. It was all very remarkable and instructive. For in the first place, one is led to ask whether it is simply their kind or not, rather than their work and discipline, which makes them all so active and spirited. Is it not with the dog, as with the horse, that a healthy and moderate diet, good care and regular work will accomplish much, and benefit both the animal and man? Certain it is that none but a pampered, petted and over-fed dog was ever lazy; and of all the working dogs I have seen, none but had energy enough, even after a day's toil, to bark lustily and cheerfully. Now as our country develops, and population and poverty increase, is there any good reason why, in the larger cities particularly, the dog should not become a recognized able and economical beast of burden.—of great use and assistance to the humble peddler, green grocer, or general licensed vendor? His keep is nothing as compared with that of a horse, and for many purposes he would be far more available. One consideration, for instance: on hard and slippery pavements his foot can take firm hold, and he can start a load that a horse, with his smooth-shod feet, could scarcely budge. Moreover our laws against cruelty to animals are so good and so vigorously enforced, thanks largely to one good and humane man—may his rest in heaven be sweet! that the dog, as a beast of burden, would here be properly and kindly, instead of cruelly overworked, as he is in Europe. Some one or something must do a dog's work in America as well as elsewhere. If the dog himself can

be made to bear a reasonable share thereof instead of wasting all his energies in aimless trotting about and baying at the moon, the burdens of mankind would be eased in more ways than one.

As a matter of words and terms however the Supreme Court of this State has held (*People v. Walker*, 4 Hun, 441) that "a dog is not a beast of burden," but on the other hand, "that it is not cruel, but rather commendable, to train and subject him to a useful purpose." The "useful purpose" in this case was a tread-mill, but as the evidence established that the defendant over-worked and abused his dog, it is gratifying to know that he was duly convicted.

There is another curious statute relating to dogs still in force in this State, which requires that any one using them for the purpose of drawing carts, etc., shall first procure a license therefor. 3 Rev. Stat. 974. The reason for this law is scarcely clear, though doubtless it must have been enacted with some view to the protection of the dog from abuse, inasmuch as it was passed at the same time, and in connection with the other statutes for the prevention of cruelty to animals. But just why a peddler should take out a license for his dog-cart, while a gentleman of fashion need not, it is hard to see. But I really mean more than a quibble on words.

So little poetry is found running through the dry gravel of the law, that if the dog has added to that, we surely owe him much. An expression found in Bouvier, and credited to Coke, is "*inter canem et lupum*," that is to say, "between the dog and the wolf;" and it means the twilight, because then the dog seeks his rest and the wolf seeks his prey; as beautiful and poetical a thought, it seems to me, as is to be found anywhere in legal writing.

Whether in other fields then, and in work-a-day life, it shall come to pass that the dog shall lighten our labors and help bear our burdens, let us at least give him praise, and rejoice and be glad that Judge Allen has written opinions about him, that he has lent humor and to cheer the dreary Reports, and made even Bouvier's Law Dictionary to sparkle with a gem of true poetry.

W. D. ELLWANGER.

ROCHESTER, N. Y.

#### CONSTITUTIONAL LAW — LEGISLATIVE POWERS — DIVORCE.

UNITED STATES SUPREME COURT, MARCH 19, 1888.

MAYNARD V. HILL.

A special act of a Territorial Legislature dissolving the marriage relation between a husband, a resident of the Territory, and a wife who is a non-resident, is a valid act of legislative power, and it does not invalidate the act that there was no cause for the divorce, nor that the wife was not notified.

**A** PPEAL from the Supreme Court of the Territory of Washington.

This is a suit in equity to charge the defendants, as trustees of certain lands in King county, Washington Territory, and compel a conveyance thereof to the plaintiffs. The lands are described as lots 9, 10, 13 and 14 of section 4, and lots 6, 7, 8 and 9 of section 5, in township 24 north, range 4 east, Willamette meridian. The case comes here on appeal from a judgment of the Supreme Court of the Territory, sustaining the defendants' demurrer, and dismissing the complaint. The material facts, as disclosed by the complaint, are briefly these: In 1828 David S. Maynard and Lydia A. Maynard intermarried in the State of Vermont, and lived there together as husband and

wife until 1850, when they removed to Ohio. The plaintiffs, Henry C. Maynard and Frances J. Patterson, are their children, and the only issue of the marriage. David S. Maynard died intestate in the year 1873, and Lydia A. Maynard in the year 1879. In 1850 the husband left his family in Ohio and started overland for California, under a promise to his wife that he would either return or send for her and the children within two years, and that in the mean time he would send her the means of support. He left her without such means and never afterward contributed any thing for her support or that of the children. On the 16th of September following he took up his residence in the Territory of Oregon, in that part which is now Washington Territory, and continued ever afterward to reside there. On the 3d of April, 1852, he settled upon and claimed, as a married man, a tract of land of 640 acres, described in the bill, under the act of Congress of September 27, 1850, "creating the office of surveyor-general of public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," and resided thereon until his death. On the 22d day of December, 1852, an act was passed by the Legislative Assembly of the Territory, purporting to dissolve the bonds of matrimony between him and his wife. The act is in these words:

"AN ACT to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.

"SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Oregon, that the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are hereby dissolved.

"Passed the House of Representatives, December 22, 1852.

"B. F. HARDING,

"Speaker of the House of Representatives.

"Passed the council December 22, 1852.

"M. P. DEADY,

"President Council."

The complaint alleges that no cause existed at any time for this divorce; that no notice was given to the wife of any application by the husband for a divorce, or of the introduction or pendency of the bill for that act in the Legislative Assembly; that she had no knowledge of the passage of the act until July, 1853; that at the time she was not within the limits or an inhabitant of Oregon; that she never became a resident of either the Territory or State of Oregon; and that she never in any manner acquiesced in or consented to the act; and the plaintiffs insisted that the Legislative Assembly had no authority to pass the act; that the same is absolutely void; and that the parties were never lawfully divorced. On or about the 15th of January, 1853, the husband, thus divorced, intermarried with one Catherine T. Brashears, and thereafter they lived together as husband and wife until his death. On the 7th of November, 1853, he filed with the surveyor-general of Oregon the certificate required under the donation act of September 27, 1850, as amended by the act of the 14th of February, 1853, accompanied with an affidavit of his residence in Oregon from the 16th of September, 1850, and on the land claimed from April 3, 1852, and that he was married to Lydia A. Maynard until the 24th of December, 1852, having been married to her in Vermont in August, 1828. The notification was also accompanied with corroborative affidavits of two other parties that he had, within their knowledge, resided upon and cultivated the land from the 3d of April, 1852.

On the 30th of April, 1856, he made proof before the

register and receiver of the land office of the Territory of his residence upon and cultivation of his claim for four years, from April 3, 1852, to and including April 3, 1856. Those officers accordingly, in May following, issued to him and to Catherine T. Maynard, his second wife, a certificate for the donation claim, apportioning the west half to him and the east half to her. The certificate was afterward annulled by the commissioner of the general land office on the ground that as it then appeared, and was supposed to be the fact, Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.

On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband. From this decision an appeal was taken to the commissioner of the general land office, and from the decision of that officer to the secretary of the interior. The commissioner affirmed the decision of the register and receiver so far as it awarded the west half to the husband, but reversed the decision so far as it awarded the east half to the first wife, holding that neither wife was entitled to that half. He accordingly directed the certificate as to the east half to be cancelled. The secretary affirmed the decision of the commissioner, holding that the husband had fully complied with all the requirements of the law relating to settlement and cultivation, and was therefore entitled to the west half awarded to him, for which a patent was accordingly issued. But the secretary also held that at the time of the alleged divorce the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property. He also held that the second wife was not entitled to any portion of the claim, because she was not his wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one-half of the claim under the statute; and the plaintiffs insist that the decision of the commissioner and secretary in this particular is erroneous and founded upon a misapprehension of the law.

Subsequently the east half of the claim was treated as public land, and was surveyed and platted as such under the direction of the commissioner of the general land office. The defendants Hill and Lewis, with full knowledge, as the bill alleges, of the rights of the first wife, located certain land scrip known as Porterfield land scrip, upon certain portions of the land, and patents of the United States were issued to them accordingly, and they are applicants for the remaining portion. The complaint alleges that the other defendant, Flagg, claims some interest in the property, but the extent and nature thereof are not stated. Upon these facts the plaintiffs claim that they are the equitable owners of the lands patented to the defendants Hill and Lewis, and that the defendants are equitable trustees of the legal title for them. They therefore pray that the defendants may be adjudged to be such trustees and directed to convey the lands to them by a good and sufficient deed; and for such other and further relief in the premises as to the court shall seem meet and equitable. To this complaint the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and gave judgment thereon in favor of the defendants. On appeal the Supreme Court of the Territory came to the same conclusion—that the complaint did not state a sufficient cause of action; that no grounds for relief in equity appeared upon it; and that the defendants'

demurrer should be sustained. Judgment was accordingly entered that the complaint be dismissed. To review this judgment the case is brought to this court.

*Henry Beard and Cornelius Hanford*, for appellants.

*Walter H. Smith*, for appellees.

FIELD, J. As seen by the statement of the case, two questions are presented for our consideration: First, was the act of the Legislative Assembly of the Territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties? and second if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claim?

The act of Congress creating the Territory of Oregon and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly consisting of two boards, a Council and a House of Representatives. 9 St., chap. 177, § 4. It declared that the legislative power of the Territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of residents; and that all the laws passed by the Assembly should be submitted to Congress, and if disapproved, should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the Territory to any loan. These exceptions from the grant of legislative power have no bearing upon the questions presented. The grant is made in terms similar to those used in the act of 1836, under which the Territory of Wisconsin was organized. It is stated in *Clinton v. Englebrecht*, 13 Wall. 444, that that act seemed to have received full consideration; and from it all subsequent acts for the organization of Territories have been copied, with few and inconsiderable variations. There were in the Kansas and Nebraska acts, as there mentioned, provisions relating to slavery, and in some other acts, provisions growing out of local circumstances. With these, and perhaps other exceptions not material to the questions before us, the grant of legislative power in all the acts organizing territories, since that of Wisconsin, was expressed in similar language. The power was extended "to all rightful subjects of legislation," to which was added in some of the acts, as in the act organizing the Territory of Oregon, "not inconsistent with the Constitution and laws of the United States," a condition necessarily existing in the absence of express declaration to that effect. What were "rightful subjects of legislation," when these acts organizing the Territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the Legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the depart-

ment of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed; the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained. It will be found from the history of legislation that while a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon every thing within the range of civil government. *Loan Ass'n v. Topeka*, 20 Wall. 683. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings and determined the status, conditions and relations of parties in the future.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature, which can properly be conducted by the judicial tribunals. Yet such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral and intellectual, such as the contracting by one of the parties of an incurable disease like leprosy or confirmed insanity, or hopeless idiocy, or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the Legislature itself from interfering and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented.

When this country was settled the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the States. Says Bishop, in his *Treatise on Marriage and Divorce*: "The fact that at the time of the settlement of this country legislative divorces were common, competent and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written Constitution binding the legislative power." Section 684. Says Cooley in his *Treatise on Constitutional Limitations*: "The granting of divorces from the bonds of matrimony

was not confided to the courts in England, and from the earliest days the colonial and State legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases." Page 110. Says Kent in his Commentaries: "During the period of our colonial government, for more than a hundred years preceding the revolution, no divorce took place in the colony of New York, and for many years after New York became an independent State there was not any lawful mode of dissolving a marriage in the life-time of the parties but by a special act of the Legislature." Vol. 2, page 97. The same fact is stated in numerous decisions of the highest courts of the States. Thus in *Cronise v. Cronise*, 54 Penn. St. 280, the Supreme Court of Pennsylvania said: "Special divorce laws are legislative acts. This power has been exercised from the earliest period by the Legislature of the province, and by that of the State, under the Constitutions of 1776 and 1790. The continual exercise of this power after the adoption of the Constitution of 1790 cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it, but it stands upon higher ground of contemporaneous and continued construction of the people of their own instrument." In *Crane v. Meginnis*, 1 Gill & J. 474, the Supreme Court of Maryland said: "Divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light than as regular exertions of the legislative power." In *Starr v. Pease*, 8 Conn. 541, decided in 1831, the question arose before the Supreme Court of Connecticut as to the validity of a legislative divorce under the Constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that State on the subject of divorces, passed 130 years before, which provided for divorces on four grounds, said, speaking by Mr. Justice Daggett: "The law has remained in substance the same as it was when enacted in 1667. During all this period the Legislature has interfered like the Parliament of Great Britain and passed special acts of divorce *a vinculo matrimonii*. And at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law on this subject nor into the expediency of such frequent interference by the Legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the Constitution of the United States or by that of the State. In view of the appalling consequences of declaring the general law of the State or the repeated acts of our Legislature unconstitutional and void—consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery—the court should come to the result only on a solemn conviction that their oaths of office and these Constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void." It is to be observed that the divorce in this case was granted on the petition of the wife, who alleged certain criminal intimacies of her husband with others, and the act of the Legislature recited that her

allegation, after hearing her and her husband, with their witnesses and counsel, was found to be true. The inquiry appears to have been conducted with the formality of a judicial proceeding, and might undoubtedly have been properly referred to the judicial tribunals; yet the Supreme Court of the State did not regard the divorce as beyond the competency of the Legislature. The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the Legislative Assembly of the Territory, that it was beyond the competency of a Legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation. In most of the States the same legislative practice on the subject has prevailed since the adoption of their Constitutions as before, which as Mr. Bishop observes may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years in many Constitutions of provisions prohibiting legislative divorces would also indicate a general conviction, that without this prohibition, such divorces might be granted, notwithstanding the separation of the powers of government into departments, by which judicial functions are excluded from the legislative department. There are, it is true, decisions of State courts of high character, like the Supreme Court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their State Constitutions. *Sparhawk v. Sparhawk*, 116 Mass. 315; *State v. Fry*, 4 Mo. 120, 138. The weight of authority however is decidedly in favor of the position, that in the absence of direct prohibition, the power over divorces remains with the Legislature. We are therefore justified in holding—more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the Legislature. If within the competency of the Legislative Assembly of the Territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the Territory, and as he acted soon afterward upon the dissolution and married again, we may conclude that the act was passed upon his petition. If the Assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his *status*, he being a resident of the Territory, is undoubted, unless the marriage was a contract within the prohibition of the Federal Constitution against its impairment by legislation or within the terms of the ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act—questions which we will presently consider.

The facts alleged in the bill of complaint that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity if within the competency of the Legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation, and if the facts stated had been brought to the

attention of Congress, that body might and probably would have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the Assembly to pass the act. The organic act extends the legislative power of the Territory to all rightful subjects of legislation "not inconsistent with the Constitution and laws of the United States." The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the Federal Constitution against the impairment of contracts by State legislation applies equally, as would seem to be the opinion of the Supreme Court of the Territory, to legislation by Territorial Legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. As was said by Chief Justice Marshall in the *Dartmouth College* case, not by way of judgment, but in answer to objections urged to positions taken: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces." And in *Butler v. Pennsylvania*, 10 How. 402, where the question arose whether a reduction of the *per diem* compensation to certain canal commissioners below that originally provided when they took office, was an impairment of a contract with them within the constitutional prohibition; the court, holding that it was not such an impairment, said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property are vested." It is also to be observed, that while marriage is often termed by text-writers and in decisions of courts a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams v. Palmer*, 51 Me. 481, 483. Said that court, speaking by Chief Justice Appleton: "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was a contract that the relation should be established, but being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time and none other." And

again: "It is not then a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of contracting minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress." And the chief Justice cites in support of this view the case of *Maguire v. Maguire*, 7 Dana, 181, 183, and *Ditson v. Ditson*, 4 R. I. 87, 101. In the first of these the Supreme Court of Kentucky said that the marriage was more than a contract; that it was the most elementary and useful of all the social relations; was regulated and controlled by the sovereign power of the State, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the Supreme Court of Rhode Island said that "marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but, when formed by contract, it is a contract. In strictness, though husband and wife, deriving signifies the relation of husband and wife, higher than both its rights and duties from a source higher than any contract of which the parties are capable, and as any contract of which the parties are capable, which they to these uncontrollable by any contract is no more a contract than 'fatherhood' or 'sonship' is a contract."

In *Wade v. Kalbfleisch*, 58 N. Y. 282, the New York Court of Appeals said that the question whether an action for breach of promise of marriage was an action upon a contract within the meaning of that certain provisions of the Revised Statutes said: "The general statute, 'that marriage, so far as in this validity in law is concerned, shall continue in force as a civil contract, to which the consent of the parties is not capable in law of contracting, shall be essential to the decisive of the question. 2 Rev. Stat. 138. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, and its duties and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word 'contract' employed in the common law or statutes. In this State, and in the common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy for the benefit of the community."

In *Noel v. Ewing*, 9 Ind. 37, the question was before the Supreme Court of Indiana as to the competency of the Legislature of the State to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage, and the court said: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regard-

ing husband and wife as strictly parties to a subsisting contract. At common law, marriage as a *status* had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a *status* or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." In accordance with these views was the judgment of Mr. Justice Story. In a note to the chapter on marriage in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation different from what belong to ordinary contracts." Section 108n.

The fourteenth section of the organic act of Oregon provides that the inhabitants of the Territory shall be entitled to all the rights, privileges and advantages granted and secured to the people of the territory of the United States north-west of the river Ohio by the articles of compact contained in the ordinance of July 13, 1787, for the government of the Territory. The last clause of article 2 of that ordinance declares "that no law ought ever to be made or have force in said Territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed." This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the Federal Constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the donation act. But that act conferred the title of the land only upon the settler who at the time was a resident of the Territory or should be a resident of the Territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. The words of the act, that "there shall be and hereby is granted to every white settler or occupant," is qualified by the condition of four years' residence on the land and its cultivation by him. The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title; what is sometimes vaguely called an inchoate interest. In some of the cases decided at the Circuit, the fourth section of the act was treated as constituting a grant *in present*, subject to the conditions of continued residence and cultivation, that is, a grant of a defeasible estate. *Adams v. Burke*, 3 Sawy. 418. But this view was not accepted by this court. In *Hall v. Russell*, 101 U. S.

503, the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditions were fully performed. After citing the language of a previous decision, that "it is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," the court said: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee."

If then the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future and not presently. In all cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law, and actually in existence at the time." \* \* \* Coming then to the present case, we find that the grantee designated was any qualified settler or occupant of the public lands, \* \* \* who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act. The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the Territory, having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." In *Vance v. Burbank*, 101 U. S. 521, the doctrine of the previous case was reaffirmed, and the court added: "The statutory grant was to the settler, but if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband."

When therefore the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation, which gave him any thing more than a mere possessory right to remain on the land so as to enable him to comply with the conditions, upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him.

A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right.

It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half she must have continued his wife during his residence and cultivation of the land. The judgment of the Supreme Court of the Territory must therefore be affirmed; and it is so ordered.

Matthews and Gray, JJ., dissented.

Bradley, J., took no part in the decision.



CONSTITUTIONAL LAW — POLICE POWER—  
BOARD OF HEALTH — DESTRUCTION OF  
DISEASED ANIMALS.

NEW JERSEY SUPREME COURT, FEB. 27, 1888.

NEWARK & S. O. H. R. Co. v. HUNT.

The "supplement to an act entitled 'An act to establish a State board of health,' approved March 9, 1877," which supplement was approved March 12, 1880 (Laws 1880, p. 322), makes animals with contagious and infectious diseases common nuisances, and authorizes their destruction by certain officials under certain conditions. The "Supplement to an act entitled 'An act to prevent the spread of glanders in horses,' approved March 31, 1864," which supplement was approved March 12, 1884 (Supp. Rev. 8), makes horses affected by glanders common nuisances, and authorizes their destruction by certain officers. *Held*, (1) These acts, so far as they relate to glanders in horses, are within the police powers of the State. (2) They are not within the prohibition of the 14th amendment to the Federal Constitution, because although they authorize the abatement of such nuisances in advance of a judicial adjudication of the fact of nuisance, yet they do not make the determination of the officials as to that fact conclusive, and only permit their acts, in abating the nuisance, to be justified by proof of the actual existence of such nuisance. (3) The conditions under which such officials may act, under the act of 1880, are mere limitations on their power for the benefit of the property owner, and their adjudication that such conditions exist will not protect them, unless the existence of the common nuisance is shown.

ON demurrer. The action is in trespass, and by the declaration defendants are charged with killing certain horses of plaintiff, to its damage, etc. The second, third and fourth pleas are special pleas. The second plea avers that defendants were duly appointed assistants of the State board of health, and that by law it was the duty of such assistants whenever any contagious disease should break out among animals in any locality, and it should appear in the judgment of such assistants that such disease was not likely to yield to any remedial treatment, to cause the animals affected by such diseases to be slaughtered; and that at the times, etc., the contagious disease known as "glanders" had broken out in plaintiff's stables in South Orange, and the horses in question were affected therewith, and said disease was not likely, in defendants' judgment, to yield to any remedial treatment; wherefore the defendants slaughtered, etc., said horses, as it was lawful for them to do, for the cause aforesaid. The third plea avers the due appointment of defendants as assistants of said board, and that by law it was the duty of such assistants, whenever any contagious disease should break out among animals in any locality, and it should appear, in the judgment of such assistants, that such disease threatened its spread to other animals, to cause the animals affected with such disease to be immediately slaughtered; and that at the times, etc., a contagious disease known as "glanders" had broken out in plaintiff's stables, and the horses in question were affected therewith, and said disease, in the judgment of defendants, threatened its spread to other animals; wherefore defendants slaughtered said horses, as it was lawful, etc. The fourth plea avers the due appointment of the defendant Hunt as a member of said board, and of the defendant Hawk as an assistant thereof, and that by law it was the duty of each member of said board, whenever satisfied that any horse, etc., in this State was diseased with glanders, to cause such horse, etc., to be immediately slaughtered; and that at the times, etc., said horses were each diseased with glanders, and

said Hunt was satisfied thereof: wherefore said Hunt, in discharge of the duty imposed, etc., directed said Hawk, assistant as aforesaid, to destroy, and said Hawk, in compliance with such directions, did destroy said horses, as it was lawful, etc. Plaintiff filed a general demurrer to these pleas.

Argued at November Term, 1887, before the Chief Justice and Justices Dixon, Reed and Magie.

Mr. Borchertling and C. Parker, for plaintiff.

Attorney-General Stockton and Wm. S. Gummere, for defendants.

MAGIE, J. The second and third pleas have evidently been based upon the provisions of the "Supplement to an act entitled 'An act to establish a State board of health,' approved March 9, 1877," which supplement was approved March 2, 1880 (Laws 1880, p. 322). The fourth plea has evidently been based upon the provisions of the "Supplement to an act entitled 'An act to prevent the spread of glanders in horses,' approved March 31, 1864," which supplement was approved March 12, 1884 (Supp. Rev. 8). If any specification of the causes of the demurrer were demanded and furnished, they have not been printed, and the only objections to the pleas which will be considered, are those which are shown in the brief of counsel.

The first objection seems addressed to the two pleas based upon the act of 1880. The contention is that the provisions of that act do not apply to horses. The first section of that act gave power to the State board of health to determine whether pleuro-pneumonia, rinderpest, or any other contagious or infectious disease existed among animals in any county in the State. From the enumeration of two diseases which usually afflict animals of the bovine species, and from the fact that in a proceeding prescribed in the second section, notice is required from the owner of "said cattle," it is argued that the provisions of the act are to be restricted to animals ordinarily called "cattle," that is, to horned or neat cattle. But the word "cattle" is defined as including all domestic quadrupeds, such as horses, mules, etc., as well as oxen, cows, etc. Worcester, Dict., tit. "Cattle." It has been held to bear a legal significance which includes horses. *Rex v. Pate*, 2 W. Bl. 721. The word "animals," elsewhere used in every part of the act, has a signification broad enough to include horses. When the Legislature expressly gives power in respect to any contagious or infectious disease among animals, I see no reason to limit the intention within narrower bounds than will be set by the acceptance of the words giving power in their natural meaning. Thus accepted, a contagious disease affecting horses plainly comes within the intent of the act.

It is next objected that the provisions of the act of 1884 cannot be resorted to in support of the fourth plea, because the trespass charged in the declaration is there said to have been committed on August 1, 1883. But the trespass is in fact charged in the declaration to have been committed on August 1, 1883, and on divers days and times between that day and the commencement of the suit which was in March, 1886. The act of trespass charged in the declaration is however one of a nature not possible to be continued. Laying a trespass of that nature with a *continuando*, or on divers days and times, was formerly bad on special demurrer. When so laid, upon objection made at the trial, the plaintiff was confined to evidence of a single trespass, but might prove any trespass committed before the commencement of the suit. *Janson v. Brown*, 1 Campb. 42, note 1. Since therefore under the declaration plaintiff could prove any killing of horses by defendants on any day prior to the commencement of the suit in March, 1886, defendants may properly set up the power conferred by the act of March 12, 1884.



as a justification for any killing which they admit after the latter date. The fourth plea does no more than this, and is not open to this objection.

It is next objected that the acts in question are within the prohibition of that clause of the fourteenth amendment of the Federal Constitution which reads: "Nor shall any State deprive any person of life, liberty or property without due process of law." This is the only constitutional objection urged, and no other has been considered. The power to abate any condition of things which from its injurious effect on public rights, public convenience or public morals, constituted a common nuisance, was a recognized part of the common-law scheme of government brought from England. In the complex system of government developed here, it is well settled that the States, under the powers called "police powers," may, by legislative action, define common nuisances, and declare what condition of things shall constitute such nuisances. It is equally well settled that the States have power to abate what are thus declared to be public or common nuisances; and that without making compensation to the owners of property thus interfered with or destroyed. *Cooley Const. Lim.*, chap. 18; *Mills Em. Dom.*, § 6. The fourteenth amendment does not impair the police powers of the States, when so exercised as to restrain equally all those affected, and when an equal opportunity to be heard is afforded before a judicial determination affecting personal rights or rights of property is made. *Barbier v. Connolly*, 113 U. S. 27; *Wurts v. Hoagland*, 114 id. 606. This court has sustained legislation, adopted under the police powers, where it gave authority to abate what was declared to be publicly injurious, by the destruction of property without compensation. *Weller v. Snover*, 42 N. J. L. 841; *Shivers v. Newton*, 45 id. 469. The acts in question have evidently been passed in the exercise of the police powers of the State. By their terms there is disclosed a legislative intent to place in the category of common nuisances all animals having contagious or infectious diseases, and all horses having glanders; and this is recognized as within those powers. Thus, animals coming within the provisions of the act of 1880 may, under certain circumstances, be slaughtered and are required to be, in all cases, quarantined and subjected to the control and regulation of the board of health, while by the provisions of the act of 1884 all glandered horses are to be destroyed. It was probably within the power of the Legislature to have authorized any person to abate such nuisances by the destruction of such animals. But following the policy adopted in the fish acts and the milk act, which were discussed in the cases last cited, the Legislature wisely placed the power to abate in the hands of officials, who may be supposed to act under a due sense of their responsibility, as well to the property owner as to the public. It was within the power of the Legislature to authorize such officials to abate such nuisances without other prerequisites to the exercise of such authority, save the existence of the prescribed disease, of which they must of course primarily form a judgment. This is the scheme of the act of 1884, which gives to any member of the board of health authority to destroy horses having glanders if he is satisfied of the fact. The act of 1880 is more restricted, and only gives power to abate such nuisances when the officials judge that the disease (which by implication they have determined to exist, and to be contagious or infectious) is not likely to yield to remedial treatment or threatens to spread to other animals. But this judgment of the officials in respect to the virulence of the disease or its threatened spread, is not an adjudication upon the existence of a nuisance, for that the law has declared to exist whenever a disease of the specified kind exists. The requirement

that the officials, before proceeding to abate, shall form a judgment or opinion respecting the probabilities of cure or the likelihood of the disease spreading, is in the nature of a limitation on the officials' power in favor of the property owner, and to afford him an opportunity, under certain circumstances, to retain property which is in fact a common nuisance, and which might justly be required to be abated.

Plaintiff however contends that the determination of the officials that the prescribed disease exists, is to be made without notice to the property owners, and without affording them an opportunity to be heard, and on this ground claims that these acts are obnoxious to the constitutional provision invoked. If the Legislature by these acts has made the determination of these officials, as to the existence of the common nuisance, a conclusive adjudication upon the rights of the property owner, then it is perfectly obvious that this legislation cannot be supported. It has been settled in this State that it is not within the power of legislation to impart to a determination of this sort a conclusive character as against the property owner, and legislation intending that result was held to be futile. *Hutton v. Camden*, 39 N. J. L. 122. An examination of the acts in question clearly shows that there was no intent in the legislative mind to make the conclusions of the officials decisive of the right of the property owner, nor to the existence of that condition of things which these acts declared should constitute in these cases a common nuisance, and would justify its abatement by the destruction of the animals diseased. The right of the property owner is not thereby barred on the one hand; nor is the justification of the officials made effective on the other hand by reason of their adjudication, but by reason of the fact that the common nuisance declared by the acts existed, and so existed as to permit the officials to exercise the power of abatement. What the acts authorize is the abatement of an actual nuisance. They afford no protection to any invasion of the rights of property in any other case. There is nothing in the decision in *Hutton v. Camden*, *supra*, nor in the learned and well-considered opinion of the chief justice, which gives the least countenance to the notion that the legislation may not authorize the abatement of a common nuisance until after its character as a nuisance has been determined in a judicial proceeding, with the safeguards of notice and opportunity to the property owner to be heard. Such a doctrine, enforced by the courts, would interpose an almost absolute barrier to the praiseworthy efforts everywhere made to prevent preventible disease, and to stamp out contagion and infection affecting public health and comfort, and would render much of the health legislation of to-day of no avail. But I think it cannot be claimed that the rights of a property owner will be improperly interfered with by legislation authorizing the abatement of nuisances of this character, although in advance of a judicial adjudication, provided such an adjudication, with notice and full opportunity to be heard, is not denied, but may be evoked and compelled. As has been said in this court, every property owner holds the title to his property subject to the paramount consideration of the health and safety of the public, and the power of the Legislature to fix upon it, when in certain conditions, the brand of noxiousness to public safety or health. If his property, in common with other property of the same sort, has been legally declared to be subject to destruction when in certain conditions noxious to the public, he cannot complain of its destruction if it was in fact in those conditions. It has never been pretended that the fourteenth amendment worked the abolition of the common-law rule which justified any one specially affected by a nuisance in abating it without waiting

for an adjudication that it was a nuisance which he might abate, but unless the fact of the nuisance was established by proof, he was liable to the aggrieved property owner as for an unwarranted trespass. The amendment was in my judgment likewise ineffectual to prevent the State from providing, under its police powers, for the immediate abatement of public nuisances actually existing, though not yet judicially adjudged nuisances. In such case the officer intrusted with the power of abatement could not be protected if he destroyed property without the existence of those conditions which make it a common nuisance and justify its destruction. But if the property owner is not deprived of a right to contest the existence of such conditions, and to obtain redress as for a trespass, if they are not shown to have existed, such legislative acts would not infringe any constitutional provision. These acts, being of the character above indicated, are not open to this objection. The pleas in question are drawn in conformity with the construction I have thus put on the acts. While they severally aver the judgment of defendants as to the existence, virulence and probability of the spread of the disease—which averment seems necessary because otherwise the power to abate the nuisance was not granted—they place the justification of defendants upon the existence in the horses destroyed of a contagious disease called glanders. This fact, if true, made the horses a common nuisance, and justified their destruction under the circumstances. The matter was therefore presented for judicial determination, and by plaintiff's taking issue on the pleas, an adjudication could have been compelled. The demurrer admits the justification, and the pleas are a complete answer to the case made in the declaration.

One objection still remains to be considered. Plaintiff contends that on a proper construction of the acts of 1880 the adjudication that the disease is not likely to yield to remedial treatment, or threatens to spread to other animals, is to be made by the board of health and cannot be made by the assistants. The language of section 3 (which gives the power) does not in my judgment admit of such a construction. Its reasonable construction devolves the power to slaughter upon the assistants of the board, upon their judgment that the disease is not likely to yield to remedial treatment or threatens to spread.

For these reasons I conclude the pleas must be sustained and the defendants have judgment on the demurrer.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**CARRIERS—OF GOODS—LIABILITY FOR LOSS—CHANGE IN CONTRACT.**—A common carrier contracted with the purchaser to transport certain iron, which contract was evidenced by a letter from the purchaser to the carrier, accompanied by an order to the seller for the delivery of the iron. Under the order the carrier got possession of the iron, and loaded it on a canal-boat, and delivered to the seller a bill of lading which he forwarded to the purchaser. The bill of lading modified the carrier's liability under the original contract. On the same day, by the sinking of the boat, the iron was lost. *Held* that the carrier could not defend under the bill of lading against a recovery of the value of the iron by the purchaser, in the absence of evidence of a course of business between the parties, or of a custom sanctioning such an interpretation of the original contract. Before the letter was written the plaintiff's agent called on the defendants, who were carriers, and inquired if they would take the iron to Pittsburgh, and at what rate, and the defendants agreed to take it at the rate of \$3 per ton, including

insurance. The letter of April 20 was then addressed by the plaintiff's agent to the defendants, the body of which is as follows: "DEAR SIRS: We haud you here-with delivery order for 25 tons iron, ex. str. Lepanto, which you are to ship to Mess. Park Brother & Co., Pittsburgh, Pa., per canal to Buffalo, and thence per rail via A. V. R. R. Co., at \$3 per gross ton, including insurance and all charges." If the goods are lost under circumstances which render the carrier liable by the general rule of law, the carrier must respond unless he can show that there was a special acceptance equivalent to a contract, which exempts him from the ordinary liability of common carriers in the particular case. *Dorr v. Navigation Co.*, 11 N. Y. 485; *Blossom v. Dodd*, 43 id. 284; *Madan v. Sherard*, 73 id. 330. The defendants having acted upon the letter of April 20, and acquired possession of the goods by means of the delivery order inclosed, there was apparently a complete contract for the carriage of the iron. It may be assumed that it was contemplated that a bill of lading would be signed when the iron was shipped. This would be according to the usual course of business. But we do not perceive that this justifies an inference that it was open to the defendants to insert therein clauses restrictive of the usual liability of carriers, especially in the absence of any evidence of a course of business between the parties, or of any custom or usage sanctioning such an interpretation of the preceding negotiations. Feb. 28, 1888. *Park v. Preston*. Opinion by Andrews, J.

**MARRIAGE—DIVORCE—JURISDICTION—WAIVER OF OBJECTION.**—A wife, resident in Texas, brought suit for divorce against her husband, resident in New York, after her husband had instituted a suit against her for divorce. In her suit she obtained personal service on him in New York. He went to Texas, and after his motion to quash the service had been overruled, answered to the merits, and asked for and obtained a continuance to prepare for trial. On the trial judgment was rendered for the wife, which was affirmed by the highest court of the State. *Held*, that by personally appearing and contesting the cause on the merits, the husband waived the invalidity of the personal service outside of the jurisdiction of the court issuing the same, and the divorce granted there, was valid. In the determination of the question whether the Texas court acquired jurisdiction of the person of the defendant in the action, it must be conceded at the outset that the service of the citation upon the defendant here, who at the time was a resident and citizen of New York, owing no allegiance to the State of Texas, was utterly void and ineffectual as a means of giving the courts of Texas jurisdiction of the defendant. The processes of courts run only within the jurisdiction which issues them. They cannot be served without the jurisdiction, and courts of one State cannot acquire jurisdiction over the citizens of another State, under statutes which authorize a substituted service, or which provide for actual service of notice without the jurisdiction, so as to authorize a judgment *in personam* against the party proceeded against. This question has recently been considered in several cases in this State, with a fulness of argument and illustration which leave nothing to be said, and it is sufficient to refer to the decisions. *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 id. 80; *Hunt v. Hunt*, 72 id. 217; *People v. Baker*, 76 id. 78; *O'Dea v. O'Dea*, 101 id. 23. It cannot be doubted therefore that the Texas court did not acquire jurisdiction of the defendant in the action by the service of the citation here, or that if the defendant had remained silent, taking no notice of the proceeding, no valid judgment could have been rendered against him. The contract of marriage cannot be an-

nulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The married relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending. *Folger, J., Hunt v. Hunt, supra; Cheever v. Wilson, 9 Wall. 108; O'Dea v. O'Dea, supra.* But notwithstanding the ineffectual proceeding to acquire jurisdiction of the defendant by the service of notice in this State, it was nevertheless competent for the defendant by a general appearance in the action, or other equivalent act, to submit to the jurisdiction of the Texas court, and thereby bind himself by the judgment pronounced. Jurisdiction of the person may be acquired by consent, although not of subject-matter, and it is well settled that a general appearance of a defendant in an action is equivalent to personal service of process. It is claimed that the defendant, by appearing in the Texas court and putting in an answer, and proceeding to trial on the merits, and subsequently appealing from the judgment, waived defective service of process and gave jurisdiction of his person, notwithstanding his appearance in the first instance was for the special purpose of objecting to the jurisdiction, and the subsequent proceedings on his part were accompanied with a protest against the jurisdiction. In *Avery v. Slack, 17 Wend. 85*, it was held that a party who appeared and objected to the validity of process, did not waive the objection by answering and going to trial on the merits after his objection had been overruled. The principle has been applied in a great variety of cases, and there is substantial uniformity in the decisions to the effect that a party not properly served with process so as to give the court jurisdiction of his person, does not waive the objection or confer jurisdiction by answering over and going to trial on the merits, after he has ineffectually objected to the jurisdiction and his objection has been overruled. *Harkness v. Hyde, 98 U. S. 476; Steam-Ship Co. v. Tugman, 106 id. 118; Warren v. Crane, 50 Mich. 301; Dewey v. Greene, 4 Denio, 94; Walling v. Beers, 120 Mass. 548.* It is contended however that the error in overruling the objection to the jurisdiction, when the party subsequently answers over and proceeds to trial on the merits, can only be corrected by a direct proceeding on error or appeal, and that the judgment, when the party has appeared and gone to trial on the merits, cannot be assailed collaterally for want of jurisdiction. Most of the cases which declare the doctrine that an answer and trial on the merits does not preclude a party who has objected to the jurisdiction from subsequently insisting that the court had no jurisdiction of the person, were cases on appeal or error. The principle upon which the doctrine proceeds is that a party who has objected to the jurisdiction, and whose objection has been overruled, is not bound, as was said by Harlan, C. J., in *Steamship Co. v. Tugman, supra*, "to desert the case, and leave the opposite party to take judgment by default." It is difficult to see why a party, proceeding under such circumstances, should be permitted to raise the question on error, and not be permitted to assail the judgment collaterally in another State, where the judgment is set up as a binding adjudication. The court does not acquire jurisdiction over the person by deciding that it has jurisdiction. If the acts of the defendant do not constitute a legal waiver of the objection, or a submission to the jurisdiction so as to preclude raising the question on error in the State where the judgment is rendered, how can the same acts preclude the party from raising the question in another State in answer to the

judgment? But passing the question, we think the judgment of the Texas court became and is a binding adjudication on the defendant therein, for the reason that the defendant, by going to Texas and filing an answer in the action, became bound by the statute law of the State prescribing the effect of that proceeding, and that by the Texas law the filing of an answer by a defendant is an appearance and submission to the jurisdiction. The Statutes of Texas (art. 1234) authorize a non-resident defendant to be brought in by service of notice out of the State, and when so served he is required to appear and answer in the same manner as if he had been personally served with a citation within the State. By article 1242, "the filing of an answer shall constitute an appearance of the defendant so as to dispense with the answer and service of the citation upon him." It is clear that a State cannot, by a statute, give jurisdiction to the courts over a citizen of another State, not served with process within the jurisdiction, and who does not appear in the action; at least a judgment rendered pursuant to such a statute, upon substituted service, would be void in every other jurisdiction. But as was said in *Parsons, C. J., in Bissell v. Briggs, 9 Mass. 464*, a citizen of a State going into another State owes a temporary allegiance to that State, and is bound by its laws and is amenable to its courts. The defendant in the Texas action was not bound to appear. He could stand aloof, and so long as he did so, could not be affected by the proceeding. But he chose to avail himself of the right given by the laws of Texas to file an answer and contest the claim of the plaintiff. He went within the jurisdiction, and was represented by attorneys there. He voluntarily filed his answer, after first seeking to dismiss the case for want of jurisdiction over his person. The effect of this proceeding was declared by statute to be equivalent to an appearance in the action, and to dispense with the service of a citation. The defendant was bound by the consequences which the statute affixes to that proceeding. He cannot invoke the general rule that an answer on the merits does not waive an objection to jurisdiction, because the statute in this case had intervened, and of this statute the defendant had notice. Feb. 28, 1888. *Jones v. Jones.* Opinion by Andrews, J.

**PARTNERSHIP—LIMITED—FAILURE TO RECORD CERTIFICATE.**—The New York Revised Statutes, in relation to limited partnerships (§ 6) provide that the certificate required by law to be made by those forming a limited partnership shall be filed in the office of the county clerk, and shall be recorded by him in a book to be kept for that purpose, open to public inspection. Defendants filed such certificate, but the county clerk failed to record it. *Held*, that defendants were not required by such statute to see that the certificate was recorded, and that they were not liable as general partners by reason of such failure of the county clerk. In many counties in the State the clerk is largely behind in the matter of the actual, physical recording of papers left in his office therefor. In this very county, where this court now sits, the clerk has been from one to three months behindhand; and is it fair to those who are desirous of forming a limited partnership to so construe the statute that although they may desire to commence business on the 1st of January, and for that purpose file their certificate on the 31st of December previous, yet they shall not be deemed to have thus formed such partnership, because the clerk has not recorded the certificate, and which perhaps he may not record until three months thereafter? It is said that there are not a great many of this class of papers left for record, and that therefore they might be recorded with great dispatch. Undoubtedly they

might be, but the question is, can the clerk be compelled by *mandamus* to record such papers one hour earlier than other papers which came in ahead of them for record? It is his duty to record them all; and can the court say, that because the paper is a short one, he shall record it immediately, and in advance of a paper filed a week, a month, or perhaps three months ahead of it? In other words, is not the clerk doing all that he can be compelled to do when he records papers as of the day when they were left for record, as soon as he reaches them in the regular discharge of his duties? It seems to me so, and yet during all this time the partnership does business at the peril, as to the special partner, of having it declared a general one, and the statement in the certificate as to when the partnership is to commence may be false, owing to a failure of the clerk to make this record; or the special partner, unwilling to take this risk, may endeavor to avoid it by refusing to allow any business to be done until that record is made; although how he can carry out such refusal, or how he can prevent any business being done during this time by the general partners is a little difficult to understand. All this difficulty is avoided by holding what it seems to me is the fair and plain intention of the Legislature, viz., that when the parties have done all that they can do in the way of complying with the terms and conditions of the Limited Partnership Act, and when all that remains to be done is for a public officer (intrusted with the care and custody of the papers filed with him) to perform the duties placed upon him under the provisions of the law, it must be regarded as a compliance by the parties interested with the terms of the statute, and the record must be assumed to be made when the paper goes for the purpose of record out of the control of the individual into the control of the public officer. It is said that the same reasoning would apply to the publication in the newspapers of the terms of the partnership as provided for by the act. But it seems to me an entirely different principle applies there. The duty of making the publication is cast upon the partners; and there is no obligation on the part of the publisher of the paper as there is on the part of the public officer, to do any thing. Again it is a matter of private contract between the partners and the publishers of the newspaper; and in that way it is within the power of the partners to see to it that the publication is made within the time required in the statute, and that it correctly states the terms of such partnership. However the effect of a failure to publish is not now before us. It is true, that in the general construction and interpretation of the statute in relation to limited partnerships, courts have inclined to exact a rigid performance of the substance of the statute from those desirous of availing themselves of its benefits. But in all the cases that my attention has been called to, and in all that I have been able to find, where the individual has been held liable for a failure to comply with the terms of the statute, such liability has been based upon a failure to do that which the statute called upon the parties interested, or some of them, to do, and not upon the failure of a public officer to do an act which the statute provided that he should do. Thus in the case of *Smith v. Argall*, 6 Hill, 479, the publication of the terms of the partnership made in one of the newspapers stated that the special partner had contributed \$5,000, when in fact he had only contributed \$2,000. It was not claimed that there was any fraud in the statement, but simply a mistake, and as the law cast the duty upon the partners to make the publication, a failure to make it correctly rendered the defendant liable as a general partner. That case is again reported on appeal in 3 Denio, 435, where as the main ground for holding the defendant

liable as a general partner, the court stated that "the duty of making such publication is by the statute devolved upon the partners." In *Van Ingen v. Whitman*, 62 N. Y. 513, the special partner did not, as matter of fact, contribute \$30,000 in cash to the general fund, as the certificate stated. There were certain assets which he owned in an old partnership, and he empowered one of the general partners to turn them into cash, which was to be contributed as his payment, and treated as cash, the firm being solvent. But this court held that that was not a compliance with the statute, which required that the payment should be made in cash. Here again the liability rested upon a failure of the individual to do that which the statute required that he should do. It was his own act, or rather his own failure to act, for which he was held responsible. Then there is the case of *Durant v. Abendroth*, 69 N. Y. 148. There the partnership was to commence on the 1st of January, which happened to be Sunday. The articles of copartnership were drawn up, and the certificate and affidavit made, on the 23d of December, upon which day the special partner gave his check for the amount he was to contribute, dated the 31st of December, and the certificate and affidavit were immediately filed. The check was paid on the 2d of January—the first banking day of the new year—and the cash was thereby paid into the partnership before one particle of business was done under its terms. This court however held that the affidavit was false when made, because at that time payment in cash had not been made, but a post-dated check was given in lieu thereof, and after such check was paid no affidavit was made of the contribution in cash of the amount to be contributed by the special partner. Here again the defendant was held liable because of his own failure to fulfill and comply with the terms of the statute. He had full power to pay in cash at the time the affidavit was made, and if he failed, it was his misfortune. I think it was a very stern and technical application of the statute, because confessedly before one particle of business was transacted by the firm, and on the earliest possible day after the commencement of the term of partnership at which it could be done, the check was paid, and the cash contributed by the special partner to the general fund. It does not seem to me as if the principle of that case should be extended. *Church, C. J.*, and *Earl, J.*, dissented from the decision thereof, and *Allen, J.*, did not sit. Upon a subsequent appeal, reported in 97 N. Y. 132, the doctrine is reiterated. A substantial compliance with the terms of the statute, even in the case of a limited partnership, has upon one or two occasions been held sufficient. Thus in *Bowen v. Argall*, 24 Wend. 496, a publication of the names of the parties was made, in which the name of one partner was printed "Argale," instead of "Argall;" and the court held, that in the absence of any evidence that anybody was misled by it, the mistake was unimportant, and if there were any such evidence, it would have been a fair question for the jury. Again in *Bauk v. Gould*, 5 Hill, 309, the period of the commencement of the partnership was erroneously stated as November 16 instead of October 16 in the newspaper. In the absence of evidence that any one was injured, that was also held to be an unimportant mistake, and that the statute was substantially complied with, and the special partner not liable. Some cases in other States have been referred to on the argument in relation to the construction to be given to this act, but upon examination I do not see that very much light is thrown therefrom. The case of *Gray v. Gibson*, 6 Mich. 300, does not discuss the question at all. It assumes the fact to be as stated in the opinion and then decides some other question. That was a case where they attempted to prove a general partner-

ship as between the plaintiffs themselves by proving an attempt to form a special partnership, and a failure to record the certificate. The court held such facts did not prove that the plaintiffs were partners as between themselves. At the same time, it assumed that the failure to record the certificate would have rendered plaintiffs liable as general partners as to third persons. The case of *Henkel v. Heyman*, 91 Ill. 96, affirming 1 Bradw. 145, assumed that the failure of the clerk to record the certificate would not render the special liable as a general partner. In that case the certificate had been taken to the clerk's office for the purpose of being filed, and had been withdrawn; and the court held it was not filed within the meaning of the act. Those are the only cases outside of the State to which my attention has been called, and the only ones I have found upon the subject. One might be said to offset the other, and neither contributes anything toward a proper solution of the question in hand. In this State some cases have been decided by the Supreme Court which are somewhat analogous to the one now under discussion. By the statute every chattel mortgage, under the circumstances therein named, is absolutely void as against the creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, be filed as directed in the act. It is made the duty of the clerks of towns in whose office chattel mortgages are required by the act to be filed, to provide proper books in which the names shall be entered in alphabetical order of the parties to every mortgage, and also to indorse them on the back, and to enter the number in a separate column in the books in which the mortgages shall be entered. Yet in the cases of *Bishop v. Cook*, 13 Barb. 326; *Dodge v. Potter*, 18 id. 193; and *Dikeman v. Puckhafer*, 1 Abb. Pr. (N. S.) 32, it was held that the failure of the clerk to do these things did not affect the rights of the mortgagee, as he had done all that he could do when he delivered the mortgage to the clerk to be filed, and that he ought not to be held liable for the default of the clerk, a public officer, over whose acts he had no control. The cases are not precisely similar to the one under consideration, and yet the principle of non-liability for the default of a public officer, under circumstances somewhat similar, is announced, and I think correctly maintained. Plaintiff cited the case of *Frost v. Beekman*, 1 Johns. Ch. 288, as an instance where the courts have held an individual bound by the neglect of a public officer. The case was where the record of a mortgage mistakenly stated its amount as \$300, instead of its actual sum of \$3,000; and the mortgagee was held bound by the record in favor of a subsequent *bona fide* purchaser, relying on the record as correct. The case is entirely unlike the one under consideration. The very life of the system of recording titles and incumbrances thereon depends upon the fact of the record itself being a sufficient source of information for a subsequent *bona fide* purchaser or incumbrancer; and unless such were the case it would be practically useless to have a record. A mortgagee knows this, and hence is responsible for the truth of the record, as it must be assumed he knows its contents, and knowing it, still allows others to deal with the property on the faith of the correctness of such record. He might fairly be said to be estopped from denying the correctness of the record on the principle applicable to an estoppel *in pais*. The case is peculiar, and stands on principles which call for such a decision, at the peril of otherwise losing most of the benefits to be derived from a record of titles or incumbrances. It will be noticed the mortgagee is not liable for a failure of the clerk to record at all, but only for a false record. He can easily call the attention of the clerk to the mistake, and it may be instantly remedied; but in the case at bar the partners

cannot, as I have shown, compel an immediate record of the certificate. It seems to me the principle of holding an individual responsible for a default of a public officer should not be extended to a case such as is under consideration here. But I think that this court has decided the principle involved in this case in accordance with the views which I take of this statute. I refer to the case of *Veeder v. Mudgett*, 86 N. Y. 295, which arose by reason of an attempt to enforce the liability of the defendants under the General Manufacturing Act of 1848. I confess I am wholly unable to see any distinction in principle between these two acts. I am unable to see how, if a record of a certificate is necessary in the one case, it is not equally necessary in the other; and as this court has decided that it is not necessary in a case arising under the Manufacturing Act, I am unable to perceive any valid reason why it should be necessary in case of a limited partnership. The statute is no more peremptory in the one case than in the other, and there is no more reason for holding a liability in the one case than in the other. On a line with the decision in the *Veeder* case, although prior in point of time, is that of *Cameron v. Seaman*, 69 N. Y. 396, which involved the proper construction of section 12 of the Manufacturing Act of 1848. See also *Butler v. Smalley*, 101 N. Y. 71. I see no reason whatever for establishing a different rule in regard to the formation of limited partnerships, for the purpose of terminating the liability of the individual as a general partner, from that which is held in relation to manufacturing corporations, for the purpose of terminating the individual liability of stockholders. March 6, 1888. *Manhattan Co. v. Latrobe*. Opinion by Peckham, J., Andrews, Earl, Danforth and Finch, JJ., concur. Ruger, C. J., and Gray, J., dissenting.

**WILLS—REVOCATION—BY RELEASE FROM DEVISEE.**—Under 3 Revised Statutes of New York, p. 2, chap. 6, §§ 47, 48, providing that a devise shall not be revoked by any alteration in testator's interest in the property devised, not amounting to an entire divestiture, except by a conveyance, either declaring such alteration to be a revocation, or itself wholly inconsistent with the previous devise, the execution by a remainderman of realty of a receipt for money in full of all interest in the testator's estate, up to date, and all such other property as he may accumulate up to his decease, does not operate as a revocation so as to effect a satisfaction of the devise, where testator dies without altering or revoking his will. The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty. Story Eq. Jur., § 1111; 2 Wms. Ex'rs (5th Am. ed.), 1202; 1 Rep. Leg. 365; *Davy v. Boucher*, 3 Young & C. 397; *Langdon v. Astor's Ex'rs*, 16 N. Y. 84. Ademption is the extinction or satisfaction of a legacy by some act of a testator, which is equivalent to a revocation of the bequest, or indicates the intention to revoke; and the rule is applied where the testator is a parent of the legatee, or stand *in loco parentis*. The question of its application is made to depend upon the declared or presumed intention of the donor. *Langdon v. Astor's Ex'rs*, *supra*. The danger of creating an intention from the facts is ordinarily great enough to require in each case that the mind of the court should be wholly satisfied as to the meaning of the testator's act. In the present case, had the testamentary gift been a legacy of personal property, we should say that no doubt could exist as to what was intended by testator at the time of the transaction. We see no reason however for the application of any such rule to devises of real property. During a testator's life-time his will was of course inoperative and ineffectual, and only upon his death does it have any legal operation. The writing which testator took from his daughter was not an agreement in any sense binding upon him, nor

was it one which accrued to appellant's benefit. Appellant was no party to it, and no consideration moved from him for its execution. The question is not such as would arise by reason of a transaction between respondent as the legatee and appellant as the residuary legatee, by which she had transferred or released to him, her interest under her father's will in due form. After the writing had been delivered the daughter may have been precluded from asserting her right to recognition in her father's will, but the father was at liberty either to give legal effect to the transaction by changing his will and revoking the provisions in his daughter's favor, or to reconsider any previously-existing intention of altering his provision for her. Although he survived the transaction fifteen years, he did not change his will, and the presumption of a subsequent change of intention on his part from any motive may be entertained without doing any violence to our ideas of strict justice. But a deeper principle underlies the consideration of this question in the effect to be given to our statutes governing the making of wills. A specific devise of real property may be revoked by alteration or alienation of the estate during testator's life (*Livingston v. Livingston*, 3 Johns. Ch. 124; *McNaughton v. McNaughton*, 34 N. Y. 201), but we fall to see any other mode of effecting such revocation without running counter to those provisions of the statutes which declare what acts shall revoke or alter a will in writing. 3 Rev. Stat. (Banks' 7th ed.), 2286-2288. In these provisions I think I see ample reason for refusing our sanction to the introduction of a doctrine, which while if applicable at this day to legacies of personal property, can work no especial prejudice to rights of property in such application, yet in its application to devises of real property might work great mischief and tend to endanger the safety of titles which depend for their security upon the conduit of a testamentary devise. The reason for refusing to extend the application of the principle of satisfaction of devises of real estate, which was assigned in the case of *Davys v. Boucher*, 3 Young & C. 397, was that to so extend it would repeal that provision of the statute of frauds which applies to the revocation of wills of real estate. The sixth section of the English statute of frauds (29 Car. II, chap.) provided that devises in writing of lands, etc., should be revocable by some other will or codicil or writing declaring the same, or by destruction by testator's act; and that all such devises should remain in force unless destroyed, or unless altered as mentioned by will, codicil or writing witnessed in form. The subsequent passage of chapter 28, 2 Vict., placed the revocation of wills of personality upon the same footing as wills of realty. 1 Wms. Ex'rs, 106, 107, 130, 131. There is a sufficient likeness in the English statute to ours to make the reasoning applicable here. A rule of law which has heretofore been sanctioned and relied upon, which is in unison with the spirit and with the sense of our statute, and which offers a safe rule of property, is rather to be followed than to be departed from for reasons moving from the circumstances of a particular case. Reference to adjudged cases in the courts of other States only serves to confirm us in the views we have expressed. *Clark v. Jettou*, 5 Sneed, 229; *Allen v. Allen*, 13 S. C. 512; *Weston v. Johnson*, 48 Ind. 1. Feb. 28, 1868. *Burnham v. Comfort*. Opinion by Gray, J., Earl and Peckham, JJ., dissenting.

#### UNITED STATES SUPREME COURT ABSTRACT.

JURISDICTION — FEDERAL QUESTION — QUESTION ARISING UNDER PATENT LAWS.—A decision of a State

court, in an action between citizens of the same State, on an agreement in writing, by which plaintiff, the owner of letters-patent already once reissued, granted to defendant an exclusive license to make and sell the patented article, the defendant expressly acknowledging the validity of the patent, and stipulating that plaintiff might obtain reissues, and promising to pay royalties so long as no decision adverse to the patent should have been rendered, that defendant was estopped from denying the validity of subsequent reissues of the letters, is not a decision of any questions arising under the patent laws of the United States, and the Supreme Court has no jurisdiction. It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters-patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, chap. 357, § 17 (5 St. 124); Rev. Stat., § 699; *Wilson v. Sandford*, 10 How. 99; *Brown v. Shannon*, 20 Id. 55. Following those decisions, it was directly adjudged in *Hartell v. Tilghman*, 99 U. S. 547, that a bill in equity by a patentee, alleging that the defendants had broken a contract by which they had agreed to pay him a certain royalty for the use of his invention, and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition, and he filed this bill charging them as infringers, and praying for an injunction, on account of profits and damages, was not a case arising under the patent laws, and therefore, the parties being citizens of the same State, not within the jurisdiction of the Circuit Court of the United States; and the judges who dissented from that conclusion admitted it to be perfectly well settled "that where a suit is brought on a contract of which a patent is the subject-matter—either to enforce such contract, or to annul it—the case arises on the contract, or out of the contract, and not under the patent laws." 99 U. S. 558. In the still later case of *Albright v. Teas*, 106 U. S. 613 a patentee filed a bill in equity in a State court, setting up a contract by which he agreed to assign his patent to the defendants, and they agreed to pay him certain royalties, and alleging that the defendants had refused to account for or pay such royalties to him, and had fraudulently excluded him from inspecting their books of account. The defendants answered that the plaintiff had been paid all the royalties to which he was entitled, and that if he claimed more, it was because he insisted that goods made under another patent were an infringement of his. This court held that it was not a case arising under the Constitution or laws of the United States, removable as such into the Circuit Court, under the act of March 3, 1875, chap. 137, § 2 (18 St. 470). It was said by Chief Justice Taney in *Wilson v. Sandford*, and repeated by the court in *Hartell v. Tilghman*, and in *Albright v. Teas*: "The dispute in this case does not arise under any act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles." 10 How. 101, 102; 99 U. S. 552; 106 Id. 619. Those words are equally applicable to the present case, except that as it is an action at law, the principles of equity have no bearing. This action therefore was within the jurisdiction, and the parties being citizens of the same State, within the exclusive jurisdiction of the State courts, and the only Federal question in the case was rightly decided. Upon the merits of the case



it follows from what has been already said that no question is presented of which this court, upon this writ of error, has jurisdiction. *Murdock v. Memphis*, 20 Wall. 590. The grounds of the judgment below appear in the opinion of the Court of Appeals, to which, under the existing acts of Congress, this court is at liberty to refer. *Fire Ass'n v. New York*, 119 U. S. 110; *Kreiger v. Railroad*, — Sup. Ct. Rep., 752. Whether that court was right in its suggestion that it would have no jurisdiction to determine the validity of the second reissue if incidentally drawn in question in an action upon an agreement between the parties, we need not consider; inasmuch as it expressly declined to pass upon any such question, because it held that in this action to recover royalties due under the agreement, the defendant, while continuing to enjoy the privileges of the license, was estopped to deny the validity of the patent, or of any reissue thereof. The decision was based upon the contract between the parties, and the court did not decide, nor was it necessary for the determination of the case that it should decide, any question depending on the construction or effect of the patent laws of the United States. *Kinsman v. Parkhurst*, 18 How. 289; *Brown v. Atwell*, 92 U. S. 327. March 19, 1888. *Dale Tile Manufg Co. v. Hyatt*. Opinion by Gray, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**ATTACHMENT — BOND — SURETIES — SIGNATURE OF PARTNERSHIP NAME.**—In the absence of proof to the contrary, it will be presumed that a surety on an attachment bond, who signs the name and style of a partnership, did so with the authority of the other partners, and the attachment issued thereon will not for that reason be declared invalid. We cannot assume from the fact that one of the sureties signed as "Arnold & Shelton," that this name or style represents a partnership; for it is frequently the case that one person does business under a name or style which would indicate that more than one person was interested in it. It is doubtless true that one member of a copartnership has no authority, by virtue solely of the partnership, to bind the firm as surety in a matter not affecting the partnership business; but it is equally true that one member of a firm, by consent of his copartner, may bind the firm as surety in a matter in which the partnership has no interest whatever. The power of a partnership is not limited, as is that of a corporation, to the transaction of such business as falls fairly within the purposes for which it was entered into, but by consent of its members may extend to any transaction not forbidden by law. It may become surety for the payment of the debt or undertaking of another. If it be conceded that "Arnold & Shelton" was the name or style of a partnership composed of two or more persons, to hold the bond invalid because the firm appears to be the surety, we should have to assume that the bond was executed by a member of the firm without the consent or authorization of his copartners. There is no presumption of law or fact that this is true; but on the contrary, the presumption, in the absence of evidence to the contrary, is that the officer whose duty it was to pass upon the sufficiency of the sureties, made inquiry and satisfied himself that the person who signed for "Arnold & Shelton" had authority so to do. Such has been the ruling elsewhere. *Danforth v. Carter*, 1 Cole, 563; *Churchill v. Fulliam*, 8 Iowa, 47; *Cunningham v. Lamar*, 51 Ga. 575. The motion is based solely on what appears upon the face of the

bond, and raised no issue of fact on which an inquiry could have been made as to the authority of the person who signed the bond to bind a partnership doing business under the name and style of "Arnold & Shelton." It would seem that in any case in which the authority of one to sign a firm name as surety to such a bond, approved and filed, is questioned, that this should be done by some plea raising an issue of fact, and not by a motion which goes only to the sufficiency of the papers as they appear. *Messner v. Hutchins*, 17 Tex. 602; *Wright v. Smith*, 19 id. 299; *Drake Attachment*, 133. No such plea was filed. If such a plea had been filed and on inquiry it had been found that "Arnold & Shelton" was the style of a partnership composed of two or more persons, and that this was signed by one member of the firm without authority from his copartner so to sign it, then the attachment and all proceedings under it should have been set aside. The fact that such a result may ensue when the name or style of a partnership is signed to an attachment bond is a very good reason why a clerk should not receive a bond having on it as surety a name which seems to be the name or style of a partnership. A bond thus signed ought to be rejected by the officer whose duty it is to approve the bond; for he ought not to imperil the rights of parties by undertaking to pass upon the power of one partner to bind his firm as surety, which will most frequently involve a question of law, and in all cases complicated inquiries of fact which he ought not to assume to decide. He must inquire who are the members of the firm, and whether they have all consented that it shall become surety in the given case. If some or all members of a firm are willing to become sureties they can sign or cause to be signed their own names, and thus avoid all question. Legislation upon this matter may be desirable. Tex. Sup. Ct., Dec. 2, 1887. *Dannelly v. Elser*. Opinion by Stayton, J.

**CARRIERS—OF PASSENGERS—COUPON TICKETS—REFUSAL TO ACCEPT DETACHED TICKETS.**—The defendant, while riding in a car of the plaintiff, tendered in payment of his fare a coupon taken from a ticket-book which contained originally one hundred similar coupons. On each coupon were printed the words, "Not good if detached," and on the cover of the book, "Coupons are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket." The defendant refused to exhibit his ticket-book or to pay his fare in any other manner than as aforesaid. At the trial he offered to prove that it was the custom of passengers to pay their passage with detached coupons, without showing their books; but the evidence was excluded. *Held*, that the contract of which the book and coupons were evidence was a reasonable one; that there was no evidence that the plaintiff had rescinded or waived any of the terms or conditions of the contract; and that the plaintiff was entitled to judgment. Mass. Sup. Jud. Ct., Jan. 12, 1888. *Boston & M. R. Co. v. Chipman*. Opinion per *Curtam*.

**CATTLE—NEGLIGENCE—PRESUMPTION.**—Eight cows having been safely loaded in a truck at D. for conveyance to B., on the arrival of the train at B. it was found that one had a leg broken, and that three others were injured about the hips and rump. The owner having brought an action for negligence against the railway company, and having proved the injuries and given his opinion that they were caused by undue shunting and jerking of the train, *held*, that the defendants are entitled to judgment. Stephen, J.: It seems to me that it is impossible to go beyond making a mere guess as to how the injury to the cattle



***The Legal Relations of Infants***, parent and child, and guardian and ward, and a particular consideration of guardianship in the State of New York, including practice and procedure in Surrogates' courts, and in the Supreme Court and county courts, and the superior courts of cities, in matters of guardianship; and in actions against infants

Judgment affirmed with costs—Edward Tack, appellant, v. Peter Ross, respondent.—Judgment affirmed with costs—First National Bank of W. H. Hall, N. Y., respondent, v. William A. Griswold, appellant.—Judgment affirmed with costs—Geo. Crispin, respondent, v. Benjamin T. Babbitt, appellant.—Judgment affirmed with costs—Andrew Klindberg, respondent, v. Samuel T. Freeman, appellant.—Judgment affirmed with costs—Prudence M. Wing, appellant, v. Ambrose S. Field, respondent.—Judgment affirmed with costs—Benjamin Weill, respondent, v. Henry Hamilton, appellant.—Motion for reargument denied with ten dollars costs. Motion for reargument to dismiss, etc. Motion to dismiss appeal from the General Term order of July 8, 1887, granted without costs—Thomas W. Kling v. Reon Barnes, four cases.—Motion to amend denied without costs—James H. Goodsell v. Western Union Telegraph Company.—Motion to file new undertaking granted without costs—August Weidner, respondent, v. Timothy G. Phillips, appellant.

# The Albany Law Journal.

ALBANY, MAY 12, 1888.

## CURRENT TOPICS.

THE question of prison labor has become very serious. How to employ prisoners so that their life shall not be more luxurious than it would be if they were free, and the policy of contracts for their labor, are practical questions pressing upon public attention, and which are brought to our attention by a recent bill at the present session of our Legislature, and an article on the subject in the *Central Law Journal* of the 4th instant. The bill in question provides for the employment of convicts on roads and in other public work. We understand that the old system of the employment of convict labor upon contract with *private* parties has been abolished in this State, but we see no reason in justice or humanity why prisoners should not be employed upon *public* works of the State, such as roads and canals. The article in the *Central* seems to have been suggested by a case in Kentucky, where under an act of the Legislature convict labor was farmed out to a mining company and by them sub-let, and where it was held that the entire scheme was illegal, or if not, that the sub-letting was unauthorized. The *Central* says: "The Kentucky Legislature seems to have regarded convicts in the light of chattels, useless and expensive, which must be disposed of in the cheapest and most expeditious manner possible. Economy is the dominant principle of all the legislation on this subject, and we rather wonder that it has, as yet, stopped short at such half measures. Why not sell out the penitentiary altogether, sentence the convict directly to the mines, require the contractor to pay all the costs of the trial, and a good round sum by way of hire besides? By this means the State could put money in its purse, and be fairly rid of the convict until he shall, what is left of him, emerge from the earth when his term of servitude shall have expired. This system would certainly be the cheapest, but whether it would not engender horrors and cruelties which would shock every sense of mercy and humanity, is another and altogether a different question." We agree with these sentiments, but this, we believe, is not contemplated by the bill now pending here. One objection made to this bill is the sentimental one that it would be shocking to the public sense to have convicts working side by side with honest laborers, and to see convicts toiling with ball and chain in public places. But this is easily regulated as to the co-labor, and as to the other point it would be a wholesome public spectacle. The *Central* says: "In some of the States the penitentiary is becoming a sort of receiving ship where convicts abide until they are sold into slavery, or farmed out, if that euphuism is preferred, to the highest bidder

or to favored contractors. In due season, if this course is persevered in, it is safe to predict the worst horrors of the galley of the penal colonies, even of Norfolk Island and the Siberian mines will be reproduced in our own country." This undoubtedly is not exaggerated as to the farming system in some States, but we are inclined to believe that the popular belief exaggerates the horrors of our prisons, and that the majority of convicts are better fed, housed and cared for than they would be outside. At all events they are at liberty to keep out. It is quite probable that the prospect of a little stone-breaking and digging in public would be a wholesome deterrent. There is a growing belief that mere imprisonment is not so terrible as it ought to be made, and so whipping is adopted in England and in some of our States, and strongly urged elsewhere by humane men. Public labor would be much more humane and effectual, in our judgment. But the *Central* and ourselves are not far apart when it says: "Felons to whose crimes the law does not award capital punishment should be imprisoned in the penitentiary, with or without hard labor, according to the terms of the law and the sentence of the court. And this should be done at the expense of the State. If the labor of convicts in the penitentiary can, without detriment to the labor of honest citizens, be made to pay part of the prison expense, the proceeds of that labor should be so applied; if there is a deficit, let the State discharge its duty and pay up like a man." The thing to be accomplished at all hazards is to make the convict work hard for his living. He should not be supported in idleness through any sentimentality or fear of "taking the bread out of honest men's mouths."

The Civil Code is again defeated, and this time by a decisive majority in the Assembly. We are not in the habit of "crying over spilt milk," nor of whining at defeat, and so shall not have much to say about this, but we may be allowed to remark that while some members laid great stress on ex-Judge Noah Davis' discovery of what he deemed defects, after less than three days' acquaintance with the Code, a similar judgment on the learned judge would be cruel, when the number of times that he has been overruled is considered, especially in such important cases as those of Tweed and Sharp. The Code, or some code, will make its way in time. Public sentiment is growing to demand it, and is being educated to it. The present hostility of the legal profession, at least among the candid part of it, mainly springs from ignorance and indifference. We have happily at hand a very neat corroboration of this opinion in a letter from our correspondent who deprecated the discussion, and to whom we offered to send this journal free for a year if he would assure us that he had ever read the Code. He answers: "I frankly confess that I have never even looked at the Field Code, and I did not wish to be understood as violently opposed to it, but merely as somewhat weary of the

unending discussion. Toward the Code itself my position is identical with that of a certain 'Pharisee named Gamaliel, a doctor of the law,' toward the early church. If the Code is passed by the Legislature I shall of course be forced to study its provisions, but until then, for my leisure reading I prefer such books as 'Iconoclasm and Whitewash,' even to the weighty utterances of David Dudley Field." This of course is very flattering to us, but it confirms us in our opinion of the reason for the opposition of the lawyers to any code. To use a homely proverb, and without any intention of disrespect, "it is hard to teach an old dog new tricks." We ourselves feel that—it would be extremely hard to teach us to prefer the higgledy-piggledy common law to a code. Young lawyers are much more apt to be favorable to codification than old ones, who have learned the ritual of the temple of justice, and are not willing to have a new and easier one which may let in a new class of priests. We shall give our friend a rest and go into camp until next winter, but then we shall hope to have him "on the list" of men who at least have read the Code.

The president has made a surprising selection to fill the vacancy in the chief justiceship, and yet it seems a fairly good one. Mr. Fuller, although completely unknown outside his own State, is there regarded as an excellent and brilliant lawyer, perhaps the leader of the bar, and has had experience in Federal litigation. He has had no judicial experience, but this is not an insuperable objection, for some of the best judges of the highest courts of this country have been taken directly from the bar. We are glad that the president has taken a recognized lawyer in this instance. Mr. Fuller is hardly more unknown than Mr. Waite was. He is of the proper age, about fifty-five, but as he was a college class-mate of Mr. Phelps, we suppose the latter is of the same age, and this leads us to say that we should have preferred Mr. Phelps, who has a national reputation. The nominee is from a proper locality. The appointment, we think, was fairly due to the west, or at least might gracefully have been accorded to it, and the great State of Illinois is well entitled to have the honor of a representative on this bench. In respect of character and general attainments Mr. Fuller seems to be quite admirable in the judgment of his neighbors. Indeed it is rare that a nomination has been received with such nearly unanimous approbation and cordiality. Mr. Fuller delayed his acceptance, and it would be a reproach on our national economy if the reason for this was, as it is rumored, that he cannot afford to take the chief justiceship on account of the meagreness of the salary. If this sort of public prudence continues we may yet be driven to appoint our judges from the ranks of unmarried men. Our judges should not be hampered by pecuniary anxieties, and *res angusta domi* should not intrude on their consideration of the gravest questions of law.

We are inclined to regret the governor's veto of Senator Langbein's bill to punish the advertising for divorce business. The bill proposed to punish not only the lawyer but the publisher or printer. The governor objected to the substance and to the form, although he conceded that the object was meritorious. He objected to the substance because it proposed to punish the publisher or printer. He thought it sufficient to punish the advertiser, as the others are "comparatively innocent." It may be that in some cases it would be impossible to reach the advertiser, as where in some actual cases he used an assumed name. We see no objection on this score. If it is proper to punish one who gets married without a license, there would seem to be good reason to punish one who circulates advertisements for divorce business. The former in most instances would be "comparatively innocent," but it has been thought politic to punish even such persons to effect a reform and prevent an abuse of great moment. A similar bill has been enacted in Massachusetts, which singularly punishes the publisher or printer and not the advertiser, seeming to regard the latter as "comparatively innocent." The objection to the form is that the bill ought not to be special, but ought to amend some section of the Penal Code. The governor says with great force and truth, that "the chief benefit of the Penal Code will be defeated if offenses like the one in question, capable of easy classification within the contents of the Code, are scattered by independent enactments through the various volumes of the Session Laws." We are glad to see the governor stand up for any code. But it would perhaps be difficult to find any section to which the provision in question could properly be attached by way of amendment. On the whole we wish, in view of recent exposures of the great abuse in question, that the governor had sanctioned the measure.

#### NOTES OF CASES.

**I***n Diemer v. Herber*, California Supreme Court, March 20, 1888, the court said: "The plaintiff and the defendant got into a discussion as to whether any watch could be found in San Francisco which would run longer than a week without being wound up. The defendant was willing to bet five dollars against a hundred that no such watch could be produced. Finally the parties each bet and put up a hundred dollars; the plaintiff betting that sum that he could, and the defendant betting that he could not, produce such a watch. Then the plaintiff produced a watch that he said would run longer than a week, and was told by the defendant to take the money which had been put up on the wager. The plaintiff, in accordance with this permission and request, took the money and went out of the defendant's premises. In a very few minutes the defendant sent a messenger after him to bring back the money, or he would be

arrested. The plaintiff, thinking he had won the money fairly, treated the demand with scorn. Afterward, through his attorney and others, the defendant endeavored to induce the plaintiff to return the whole and then a part of the money; one of the propositions made being that if the plaintiff would pay back fifty dollars the defendant would 'have it published in all the papers in San Francisco that he was wrong.' Finally the defendant and one McPherson came to the plaintiff to see him about the matter, and were told that the plaintiff would not pay a cent. Then the defendant had the plaintiff arrested, and after a preliminary examination he was bound over to the Superior Court to answer a charge of grand larceny. An information was duly filed against the plaintiff accusing him of that crime in stealing one hundred dollars from the defendant. This information was dismissed upon motion of the prosecuting attorney, for the reason that there was 'no evidence to convict.' The plaintiff then instituted this action. As the matter appears to us, the defendant having made a foolish bet in a vein of braggadocio, and given up the money he had staked, repented of it in a very short time, and sought to get his money back. Finding that the person he had bet with treated the affair as serious, he tried the influence of lawyers and friends to get back that which he had thus wagered. This not bringing about the desired result he had the defendant arrested, charged with an infamous offense, and he sued him also civilly to recover the money, and obtained a judgment. He succeeded by this latter means in accomplishing the desired result. From the evidence before us there does not appear to have been the least ground to believe that the plaintiff had committed a larceny; and it is hardly comprehensible how the defendant could have believed, in good faith, that such a crime had been committed. The whole affair, so far as the defendant is concerned, exhibits a reckless disregard of the rights and character of the plaintiff, and a willingness to resort unjustly and without any proper foundation to the harsh arm of the law, in the shape of a criminal prosecution. The fact that plaintiff was held to answer by the committing magistrate does not alter the case. The fact is *prima facie* evidence of probable cause (*Ganea v. Railroad*, 51 Cal. 140), but it is not conclusive. That is to say, if the defendant was clearly guilty of having instituted a malicious prosecution against plaintiff without probable cause, the fact that the committing magistrate held plaintiff to answer does not take away the malice, or establish conclusively that there was probable cause."

In *Mercer v. Mercer's Adm'r*, Kentucky Court of Appeals, Feb. 28, 1888, it was held that an oral promise by the putative father of bastard children made to their mother for their benefit, in consideration of his relationship and the natural moral duty resting upon him to support and educate them, to give and secure to them an estate, the

promise not having been made upon threats to institute proceedings against him by the mother, is not based upon sufficient consideration, and is invalid. The court said: "At common law the father was not bound to support his bastard child. He was said to be *filius nullius*; and while in the absence of a statute the father is under no legal obligation to support him, and it can be enforced only through the remedy thus provided, yet a just sympathy for the innocent and helpless, and a proper recognition of right, has led to some advance of legal right and remedy in his favor. Thus the weight of English authority now is that a promise by the putative father to pay the mother a certain sum, in consideration that she will support and maintain their child, is enforceable. *Jennings v. Brown*, 9 Mees. & W. 496; *Hicks v. Gregory*, 8 C. B. 378. Also, if his promise be in consideration that the mother will abstain from affiliation or bastardy proceedings against him, and in consequence thereof she suffers the time within which they may be had to expire, it will be binding upon him. *Linnegar v. Hodd*, 5 C. B. 487. In this State it was held by this court, in the early case of *Burgen v. Straughan*, 7 J. J. Marsh. 583, that a contract by the putative father to pay the mother a certain sum for the support of their child, provided she would not proceed against him under the bastardy act, was not immoral or inconsistent with the policy of the law, but binding and enforceable. She has a right to compel him to assist in supporting the child. It is a civil right, supported by a civil remedy. If to save both from exposure and disgrace, and to induce her to waive her right to compel him to do right, he promises to contribute for the support of their innocent and helpless offspring, there is no compounding of an offense or other violation of the rights of society. In such a case she waives a right, and it is a sufficient consideration to support the contract. Indeed, such a course is likely to redound often to the public benefit. The mother will often prefer to suffer in poverty, and permit her child to do so, rather than expose her shame to the gaze of the public eye by a court trial; and then the child, in the absence of a contract by the father to support it, based upon the waiver of legal proceedings by the mother for that purpose, and which is a detriment to her, and therefore a valuable consideration, will as a pauper become a charge upon the community. The same doctrine was announced in the later case of *Clark v. McFarland's Ex'rs*, 5 Dana, 45, where such a contract, made when the mother was about to institute bastardy proceedings, was upheld. The court however in substance said that the natural affection of a putative father for his child, and the moral obligation and duty resting upon him to support and provide for it, did not constitute a sufficient consideration to impart a legal obligation to a verbal promise. They are insufficient in themselves to such an end. A mere moral duty is insufficient of itself as a consideration for such a contract. In this instance nothing else was either

pleaded or proven as a consideration for the alleged promise. The action is against both heirs and personal representative. Doubtless the only reason why it was instituted upon the equity side of the docket was that the personal estate of the decedent was insufficient to pay the claim, and it was asked that the real estate in the hands of the heirs be subjected to its payment. It is not an action against the heirs alone to obtain a lien upon the real estate descended to them, but one to enforce a legal right for which a legal remedy exists. *Hagan v. Patterson*, 10 Bush, 441. It is really an action at law, brought and heard without objection upon the equity side of the docket. The mother is really the only witness in support of the alleged promise or promises. She is not only materially contradicted but is shown to be of bad character. The chancellor, acting in the place of a jury, passed upon the facts; and if there were no other obstacle in the way we would not be authorized, upon the evidence, to reverse his finding as flagrantly against it. The mother lived with the decedent for many years as his concubine. The unlawful relation began prior to the birth of any of the appellants, and continued until his death. The mother no doubt expected that he would provide for her and her children by will. There is no evidence that she ever threatened or proposed to institute any proceedings against him looking to the support of the children. They were all living under the same roof. Under such circumstances it would be exceedingly dangerous to the rights of legitimate heirs—even legitimate children—and destructive of home, family and social relation, if upon questionable testimony and mere natural affection and moral duty only, the parol promise of the putative father were to be held valid, and his estate subjected to its payment. The statute has provided a remedy for the mother and illegitimate children; and the law, through mercy and for the protection of the weak and helpless from the imposition of designing men, and to guard against the waiver or loss of their legal rights by a reliance upon promises, has so far expanded by the aid of the courts as to permit the enforcement of a promise, such as we have been considering, if based upon a sufficient consideration, and not resting upon a mere moral or natural duty." See *Gardner v. Hoyer*, 2 Pai. 11; *Todd v. Weber*, 95 N. Y. 181; S. C., 47 Am. Rep. 20, *contra*.

In *Otto v. Journeymen Tailors' Protective and Benevolent Union of San Francisco*, California Supreme Court, March 21, 1888, it was held that where the only penalty imposed by the constitution and by-laws of an unincorporated tailors' benevolent union against members working for parties against whom a strike has been declared, is a fine, the expulsion of a member for such an offense is invalid. The court said: "The right of expulsion from associations of this character may be based and upheld upon two grounds: First, a violation of such of the established rules of the association as have been

subscribed or assented to by the members, and as provide expulsion for such violation; second, for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute. We content ourselves with stating the propositions thus broadly, and for the purposes of this case need not refer to the numerous authorities defining and limiting the power. In the matter of expulsion the society acts in a quasi judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal. *Commonwealth v. Society*, 8 Watts & S. 250; *Burt v. Lodge*, 44 Mich. 208; *Robinson v. Lodge*, 86 Ill. 598. The courts will however decide whether the ground for expulsion is well taken. *Hirsch. Frat. & Soc. 55*; *Cotton Exchange v. State*, 54 Ga. 668. It has been held in reference to the expulsion of members from societies of this character, that the courts have no right to interfere with the decisions of the societies, except in the following cases: 'First. If the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity to explain misconduct. Secondly. If the rules of the club have not been observed. Thirdly. If the action of the club was malicious and not *bona fide*.' *Hirsch. Frat. & Soc. 56*; *Daukins v. Antrobus*, 44 L. T. 557; *Lambert v. Addison*, 46 id. 20."

#### BLASPHEMY.

A PROPOS of that part of Mr. George Kennan's interesting article in the April *Century* on "The Russian Penal Code," which deals with the punishments for blasphemy and heresy, it may be well to recollect that in England blasphemy is still punishable. Mr. Odgers, in the second edition of that most interesting book, "The Law of Libel and Slander," says this: "It is a misdemeanor, punishable by indictment and by criminal information, to speak or write and publish, any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. This is the crime of blasphemy, and on conviction thereof the blasphemer may be sentenced to fine and imprisonment to any extent in the discretion of the court." (The italics are ours.) "Formerly he was frequently also sentenced to the pillory or to banishment. He may also be required to give security for his good behavior for any reasonable time after he comes out of prison; and can be detained in prison till such sureties be found."

Such then is the existing law in England as to blasphemy, nor is it a dead letter.

Mr. Odgers tells us that in Scotland, up to the year 1813, blasphemy was in certain circumstances a capital offense. In 1697 Thomas Aikenhead, an Edinburgh student, was hanged, buried beneath the gallows, and all his movables forfeited to the Crown, because he talked loosely about Ezra and Mahomet, and uttered crude anticipations of Materialism. By an act

passed in Scotland in the first year of Charles II, whoever, "not being distracted in his wits," should curse God or any person of the blessed Trinity was punishable by death; and by a statute passed there in the time of William, of "pious, glorious and immortal memory," any one reasoning against the being of God, or any person of the Trinity, or the providence of God in the government of the world, was to be imprisoned for the first offense until he should give public satisfaction in sack-cloth to the congregation, to be punished more severely for the second offense, and for the third doomed to death.

About the year 1650 the Maryland colony enacted that if any person should deny the holy Trinity he should for the first offense be bored through the tongue, and fined or imprisoned; for a second offense, should be branded as a blasphemer, the letter B being stamped on his forehead; and for the third offense should die. And these laws were re-enacted in 1723.

And in many of the States blasphemy is still an indictable offense.

### OFFICE—JUSTICE OF THE PEACE—ABOLITION OF TOWN.

NEW YORK COURT OF APPEALS, APRIL 10, 1888.

#### MATTER OF GERTUM.

A justice of the peace is a town, and not a county officer, and if the town in which he was elected be abolished by act of the Legislature, his office ceases with the existence of the town.

THE application was for a *mandamus* against the board of supervisors of Kings county to compel it to audit certain alleged fees of the petitioner for arresting and trying persons charged with criminal offenses. It was denied at the Special and General Terms.

*William J. Gaynor*, for appellants.

*John B. Meyenberg*, for respondent.

**RUGER, C. J.** By section 1, chapter 835, L. 1886, the town of New Lots, in Kings county, was annexed to, merged in, and made a part of the city of Brooklyn, and declared thereafter to constitute a part of that city, to be known as the twenty-sixth ward of such city, and to be thereafter, except as in the act otherwise provided, "subject to and governed by the same laws, ordinances, rules and regulations, and entitled to the same rights, privileges, franchises and immunities" as the said city of Brooklyn.

By section 7 it was further provided "that the supervisor of the town of New Lots and the several justices of the peace of said town, duly elected, qualified and acting at the time this act shall take effect, shall continue to hold their offices for the terms for which they were respectively elected," and that "the terms of office of all other officers \* \* \* shall cease and determine at the time this act shall take effect."

By section 16 the act was declared a public act, and made to take effect August 1, 1886.

That this statute was within the constitutional power of the Legislature to enact, and that it accomplished the extinguishment of the political organization known as the town of New Lots, and merged the administration of the municipal affairs of the territory formerly comprising such town in and subjected it to the control of the city of Brooklyn, as provided therein, is not denied, nor can it be successfully disputed. § 9, art. 8, and § 3, art. 3, present Const.; *People v. Morris*, 18 Wend. 325; *People v. Murrell*, 21 id. 562.

It is claimed however that the relator, who was elected in April, 1886, to fill a term for justice of the

peace of such town, commencing January 1, 1887, was not deprived of his office by virtue of such statute. It is by the Constitution expressly made the duty of the Legislature to provide for the organization of cities and incorporated villages, and this power can be exercised only by the creation of such bodies from territory previously existing under some other form of civil government than that intended to be created. It seems unreasonable to suppose that the framers of the Constitution intended by its provision relating to the terms and election of justices of the peace in towns, to thwart the exercise of this beneficial power, and compel the continued retention of a town organization for such territory for the mere purpose of furnishing a place for a superseded and unnecessary officer. Such officers are the incidents only of the political existence of towns. They are provided and created for the town, and it is quite absurd to say that they continue in office after the town has ceased to exist. While the Constitution provides that towns shall elect justices of the peace, whose terms shall continue for four years, there is nothing in this provision that requires the indefinite preservation and perpetuation of town organizations to enable such officers to serve out their terms, or forbids a change, if in the judgment of the Legislature the welfare and prosperity of the community requires it.

This provision cannot be construed as a limitation upon the power of the Legislature to create cities and villages. It is undoubtedly beyond the power of the Legislature by direct legislation to abolish the office of justice of the peace in towns, or shorten their terms of office so long as the town exists, but they have an unquestioned right to alter and change the limits of their jurisdiction, or abolish the town organization altogether, provided it be done in good faith, and for proper constitutional objects. The whole force and effect of the provisions in relation to justices is satisfied by enforcing it so long as there is a town organization in existence authorized under the Constitution to elect justices of the peace, and requiring the performance of their functions in the government of the town. The effect of this legislation was therefore not only to deprive the territory in question of the privilege of thereafter electing justices of the peace or other town officers, but by destroying its independent corporate existence, to abrogate its right to have justices of the peace or other officers peculiar to town organizations, except so far as they were temporarily preserved by the act.

At the time of this legislation the town of New Lots possessed four justices duly elected, qualified, and acting in such capacity, aside from the relator, and under the law was entitled to no greater number. § 1, tit. 1, chap. 5; 1 Rev. Stat. (7th ed.) 388, 345. The relator had been elected to fill a prospective term, but he was not at the time of the passage of the act a justice of the peace of that town, and before his term commenced the political existence of the town had been abrogated. His complaint therefore is not strictly that he has been legislated out of office, but that the town organization has not been continued so that his office might be preserved. The four acting justices, one of whom the relator expected to succeed, were expressly authorized to serve out their respective terms, but as their several terms expired, the office which each filled became extinct as the logical consequence of the political destruction of the town. This result would seem to follow as a matter of course from the provisions of section 12 of the same title, which provides that "justices of the peace must reside in the town for which they were chosen, and shall not try a civil cause in any other town except in cases otherwise provided for by law." Page 343. In the earlier cases in this State some discussion and differ-

ence of opinion arose over the question whether justices of the peace were county or town officers. *Ex parte McCollom*, 1 Cow. 450; *People v. Garey*, 6 id. 542. These differences grew out of the mode adopted by section 7, article 4 of the Constitution of 1821, for the selection of such officers by the board of supervisors and the county judges, and the jurisdiction which they possessed in a limited degree over the county at large, but the foundation for such differences was removed by the amendment to this Constitution adopted in 1823, which required that such justices should thereafter be elected by ballot in the several towns in such manner as the Legislature should direct. The Constitution of 1846 substantially continued this mode of election. Const. 1846, § 17, art. 6; Amendment of 1860, § 18, art. 6.

The section of the Revised Statutes above referred to was enacted for the purpose of carrying into effect the provisions of the amended Constitution of 1821, and specially restricted the number of justices of the peace to four in each town, and required their residence in the town for which they were chosen.

Under the present provisions of law no doubt can arise but that justices of the peace are town officers, and have no existence as public officers independent of town organizations, and so it has been frequently held. *People v. Garey*, *supra*; *People v. Morrell*, 21 Wend. 563. Cases in which the autonomy of the town is preserved as where it is transferred from one county to another without a change of name, or even where a town is divided and the name of the original town is preserved for a portion of the territory, manifestly have no application to the case of a town which has ceased to remain such, and whose government has been wholly merged in an inconsistent and different municipal organization. In the latter case the Legislature has, in the exercise of unquestioned constitutional power, annulled the existence of the corporate entity to which the office of justice pertains under the Constitution, while in the former they have retained such entity and its constitutional rights therefore remain unimpaired.

The questions involved in this case seem to have been so fully covered and exhaustively discussed in the case of *People v. Morrell*, *supra*, that nothing seems necessary to be added to what is there said. In that case the Legislature enacted that the county of Montgomery should be divided, and a certain portion of its territory thereafter be known as the county of Fulton with the powers and duties of other counties. By this division the first judge of the original county, who resided in one of the towns set off to the county of Fulton, ceased to be a resident of Montgomery county, and it was claimed that his office, although it was provided for and its term fixed by the Constitution, had become vacant on account of his non-residence in the county for which he was appointed, and it was so held by the court. The head-note states the point decided as follows: "When a county is divided, and two separate and distinct counties formed out of it by act of the Legislature, to one of which a new name is given, whilst the other it is declared shall be and remain a separate and distinct county by the name of the county as it existed previous to the division, the judges of the County Courts appointed previous to the division who happen to reside in that portion of the territory distinguished as a county with a new name, under the operation of the act requiring judges of County Courts to reside within the county for which they are appointed, lose their offices, and are no longer competent to act under their commissions." In illustration of the principle decided, Judge Cowan says: "One incorporated village, A., is divided by statute into two distinct incorporated villages, viz., B. and C.; independent of an express statute declaration,

no lawyer would think of suing either B. or C., or both, for a debt due from A. Such a division the Legislature may make even by a majority vote, either of cities or villages. *People v. Morris*, 13 Wend. 325. These are, like towns or counties, mere political bodies, and their powers may be modified or the corporations themselves abrogated. The recorder of a city is also constitutionally commissioned for five years. But he can no more hold his office after the city charter repealed than if the city should be physically destroyed."

The act in question seems specially intended by its terms to exclude the relator from the number of justices who were authorized to continue in office for their unexpired terms, and there is no rule of construction which requires a court to change words or interpolate expressions into an act to give it a different meaning from what its language plainly and unequivocally imports.

The order of the General Term should be affirmed with costs.

All concur.

### CONSTITUTIONAL LAW—PROHIBITION OF OLEOMARGARINE.

SUPREME COURT OF THE UNITED STATES, APRIL 9, 1888.

#### POWELL V. COMMONWEALTH OF PENNSYLVANIA.

A State statute, prohibiting the manufacture and sale of and the having in possession with intent to sell any article designed to take the place of butter and cheese, made from oleaginous substances other than unadulterated milk or cream, and prohibiting the manufacture and sale of and the having in possession with intent to sell imitation or adulterated butter or cheese, is not in conflict with the Federal Constitution.

**I**N error to the Supreme Court of the State of Pennsylvania.

HARLAN, J. This writ of error brings up for review a judgment of the Supreme Court of Pennsylvania sustaining the validity of a statute of that Commonwealth relating to the manufacture and sale of what is commonly called oleomargarine butter. That judgment, the plaintiff in error contends, denies to him certain rights and privileges specially claimed under the Fourteenth Amendment to the Constitution of the United States.

By acts of the General Assembly of Pennsylvania, one approved May 22, 1878, and entitled "An act to prevent deception in the sale of butter and cheese," and the other approved May 24, 1883, and entitled "An act for the protection of dairymen, and to prevent deception in sales of butter and cheese," provision was made for the stamping, branding or marking, in a prescribed mode, manufactured articles or substances in semblance or imitation of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which oil, lard or fat, not produced from milk or cream, entered as a component part, or into which melted butter or any oil thereof had been introduced to take the place of cream. Laws of Penn., 1878, p. 87; 1883, p. 43.

But this legislation, we presume, failed to accomplish the objects intended by the Legislature. For by a subsequent act, approved May 21, 1885, and which took effect July 1, 1885, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," it was provided, among other things, as follows:

"§ 1. That no person, firm or corporate body shall manufacture out of any oleaginous substance or any



compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same as an article of food.

"§ 2. Every sale of such article or substance, which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts in this State to recover upon any contract for the sale of any such article or substance.

"§ 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one-half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"§ 4. Every person who violates the provisions of the first section of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense."

The plaintiff in error was indicted under the last statute in the Court of Quarter Sessions of the Peace in Dauphin county, Pennsylvania. The charge in the first count of the indictment is that he unlawfully sold "as an article of food two cases, containing five pounds each, of an article designed to take the place of butter produced from pure, unadulterated milk or cream from milk, the said article so sold as aforesaid being an article manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk or cream from milk, and said article so sold as aforesaid being an imitation butter." In the second count the charge is that he unlawfully had in his possession, "with intent to sell the same as an article of food, a quantity, viz., one hundred pounds of imitation butter designed to take the place of butter produced from pure, unadulterated milk or cream from the same, manufactured out of certain oleaginous substances or compounds of the same other than that produced from milk or cream from the same."

It was agreed, for the purposes of the trial, that the defendant, on July 10, 1885, in the city of Harrisburg, sold to the prosecuting witness, as an article of food, two original packages of the kind described in the first count; that such packages were sold and bought as butterine and not as butter produced from pure, unadulterated milk or cream from unadulterated milk; and that each of said packages was, at the time of sale, marked with the words, "Oleomargarine Butter" upon the lid and side in a straight line in Roman letters half an inch long.

It was also agreed that the defendant had in his possession one hundred pounds of the same article with intent to sell it as an article of food.

This was the case made by the Commonwealth.

The defendant then offered to prove by Prof. Hugo

Blanck that he saw manufactured the article sold to the prosecuting witness; that it was made from pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as butterine; that this butterine existed in dairy butter in the proportion of from three to seven per cent, and in the manufactured article in a smaller proportion, and was increased in the latter by the introduction of milk and cream; that this having been done, the article contained all the elements of butter produced from pure unadulterated milk or cream from the same except that the percentage of butterine was slightly smaller; that the only effect of butterine was to give flavor to the butter and that it had nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food in all respects as wholesome as butter produced from pure unadulterated milk or cream from unadulterated milk.

The defendant also offered to prove that he was engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relating to the manufacture and sale of said article, and so sold by him; that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood.

To each offer the Commonwealth objected upon the ground that the evidence proposed to be introduced was immaterial and irrelevant.

The purpose of these offers of proof was avowed to be: (1) To show that the article sold was a new invention, not an adulteration of dairy products nor injurious to the public health, but wholesome and nutritious as an article of food, and that its manufacture and sale were in conformity to the acts of May 22, 1878, and May 24, 1883. (2) To show that the statute upon which the prosecution was founded was unconstitutional, as not a lawful exercise of police power, and also because it deprived the defendant of the lawful use "of his property, liberty and faculties, and destroys his property without making compensation."

The court sustained the objection to each offer and excluded the evidence. An exception to that ruling was duly taken by the defendant.

A verdict of guilty having been returned, and motions in arrest of judgment and for a new trial having been overruled, the defendant was adjudged to pay a fine of one hundred dollars and costs of prosecution, or give bail to pay the same in ten days, and be in custody until the judgment was performed. That judgment was affirmed by the Supreme Court of the State. 114 Penn. St. 205.

This case, in its important aspects, is governed by the principles announced in *Mugler v. Kansas*, 123 U. S. 623.

It is immaterial to inquire whether the act with which the defendant is charged were authorized by the statute of May 22, 1878, or by that of May 24, 1883. The present prosecution is founded upon the statute of May 21, 1885; and if that statute be not in conflict with the Constitution of the United States, the judg-

ment of the Supreme Court of Pennsylvania must be affirmed.

It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the law; rights which are secured by the Fourteenth Amendment of the Constitution of the United States.

It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler v. Kansas*, 123 U. S. 683; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 751; *Barbier v. Connolly*, 118 U. S. 27; *Yick Wo v. Hopkins*, 118 U. S. 356.

The question therefore is whether the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health.

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding, that although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has in fact no real or substantial relation to those objects. *Mugler v. Kansas*, 123 U. S. 623, 681. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were in fact wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from any thing of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in *Sinking Fund* cases, 99 U. S. 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small de-

gree on a strict observance of this salutary rule." See also *Fletcher v. Peck*, 6 Cranch, 128; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625; *Livingston v. Darlington*, 101 U. S. 401.

Whether the manufacture of oleomargarine or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the Legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property; and while according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet "in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." *Yick Wo v. Hopkins*, 118 U. S. 370. The case before us belongs to the latter class. The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued in behalf of the defendant that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. The possibility exists even in reference to powers that are conceded to exist. Besides the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for apart

from the necessity of avoiding conflicts between co-ordinate branches of the government, whether State or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the Legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the State Legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty or property, or other rights, secured by the supreme law of the land.

The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens all who manufacture or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. *Barbier v. Connolly*, 117 U. S.; *Soon Hing v. Crowley*, id. 703; *Missouri Pacific Railway Co. v. Humes*, 115 id. 519.

It is also contended that the act of May 21, 1885, is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in *Mugler v. Kansas*.

Upon the whole case, we are of opinion that there is no error in the judgment, and it is therefore affirmed.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**APPEAL—REVIEW—ORDER DENYING MOTION FOR REARGUMENT OF APPEAL—WHO MAY APPEAL—MOTION TO DISMISS FOR FRIVOLOUSNESS.**—(1) An order denying a motion for a reargument of an appeal is not reviewable, the number of arguments which an appeal is entitled to being in the discretion of the court where the appeal is pending. (2) Where an order of court, modifying a previous order, was granted on the appellant's own motion, the appellant, having received the relief applied for, cannot be aggrieved by it, and is therefore in no position to claim the right of appeal. (3) A motion to dismiss an appeal from a final judgment as frivolous, made out of its regular order on the calendar, involving the discussion of legal questions, the determination of which depends upon the consideration of the pleadings and proofs, should be denied, as against the rules prescribed for the orderly disposition of causes on appeal. March 6, 1888. *Hooper v. Beecher*. Opinion by Gray, J.

**CONTRACT—PERFORMANCE—PREVENTED BY CONDUCT OF DEFENDANT.**—A defendant cannot set up the non-performance of a contract as a defense to an action on an accepted order wherein defendant bound himself to pay a certain sum upon the completion of the contract, when the evidence shows that the performance of the contract had been delayed by reason of changes made at the request of defendant, and that plaintiff had offered to have the work finished, which offer the defendant refused, saying he would complete the work himself and deduct the cost of the same from the contract price. March 20, 1888. *Home Bank v. Drumgoole*. Opinion by Earl, J.

**EASEMENTS—CREATION—GRANT—RIGHT TO BRING WATER OVER LANDS OF ANOTHER.**—The grant in fee of the right to bring water through pipes across the land of one for the benefit of another is a grant of an interest "in fee" within the meaning of 3 Revised Statutes of New York (7th ed.), § 137, providing that every

grant in fee shall be subscribed and sealed by the grantor or his agent. If not acknowledged previous to delivery, its execution and delivery shall be attested; or if not so attested, it shall not take effect, as against a purchaser or incumbrancer, until so acknowledged. A reference to other provisions of the statute in the same chapter with that referred to will exhibit the scope and meaning of the terms "in fee, or of a freehold estate," as used in the section quoted, beyond the possibility of misconception. The section is contained in chapter 1, page 2205, Revised Statutes (3 Rev. Stat., 7th ed., p. 2175), entitled "Of the Nature and Qualities of Estates in Real Property, and the Alienation Thereof." The first, second and fifth sections of title 2, article 1, of this chapter, read as follows: "Section 1. Estates in lands are divided into estates of inheritance, estates for life, estates for years and estates at will and by sufferance. Section 2. Every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee-simple, or fee," etc. "Section 5. Estates of inheritance and for life shall continue to be denominated estates of freehold; estates for years shall be chattels real; and estates at will or by sufferance shall be chattel interests." It is further provided that the terms "real estate" and "lands" as used in this chapter, shall be construed as co-extensive in meaning with "lands, tenements and hereditaments." Section 10, tit. 5, chap. 1, 3 Rev. Stat. (7th ed.), p. 2206. It is quite obvious from the plain reading of the statute that hereditaments are included in the terms "estates of inheritance," and that such estates may be held in fee, and are capable of having the same interest and estate created with respect to them as may or can pertain to any real estate. They are created, granted, assigned, extinguished and inherited in the same manner and by the same forms as other real property, and are distinguished therefrom mainly by the fact that they are incorporeal, instead of being corporeal, property. Thus it is said by elementary writers that the word "hereditaments" is more extensive in its signification than land or tenements, and signifies any thing capable of being inherited, and as applied to realty, is divided into corporeal and incorporeal. Bouv. Inst., §§ 1595, 1596. Incorporeal real property is defined to be a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it. Id., § 1597. The principal requisites of easements are that they be imposed upon corporeal real property; that they be for the benefit or corporeal real property; and that there be two distinct estates—the dominant and the servient. Id., § 1602. The right of drainage or *fus aqueductus* is said to be an easement which gives the owner of land the right to bring down water through or from the land of another, either from its source or from any other place. Id., § 1625. This right cannot exist independent of its connection with another tenement, and therefore cannot be aliened or conveyed, except by a conveyance as an appurtenance of the dominant estate. It can be created only by grant or prescription, and partakes in this as well as other respects of the characteristics of real estate. Id., § 1625; Cronkhite v. Cronkhite, 94 N. Y. 323; Add. Torts, 130; 3 Rev. Stat. (7th ed.), 2326. It can be inherited, and is therefore classified by all elementary writers as an hereditament. Its owner has neither the general property in nor seizure of the servient estate, but by holding a fee in the estate to which such easement is appurtenant he has an estate of inheritance in the easement. Washb. Easem. (3d ed.), 15. An easement in the strict sense of the word "is a liberty, privilege or advantage in land, without profit existing distinct from an ownership of the soil;"

and therefore rights to enter upon the lands of another for the purpose of growing crops or cutting grass, wood or timber, or to derive a profit from the product of the land, or as it is called, "the right of profit a prendre," are not considered easements in the strict sense of the term, although they are generally treated under the same heads and governed by the same rules. *Post v. Pearsall*, 22 Wend. 432; *Huntington v. Asher*, 96 N. Y. 604; *Bouv. Inst.*, § 1625. It is however quite unnecessary to enter into a consideration of the various kinds of easements and the distinctions existing between them, for whatever these may be, they are all alike when attached to a dominant estate classified by elementary writers as "incorporeal hereditaments," and described with the estate to which they are attached as "land," and by the express terms of the statute may be held and enjoyed in fee and are freehold estates. *Pitkin v. Railroad Co.*, 2 Barb. Ch. 230; *Wash. Easem.* 3-14; *Senhouse v. Christian*, 1 Term R. 560; *Post v. Pearsall*, 22 Wend. 425; *Child v. Chappell*, 9 N. Y. 254. The respondent seems to concede that the right of profit a prendre requires a conveyance attended by the same formalities as are prescribed by the section in question, and we are of the opinion that such a right is not distinguishable from that of easements generally. *Huntington v. Asher*, *supra*. Washburn, in discussing the distinction between an easement and a license, says that "an easement always implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration. \* \* \* An easement must be an interest in or over the soil. It lies not in livery, but in grant; and a freehold interest in it cannot be created or passed otherwise than by deed." *Wash. Easem.* 6, 7. And further, he says: "The ownership of an easement, and that of the fee in the same estate, are in different persons; nor does the interest of the one affect that of the other so but that each may have his proper remedy for an injury to his right independent of the other." It seems to follow necessarily, from the authorities, that an easement to draw water through pipes over the land of another for the benefit of a dominant tenement is an interest in lands existing independent of the fee of the land over which it is exercised, and is an estate in land possessed in fee by the owner of the dominant estate. It is an incorporeal hereditament consisting of an estate of inheritance, transferable according to the statute of descents, and comes directly within the meaning of the terms "fee or freehold estate," as used in section 137. That it was the intention of the grantor of the easement in question to convey a fee therein, is manifest from the language of the instrument, as it grants and conveys the interest described to the grantee and "his heirs and assigns," and is made obligatory upon the grantor and "her heirs and assigns." 3 Rev. Stat. (7th ed.), p. 2206, § 1, tit. 5. We are therefore of the opinion that the easement conveyed was an estate in fee and required for its conveyance a deed executed in the manner prescribed in the statute, to affect the right of a subsequent purchaser. We are much impressed with the apparent equities of the plaintiff's claim, in view of the fact that the subsequent grantees of the servient estate took title with notice of the easement claimed by the plaintiff, but we see no way of escaping the effect of the plain words of the statute. Feb. 28, 1888. *Nellis v. Manson*. Opinion by Ruger, C. J.

**EXECUTOR AND ADMINISTRATOR—SALES OF REALTY—PARTIES—CONTINGENT REMAINDER-MEN.**—A testator devised land to his son for life, and at his decease to his children, should he leave any, but should he leave no issue or descendant, the property to go to the testator's nephews and nieces. At the time of the tes-

tator's death the son was alive and had several children living. There were also a number of nephews and nieces alive. *Held*, that the nephews and nieces had a valid contingent remainder in the land; and that an order of sale of the property to pay testator's debts, issued without citing such nephews and nieces to appear upon the hearing, was invalid. It was said in *Monarque v. Monarque*, 80 N. Y. 325, "that unless the contingent interests of unborn issue \* \* \* have been in some way barred, the title of a purchaser in \* \* \* partition proceedings" would be imperfect. It is further said that "a judgment and sale in partition may conclude contingent interests of persons not in being; but this is only in cases where the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise." If such proceedings would not bar contingent interests of persons unborn, it is quite apparent that the interests of living remainder-men cannot be barred, except by proceedings to which they are parties. When a testator devised "the use and improvement" of certain real estate to his grandson, with power to dispose of the same to the children or grandchildren of the devisee, and for want of such children or grandchildren the will directed that the estate should descend to the testator's son and his heirs, it was held that the grandson took a life-estate and not a fee-tail, with remainder in fee to his children and grandchildren, and with an executory limitation over to the testator's son, in case the grandson should leave no child or grandchild living at the time of his death. It was further held that the first-born child of the grandson took a vested remainder in fee, subject to open and let in after-born children or grandchildren, and subject to be defeated by the execution of the power of appointment among the children or grandchildren given by the will to the testator's grandson. The grandson, after the birth of five children to him, applied to chancery for authority to sell the estate in behalf of the children, and a sale was directed accordingly, and the grandson was authorized by the order to convey so as to bind all the interest of the children born or thereafter to be born, as well as the contingent interest of the testator's son. A sale and conveyance was made pursuant to the order. It was held that the purchaser took a title which was defective, for the reason that the grandson might survive his children and grandchildren, in which event the limitation over to the testator's son and his heirs would take effect, and for the further reason that the grandson, by exercising the power of appointment, might give the estate to grandchildren who were not parties to the proceeding. *Baker v. Lorillard*, 4 N. Y. 257. We think this authority, if authorities were needed on a question so clear, is decisive of this case, and that the title taken by the defendant on the surrogate's sale was fatally defective. March 20, 1888. *Wilson v. White*. Opinion by Ruger, C. J.

**INJUNCTION—TEMPORARY—APPEAL—REVIEW.**—Where the force and effect to be ascribed to certain allegations in a complaint, which form a material fact as to plaintiff's right to relief, are seriously questioned, the court will not review an order granting a temporary injunction based on such complaint. We have repeatedly held that the granting, continuing or dissolving of a temporary injunction is within the discretion of the court of original jurisdiction, and that its determination cannot be reviewed here. *Pfohl v. Sampson*, 59 N. Y. 176; *Brown v. Cheese Ass'n*, id. 242; *Van Dewater v. Kelsey*, 1 id. 533; *Paul v. Munger*, 47 id. 469; *People v. Schoonmaker*, 60 id. 493. In the case however of *McHenry v. Jewett*, 90 N. Y. 60, this rule was so far departed from that it was held

that when it clearly appeared from the complaint that the plaintiff could not in any point of view be entitled to the final relief of injunction as demanded therein, a temporary injunction was unauthorized, and this court would in that case review an order for an injunction *pendente lite*. With this single exception, the decisions in this court have been uniform to the effect that it will not review orders of this character. We have examined with some care the complaint in this action, and are not prepared to say, as matter of law, that a case may not be proved under its allegations entitling plaintiffs to some portion of the relief sought. March 6, 1888. *Strasser v. Moonells*. Opinion by Ruger, C. J.

**LANDLORD AND TENANT—LEASE—DEPOSIT FOR PERFORMANCE OF COVENANT—FORFEITURE BY BREACH—PLEADING.**—(1) A deposit made by a tenant with his landlord to secure the performance of the conditions of the lease is not forfeited by a breach, by reason of which the tenant was dispossessed. (2) In an action by a tenant against his landlord to recover money deposited as security for payment of rent, sums paid by the landlord for repairs, which the tenant covenanted to make, to be available in defense, must be pleaded as a counter-claim. It is not sufficient to claim to reduce plaintiff's cause of action to the extent of the amount expended. March 6, 1888. *Scott v. Montells*. Opinion per Curiam.

**MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—ICE ON SIDEWALK.**—When a sidewalk of a city has been regularly cleared of snow within a reasonable time after it has fallen, but the successive thawing and freezing, varied occasionally by rain, has kept the surface of the sidewalk generally coated with ice from the action of natural causes and the rigor of the climate, and a person is injured by slipping and falling upon such walk, the city is not liable, even if the ice upon which plaintiff slipped was formed by water dripping from a roof. The general facts of this case bring it within the doctrine of *Taylor v. City of Yonkers*, 106 N. Y. 202. Of course, in a severe and long-continued frost, eave-troughs will fill with ice and conductors freeze, and with a thaw or a rain, icicles will form and water drip to the sidewalk and freeze. The city is not responsible for the construction or sufficiency of the eaves upon the property of individuals. It is not bound to repair them if out of order, and has no authority to directly interfere with their construction. No possible vigilance or care in a large city, and in our climate would avail to prevent such results. The common good and general convenience sometimes brings with it a trace of seeming hardship to individuals. The duty of the municipality is to keep the sidewalks reasonably clean and safe. Snow can be removed without serious difficulty, and where a village permitted it to accumulate on the walk from the slide of an adjoining roof until it forms a positive and dangerous obstruction to travel, we held in the first of the cases above cited that the city was liable; not however because the snow fell from an ill contrived roof, but because having fallen and impeded passage, the corporation did not cause its removal. But ice from the drip of a roof is a different matter. In severe winters it is difficult to remove it. Unreasonable, persistent and extraordinary diligence during the prevalence of freezing weather would alone be adequate to the emergency. Must the city every day chop it off wherever, through miles of streets, the difficulty occurs? Is that a reasonable requirement? The plaintiff's case however failed at another point. This sidewalk through its whole extent for weeks before the accident was coated with ice formed from natural causes, and which the city could not reasonably be required to remove, and was not required to

remove. The accident occurred on the 22d day of January, when the thermometer in the morning stood at 20 above zero, at midday 27 above, and in the evening at 19 above. The day before snow fell in the morning, turned into rain at 8:30 P. M., and stopped at 5 P. M. The snow-fall was 4 inches, and the melted snow and rain-fall combined was .25 inch. The freezing of the night and the next day could not have failed to form a new coating of ice, and if, on the morning of the 21st, the walk had been utterly free from snow and ice, the latter would have formed and made the whole walk slippery. Doubtless the new ice came upon the old ice, and possibly some addition was made to that from the drip of the eaves; but it cannot be said upon the evidence produced that the plaintiff would not probably have fallen if not a drop of water had come from the eaves, or that the freezing of that drip was the proximate cause of her fall. Abundant reason and explanation existed in the conceded operation of natural causes, and the jury, as we have heretofore said, were not at liberty to guess at or speculate upon a possible ground of action against the city. We do not know, and it is not possible to say from the proof, that plaintiff slipped upon ice formed from the drip of the eaves. Ice was all over the sidewalks from natural causes, and where no such drip existed. That ice the city, as we have held, was not bound to remove. Are we nevertheless to say that it was required to remove a new coating formed from the freezing of the drip, and was negligent for not doing so? The plain truth of the case, when divested of all artificial reasoning, is that a natural cause of the accident existed for which the city was not responsible, and a possible concurrent cause from dripping eaves may have joined in making the ice, but cannot be said to have itself caused the injury. If it did, the city was no more bound to remove that new coating than the layers beneath. The motion for a nonsuit should have been granted. March 6, 1888. *Kaveny v. City of Troy*. Opinion by Finch, J.

**DEFECTIVE STREETS—ICE ON SIDEWALK.**—A city is not liable to a traveller for injuries occasioned by the slippery condition of a sidewalk, when that condition is shown to be produced merely by smooth ice of recent formation. That this city may be liable to a traveller for injuries occasioned by sidewalks unsafe in consequence of an accumulation of ice, is not to be questioned. *Todd's case*, 61 N. Y. 506. But here there was no accumulation, and it can scarcely be said there was unevenness at the place of the accident. On the contrary the ice was all in one sheet, "just alike," and of recent formation. Three days before the sidewalk "was all right." It had been thawing the day before and the day before that. The sidewalk itself was in good order. A city is not bound to keep its sidewalks absolutely free from ice, and we think the learned trial judge erred in submitting the case to the jury as one in which they might find that it had been guilty of some neglect of duty in regard to it. There was no ground for such speculation. It does not appear that ordinary care had not been exercised to keep the walk safe for use in the usual mode by travellers, nor that it was not so. We are unable to find any evidence that its condition was such as should have been noticed by the officers of the city or its police, and there is no suggestion from any quarter that their attention had been called to it. The situation was one common to all cities in a northern climate and to all sidewalks in such cities—a sidewalk difficult, it may be, of passage, but if so, from the ordinary action of the elements only, and from a formation of ice, which no body of men are competent to prevent, nor under any ordinary circumstances to remove. Something more than a slippery sidewalk

must be shown to enable one suffering from it to cast the burden of compensation upon the city. Nothing more appears here, and we think the motion of the defendant for a dismissal of the complaint should have been granted. March 6, 1888. *Kinney v. City of Troy*. Opinion by Danforth, J.

**PRACTICE—EQUITY—SUBMISSION OF ISSUE TO JURY—WAIVER OF OBJECTIONS—MOTION FOR NEW TRIAL—ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—EVIDENCE—VALIDITY OF DEBT—JUDGMENT AS EVIDENCE.**—In an equitable action where under the the Code of Civil Procedure of New York, §§ 971, 972, a question of fact is submitted by the court to a jury, the findings by the jury may be adopted as the facts of the case, or modified or rejected, without prejudice to the rights of the parties; the mode of trial being within the control of the court, and a jury trial not being a matter of right in such cases. (2) Where a jury in an equitable action, the issues being that an assignment was made to hinder and defraud creditors, that certain debts were fictitious, and that property had been concealed, in answer to a question submitted to them, under the Code of Civil Procedure of New York, §§ 971, 972, find that the assignment was not made to hinder and defraud creditors, the proofs being before the court upon which it can supplement the jury's finding, involving the determination of the other issues, the court may, there being no further facts to be tried, under the Code of Civil Procedure of New York, § 1225, confirm the verdict and make its findings covering all the issues, upon which judgment may be entered; and a failure to offer further evidence, or request a further trial, without a suggestion against the mode of trial, constitutes a waiver of any objection to the jurisdiction of the court in making its findings without trying all the issues, while a motion for a new trial is equivalent to an admission that all the issues have been tried. (3) Where the proof relied on to show a fraudulent concealment of property by an assignor for the benefit of creditors is the suppression of an outstanding insurance policy, on which money was afterward collected, the testimony of the assignor that the company being insolvent, he had not supposed the policy was of any value, and had not thought of it since he placed it in the hands of a collector, some years before, is sufficient evidence for the court or jury to say whether it did or did not exonerate him from the charge. (4) Where an assignor for the benefit of creditors explains his omission to refer to certain debts, in a previous examination as surety on a bond, by saying that the examination was a hurried one, and that he supposed he was testifying only as to a part of his property and the debts upon it, and there was evidence of the contracting of the debts and that they were genuine, the testimony justifies the jury and court in finding that these debts were not fictitious. (5) A judgment recovered after an assignment for the benefit of creditors is admissible as proof of the validity of the debt mentioned in the assignment, the genuineness of the judgment and the *bona fides* of the debt being open to contest; and the admission of such judgment cannot be objected to, on appeal, by the party who offered it in evidence. March 13, 1888. *Acker v. Leland*. Opinion by Gray, J.

**RAILROADS—STREET—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.**—Plaintiff with his companion, who was driving, was passing along a wide avenue about midnight. From the center of the avenue were two railroad tracks; on each side a dirt road. Plaintiff and his companion rode on the right-hand railroad track until they thought they heard a loaded wagon coming on the same track, when they pulled over on the left-hand track, plaintiff making no objections. After they

had gone from 100 to 150 feet they met a dummy engine, which plaintiff first heard when about seventy-five feet distant, but did not see the head-light until it was about fifty feet away. Plaintiff did nothing after he saw it except to call to the engineer to stop. No whistle was blown nor bell rung. Plaintiff testified that he expected to meet the engine about where he did. Held, in an action to recover for injuries sustained by the collision, that a nonsuit ought to have been granted. A verdict in favor of the plaintiff would have been set aside as against the evidence, and in such a case it is the duty of the court to nonsuit. *Gonzales v. Railroad Co.*, 38 N. Y. 440; *Neuendorff v. Insurance Co.*, 69 id. 393. We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger, and apparently made no objection or effort to avoid it. He was engaged in a common employment with McNally. He had full control of his own actions, and though on the safe track, did not object when after telling McNally to turn out, they turned upon the dangerous track. No decision cited conflicts with our view. The present case differs from that where a person accepts a gratuitous ride, as in the cases of *Robinson v. Railroad Co.*, 66 N. Y. 11; *Dyer v. Railway Co.*, 71 id. 228; *Masterson v. Railroad Co.*, 84 id. 247. March 13, 1888. *Donnelly v. Brooklyn City R. Co.* Opinion by Gray, J. Ruger, C. J., Earl and Finch, JJ., concur. Andrews, Danforth and Peckham, JJ., dissent.

**VENDOR AND PURCHASER—RIGHTS OF PURCHASER—WAIVER OF BREACH—LIABILITY TO THIRD PERSONS.**—A vendee who upon breach of a contract to convey to him real estate, commences an action to recover damages, and afterward withdraws it and accepts specific performance, is not liable in an action for damages or specific performance to one who in ignorance of his contract and action has contracted with the vendor for a conveyance of the land in question. March 6, 1888. *Tamsen v. Schaefer*. Opinion by Earl, J.

**WATER AND WATER-COURSES—PERCOLATION—NEG-LIGENT CONSTRUCTION OF RESERVOIR—LIABILITY OF STATE.**—(1) Where the State, constructing an embankment for a reservoir, uncovers a large bed of gravel, which is covered with water when the reservoir is full, and makes no attempt to render the bed water-tight, it will be liable under Laws of 1870, chapter 321, for all damages caused by the water percolating from the reservoir through the gravel-bed, and injuring the adjacent land. In cases arising under this statute, the State is therefore to be regarded as occupying the same position as an individual, and the inquiry is solely whether the facts proved would render an individual liable, if established against him. The situation of the gravel-bank skirting the western embankment of the reservoir was plainly visible to every one, and was known to the agents of the State while prosecuting the work of construction. Instead of taking precautions to avoid leakage at this point, they continued the work of denudation until many acres were exposed to the action of the water. That water, however situated, will seek its level through any channel open to it, is a natural law with which every one is familiar, and could not have been unknown to the officers having charge of this work. The attempt to collect a large body of water into a limited space surrounded with a porous and gravelly soil, without taking any adequate precaution to confine it to the receptacle prepared for it, was, upon the face of it, an inexcusable act of negligence in those having charge of such work, and cannot be justified under the known laws governing the motion of fluids. *Pixley v. Clark*, 35 N. Y. 520; *Jutte v. Hughes*, 67 id. 267; *Mairs v. Estate Ass'n*, 89 id. 506. Indeed one of the State engineers upon the work testified that when they were uncovering the



bank on the western side of the reservoir, he observed they were getting into a bed of coarse gravel, and that it might leak if they went deeper. Another engineer, employed in superintending the construction, stated that he observed what was going on in regard to this gravel-bed and told the canal commissioner in charge of the work that he didn't think they would be able to keep any water in the reservoir above this point. He further testified that the effect of removing the soil and earth from the gravel was to open a channel where all of the water from the reservoir might run out, but that if it had been "suitably lined with clay—a large body of which was found within the limits of the reservoir—it would not leak." The only excuse suggested by the engineers for not lining it was the large expense which the State would incur by doing so. The officers of the State seem to have proceeded with their work well knowing that they had exposed surface channels of vast extent, through which the collected waters of the reservoir must flow off and discharge at some point when its level was reached. That they did not know it would flood the land of the claimant was entirely immaterial, since they must have known that it would discharge upon somebody's land, and was liable to inflict damage thereto. There was no evidence that conflicted in any way with the facts stated, and the only attempt to palliate its force was made by calling one of the engineers of the canal department to testify to his opinion that the work of building the dam and reservoir was done according to the plans and specifications. No plans and specifications were produced on the trial, and the witness does not state that he ever saw them. One of the engineers testified that there were no specifications relating to the exposed gravel. The witness was permitted, under such circumstances, to state that the work was performed by the officers of the State with great care, and the dam was constructed in a good, safe and workman-like manner. Such testimony does not produce a conflict of evidence on the point in dispute, within the meaning of the rule precluding this court from reviewing a question of fact; on the contrary, it leaves the facts unanswered and undisputed, and the legal conclusion to be predicated thereon a question of law alone. In a case quite analogous to this which came to this court from the board of claims its conclusion of fact in regard to the liability of the State for damages occasioned by percolations of water through the banks of the canal, from defective precautions to restrain such waters, was just the reverse of that arrived at in this case. In *Clements v. State*, 106 N. Y. 621, in which the award was affirmed in this court, it held the State liable for not properly puddling the banks of the canal after raising the level of the water in the canal. In the cases of *Heacock v. State*, 106 N. Y. 267; *Avery v. State*, id. 636, and *Collins v. State*, id. 641, a refusal to award damages for such percolations was reversed by this court, and the claims sent back for a rehearing upon the merits. It is proper to say however that the refusal of the board of claims to make awards in the latter cases did not proceed upon the question of negligence or want of care on the part of the State officers, but was based mainly upon the statute of limitations. But this court held in each of those cases that evidence showing that the water in the canals had been raised by the State in such a manner as to cause them to percolate through the banks and flow upon the premises of adjacent owners, to their injury, required a hearing of the case upon the merits by such board. The rules regulating the rights and liabilities of adjacent owners of land with reference to interference with underground currents and streams have no application to the questions here presented. *Pixley v. Clark*, *supra*; *Village of Delhi v. Youmans*, 45 N. Y. 362. It does not at all follow

from the right that a land-owner has of lawfully digging on his own land for his own use, even though he thereby interrupts a subterranean current which feeds his neighbor's well or spring, that he has also a right to divert running water into an underground channel and thereby flood his neighbor's land. (2) The statute of limitations is not a bar to this claim. The claim cannot be maintained upon the theory of a permanent appropriation by the State for canal purposes of the land flooded. The cause of action is continuing, and arises from time to time as injury is inflicted upon the claimant's property by fresh percolations and floods, and will continue until the cause thereof ceases to exist. *Baldwin v. Calkins*, 10 Wend. 170. The evidence in this case tends to show that the claimant has at times been altogether deprived of the use and enjoyment of some of his land, and that other portions have been more or less injured by the flooding thereof, but it also shows that such injuries have been less frequent of late years than formerly. It is altogether probable that in the course of time they may altogether cease; but while they continue the claimant is entitled to recover such damages as he can show he has suffered within the period of statutory limitations. Some of the evidence as to damages seems to have been predicated upon the theory of a right to recover as for a permanent injury to the land flooded; but we think this is not the proper theory of damage and that the claimant must recover for the injuries suffered from time to time as they occur. *Ulline v. Railroad Co.*, 101 N. Y. 98. Feb. 28, 1888. *Reed v. State*; *Costello v. State*; *Poland v. State*. Opinion by Ruger, C. J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**JURISDICTION—FEDERAL QUESTION—EXERCISE BY CITY OF ADMINISTRATIVE POWERS.**—The Legislature of Louisiana granted plaintiff company the exclusive privilege of supplying the inhabitants of the city of New Orleans with water, by a charter which provided that nothing therein should be "so construed as to prevent the city council from granting to any person, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own use." *Held*, that the power conferred upon the city council was not legislative, but administrative, and an ordinance of the city permitting one to lay pipes for his own use is but a license, the validity of which is in no way dependent upon the Constitution or laws of the United States. In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. This court therefore has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld in the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated by two opinions of this court, delivered by Mr. Justice Miller: "It must be the Constitution or some law of the State which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or Constitution of the State, in the matter in which the conflict is supposed to exist;



or the case for this court does not arise." *Railroad Co. v. Rock*, 4 Wall. 177, 181. "We are not authorized by the Judiciary Act to review the judgments of the State courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox v. Bank*, 12 Wall. 379, 383. As later decisions have shown, it is not strictly and literally true that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the Legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the State as their fundamental law. In *Williams v. Bruffy*, 96 U. S. 176, 183, it was said by Mr. Justice Field, delivering judgment: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of the court" (Rev. Stat., § 709), and it was therefore held that a statute of the so-called Confederate States, if enforced by one of the States as its law, was within the prohibition of the Constitution. So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and whether exercised by the Legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States v. New Orleans*, 98 U. S. 381, 392; *Meriwether v. Garrett*, 102 U. S. 472. Accordingly where the city council of Charleston, upon which the Legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the State. *Murray v. Charleston*, 96 U. S. 438, 440. See also *Insurance Co. v. City Council*, 93 id. 118. But the ordinance now in question involved no exercise of legislative power. The Legislature, in the charter granted to the plaintiff, provided that nothing therein should "be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use." The Legislature itself thus defined the class of persons to whom, and the object for which the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the Legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. *Railroad Co. v. Eller-*

*man*, 105 U. S. 166, 172; *Day v. Green*, 4 Cush. 433, 438. The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the State. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States. The cases of *Water Works v. Rivers*, 115 U. S. 674, and *Water Works v. Water Works*, 120 id. 64, on which the plaintiff relied in support of its bill, were essentially different from the case at bar. In each of those cases the validity of the article of the Constitution of 1879 abolishing monopolies was drawn in question by the bill, and relied on by the defendants. *Rivers* did not contend that his property was contiguous to the river. The *St. Tammany Water Works Company* had been incorporated since the *New Orleans Water Works Company*, under a general statute of the State, for the purpose of supplying the whole city and its inhabitants with water. And both those cases were appeals from the Circuit Court of the United States, upon which this court was not restricted to the consideration of Federal questions decided below, but had jurisdiction to determine the whole case. The difference in the extent of the jurisdiction of this court on writ of error to the highest court of a State, and on appeal from a Circuit Court of the United States, as affected by the ground of the decision of the court below, is illustrated by the cases of contracts payable in Confederate currency, or made in consideration of loans of Confederate currency, during the war of the rebellion, and by the cases of promissory notes given before that war for the price of persons sold as slaves. In *Thorington v. Smith*, 8 Wall. 1, this court, reversing a judgment of the Circuit Court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the Circuit Courts of the United States. *Bank v. Bank*, 16 Wall. 483, 497; *Confederate Note case*, 19 id. 648; *Railroad Co. v. King*, 91 U. S. 83; *Cook v. Lillo*, 103 id. 792. Yet in *Bethell v. Demaret*, 10 Wall. 537, where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the Supreme Court of Louisiana, on the ground that the notes and mortgage were nullities, because the Confederate currency, which constituted the consideration, was illegal by the general law of the State, this court dismissed the writ of error, because no statute of the State was drawn in question. And in *Bank of West Tennessee v. Citizens' Bank*, 14 Wall. 432; 13 id. 9, where the Supreme Court of Louisiana, affirming a judgment rendered by an inferior court of the State before the adoption of article 127 of the State Constitution of 1868, by which "all agreements, the consideration of which was Confederate money, notes or bonds, are null and void, and shall not be enforced by the courts of this State," dismissed a suit to recover money payable in Confederate notes, basing its judgment both upon that article of the Constitution and upon adjudications in that State before its adoption, this court, speaking by Mr. Justice Swayne, dismissed a writ of error, and said: "The result in this case would have been necessarily the same if the Constitution had not contained the provision in question. This brings the case within the authority of *Bethell v. Demaret*," above cited. In another case at the same term the disposition by this court of the case of *Bank of West Tennessee v. Citizens' Bank* was thus explained by Mr. Justice Miller:

"As it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control, and was sufficient to support the judgment, because another reason was given, which if it had been the only one, we could review and might reverse." *Delmas v. Insurance Co.*, 14 Wall. 661, 666. In *Delmas v. Insurance Co.*, just cited, where the judgment of the Louisiana court was put wholly upon that article of the Constitution, this court therefore took jurisdiction, and reversed the judgment, but said that where a decision of the highest court of a State, "whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review." And in *Tarver v. Keach*, 15 Wall. 67, as well as in *Dugger v. Bocoock*, 104 U. S. 596, 601, the proposition thus stated was affirmed, and was acted on by dismissing a writ of error to a State court. So in *Stevenson v. Williams*, 19 Wall. 572, where a judgment of the Supreme Court of Louisiana, annulling a judgment of a lower court, on the ground that the promissory notes on which it was rendered had been given for a loan of Confederate money, was brought here by writ of error, this court, speaking by Mr. Justice Field, after disposing of a distinct Federal question, and observing that the aforesaid ground would not be deemed, in a Federal court, sufficient to set aside the judgment, said: "But the ruling of the State court in these particulars, however erroneous, in not subject to review by us. It presents no Federal question for our examination. It conflicts with no part of the Constitution, laws or treaties of the United States. Had the State court refused to uphold the judgment because of the provision in the Constitution of the State, subsequently adopted, prohibiting the enforcement of contracts founded upon Confederate money, a Federal question would have been presented. That provision however does not appear to have caused the ruling." 19 Wall. 576, 577. Those cases clearly establish that on a writ of error to a State court this court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the State Constitution; but that if it was based on the previous law of the State, this court had no jurisdiction to review it, although the view taken by the State court was adverse to the view taken by this court in earlier and later cases coming up from a Circuit Court of the United States. In actions brought upon promissory notes given for the purchase of slaves before the war, the same distinction has been maintained. The Constitutions adopted in 1868 by the States of Arkansas, Georgia and Louisiana respectively, provided that the courts of the State should not enforce any contract for the purchase or sale of slaves. In *Osborn v. Nicholson*, 13 Wall. 654, a judgment rendered for the defendant by the Circuit Court of the United States for the District of Arkansas, in an action on a promissory note for the purchase of a slave, was reversed, because this court was of opinion that the contract was valid at the time when it was made, and therefore its obligation was impaired by the subsequent Constitution. For like reasons this court, in *White v. Hart*, 13 Wall. 646, reversed a similar judgment rendered by the Supreme Court of the State of Georgia, and based upon the provision of its Constitution. But in *Palmer v. Marston*, 14 Wall. 10, where the Supreme Court of Louisiana in a similar action had placed its judgment for the defendant upon the law of the State, as established and acted upon before the adoption of the Constitution of 1868 and since adhered to, and had de-

clined to pass upon the question whether the provision of that Constitution was valid or invalid as an act of legislation, and in relation to the article of the Constitution of the United States against impairing the obligation of contracts, because it was unnecessary, and could have no practical influence upon the result, this court dismissed a writ of error for want of jurisdiction, saying: "It thus appears that the provision of the State Constitution upon the subject of slave contracts was in nowise drawn in question. The decision was governed by the settled principles of the jurisprudence of the State. In such cases this court has no power of review." "Substantially the same question arose in *Bank of West Tennessee v. Citizens' Bank*, heretofore decided. The writ of error was dismissed for want of jurisdiction. The same disposition must be made in this case." These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon the judgment of the highest court of a State, giving effect to a statute of the State, drawn in question as affecting the obligation of a previous contract, this court, exercising its paramount authority of determining whether the statute upheld by the State court did impair the obligation of the previous contract, is not concluded by the opinion of the State court as to the validity of the construction of that contract, even if contained in a statute of the State, but determines for itself what that contract was. Leading cases of that class are *Bridge Prop'r v. Hoboken Co.*, 1 Wall. 116, in which the State court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract, previously made by the State with the proprietors of a bridge that no other bridge should be built across the river; and cases in which the State court affirmed the validity of a statute, imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. *Bank v. Knoop*, 16 How. 369; *Trust Co. v. Debolt*, id. 416; *Bank v. Debolt*, 18 How. 380; *Bank v. Skelly*, 1 Black, 346; *New Jersey v. Yard*, 95 U. S. 104; *Railroad v. Gaines*, 97 id. 697, 709; *University v. People*, 99 id. 309; *Railroad v. Palmes*, 109 id. 244; *Gas-Light Co. v. Shelby Co.*, id. 398; *Railroad Co. v. Dennis*, 116 id. 665. In each of those cases the State court upheld a right claimed under the later statute, and could not have made the decision that it did without upholding that right; and thus gave effect to the law of the State drawn in question as impairing the obligation of a contract. The distinction between the two classes of cases—those in which the State court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract—as affecting the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in *Railroad v. Railroad*, 14 Wall. 23. That was a writ of error to the Supreme Judicial Court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did not appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract "was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract," said: "If this were all of the case, we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. Bridge

*Propr's v. Hoboken Co.*, 1 Wall. 116. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made by the laws then in existence. Now if the State court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made, does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the Supreme Court of Maine was right in that opinion. Here is therefore a clear case of a sufficient ground on which the validity of the decree of the State court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the State court, we cannot take jurisdiction, because we could not reverse the case, though they Federal question was decided erroneously in the court below against the plaintiff in error. *Rector v. Ashley*, 6 Wall. 142; *Klinger v. Missouri*, 13 id. 267; *Steines v. Franklin Co.*, 14 id. 15. The writ of error must therefore be dismissed for want of jurisdiction." Id. 26, 28. The result of the authorities, applying to cases of contracts, the settled rules, that in order to give this court jurisdiction of a writ of error to a State court, a Federal question must have been, expressly or in effect, decided by that court, and therefore that when the record shows that a Federal question and another question were presented to that court, and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and if it is of opinion that it did not confer the rights affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because if it did, the subsequent law cannot be upheld. But when the State court gives no effect to the subsequent law, but decides on grounds independent of that law that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction. In the present case the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the general law of the State, and upon the construction and effect of the charter from the Legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the Constitution or any law of the State subsequent to the plaintiff's charter. The case cannot be distinguished in principle from the cases above cited, in which writs of error to State courts have been dismissed for want of jurisdiction. As was said in *Bank of West Tennessee v. Citizens' Bank*, above cited,

"the result in this case would have been necessarily the same if the Constitution had not contained the provision in question." March 19, 1888. *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.* Opinion by Gray, J.

**WATER AND WATER-COURSES—OBSTRUCTION OF BRIDGE—COURTS—FEDERAL JURISDICTION—IMPROVEMENTS BY CONGRESS.**—(1) The act of Congress of February 14, 1859 (11 Stat. 383), admitting the State of Oregon into the Union, provides "that all the navigable waters of said State shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." *Held*, that the act did not prohibit obstructions to the navigation of such waters, and that Congress, not having by subsequent legislation assumed police power over the Willamette river in that State, a bill by one citizen of Oregon against another to enjoin the erection of a bridge over that river at the city of Portland, authorized by an act of the State Legislature, on the ground that the bridge impeded navigation, and that the act was passed without the consent of Congress, did not present a case arising under the Constitution or laws of the United States, and that the Circuit Court had no jurisdiction, both parties being residents of the same State. (2) The expenditure of money by Congress in improving the Willamette river in Oregon, and the making of Portland on that river a port of entry, do not constitute an assumption by Congress of police power over that stream, in the sense that the State is thereby deprived of the power of authorizing without the consent of Congress the erection of a bridge over that river. The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any all obstructions therein is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. Of course where the litigant parties are citizens of different States the Circuit Courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to the authorities on the subject. We refer to the following by way of illustration: *Willson v. Creek Co.*, 2 Pet. 245; *Pollard's Lessee v. Hagan*, 3 How. 229; *Passaic Bridge cases*, 3 Wall. 732; *Gilman v. Philadelphia*, id. 724; *Pound v. Turk*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 id. 678; *Cardwell v. Bridge Co.* 113 id. 205; *Hamilton v. Railroad*, 119 id. 280; *Huse v. Glover*, id. 543; *Sands v. Improvement Co.*, 123 id. 288; *Transportation Co. v. Parkersburg*, 107 id. 691, 700. The usual case of course is that in which the acts complained of are clearly supported by a State statute; but that really makes no difference. Whether they are conformable or not conformable to the State law relied on is a State question, not a Federal one. The failure of State functionaries to prosecute for breaches of the State law does not confer power upon United States functionaries to prosecute under a United States law when there is no such law in existence. March 19, 1888. *Willamette Iron Bridge Co. v. Hatch*. Opinion by Bradley, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CONSTITUTIONAL LAW—CORPORATIONS—CONSOLIDATION WITH FOREIGN CORPORATION.**—The Constitution of Illinois, 1870, art. 11, § 11, provides that "a ma-

majority of the directors of any railroad corporation, now incorporated or hereafter to be incorporated by the laws of this State, shall be citizens and residents of this State." A railroad company was chartered by the Illinois acts of 1851 and 1851, and under its charter became consolidated in 1867 with two other railroad companies, corporations of other States, and governed by a board of thirteen directors, twelve of whom are residents of other States. *Held*, that upon the consummation of the consolidation, a new corporation was created, which exists by virtue of the laws of the States authorizing and consenting to its organization, and that the above provision of the Constitution does not apply. A careful examination has satisfied us that the current and weight of authority establish the principle that upon the consummation of such consolidation, authorized by the laws of the States creating the constituent corporations, a new corporation will be created. *Railway Co. v. Berry*, 118 U. S. 465, 5 Sup. Ct. Rep. 529; *Shields v. Ohio*, 95 U. S. 319; *Graham v. Railroad Co.*, 118 id. 161; 6 Sup. Ct. Rep. 1009; *Bridge Co. v. Mayer*, 81 Ohio St. 317; *Bishop v. Brainerd*, 28 Conn. 289; 2 Mor. Corp., §§ 1000, 1001. The acts of the States authorizing and consenting to the consolidation are acts of incorporation. *State v. Railroad Co.*, 66 Me. 488 (affirmed by the Supreme Court of the United States, 96 U. S. 499). And the new corporation will possess, necessarily, every requisite corporate attribute. Its capital stock, corporate name and organization, board of directors, officers and managers will be such as may be authorized by the articles of consolidation and the acts of the respective States. The new corporation will, as was said in *Minot v. Railroad Co.*, 18 Wall. 206, become vested with "the rights and privileges which the original companies had previously possessed under their respective charters—the rights and privileges in Maryland which the Maryland company had enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed—not to transfer to either State and enforce therein the legislation of the other. \* \* \* The new company stood in each State as the original company had previously stood in that State, invested with the same rights and subject to the same liabilities." Unlike a corporation created by a single State, which cannot migrate or legally exist outside of the territorial limits of the State of its creation, the consolidated corporation, having a capital stock which is a unit, and only one set of stockholders, who have an interest by virtue of their ownership of shares of such stock in all of its property everywhere, and a single board of directors, will have its domicile in each State; and the stockholders, directors and officers can, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in either of the States; though in its relation to either State the consolidated company will be a separate corporation, governed by the laws of that State as to its property therein, and subject to taxation in conformity with the laws of such State, and to all the police power of the State in respect of its property and franchise within such State. *Graham v. Railroad Co.*, 118 U. S. 161; 6 Sup. Ct. Rep. 1009; *Bridge Co. v. Mayer*, 81 Ohio St. 317; *Sprague v. Railroad Co.*, 5 R. I. 233; *Pierce, R. R. 20*; *Minot v. Railroad Co.*, *supra*. And the same rule, as to domicile, seems to apply to a case where two corporations are created by adjoining States for the improvement of a river forming the common State boundary. "Under the joint act of two States, the powers conferred to be exercised for the benefit of both may be exercised in either. The act does not require the business to be done in either State, as regards the action of the directors; the work is to be done in both." And so it was held the corporation might be sued in either State. *Culbert-*

*son v. Navigation Co.*, 4 McLean, 544. And to the same effect is *Railroad Co. v. Railroad Co.*, 6 Biss. 219. This constitutional provision, by its terms, applies only to such railroad corporations as are "now incorporated or hereafter to be incorporated by the laws of this State." It would seem that no construction of these words was necessary to demonstrate the inapplicability of the constitutional provision to appellant corporation, or those standing in like relation to the State. It is insisted however by appellees that as appellant corporation derives its vitality from the act of the State consenting to the consolidation, and its charter powers and duties within this State are measured by the act of 1861, creating the Ohio and Mississippi Railway Company of Illinois, it falls within the spirit of the Constitution, and must therefore have a majority of its board of directors citizens and residents of this State. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. This intent is to be found in the instrument itself from the words and phrases employed. The presumption is that the language employed was intended to have its ordinary and usual meaning, and to be sufficiently perspicuous within itself to convey the intent. And 'where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' *United States v. Fisher*, 2 Cranch, 358; *Cooley Const. Lim.* 68. And it is only when, after a consideration of the language employed, there are still doubts and ambiguities as to the meaning of the law-making power, that extrinsic circumstances may be resorted to in aid of construction. As has been seen, appellant corporation is no more a corporation existing under the laws of Illinois than it is a corporation chartered by the laws of Indiana or of Ohio. To hold that the constitutional provision is applicable to appellant corporation, would be to determine that the framers of that instrument, in drafting and submitting this section, and the people in adopting it, intended that the State of Illinois should break faith with her sister States, and should become a despoiler of private right; for on the faith of the legislation of Illinois, the other States had, by like legislative action, authorized corporations existing as domestic corporations in those States to unite their property and franchises with a corporation of this State, whereby both public and private rights were greatly affected. Upon the consummation of the consolidation, bonds and stocks of the new consolidated corporation were issued, secured by mortgages upon the consolidated line, its property and franchises, and the liens on the constituent lines discharged. The terms and conditions of the articles of consolidation are not set out in the answer; but it is manifest, from what is disclosed, that the legal effect of the consolidation, which it is averred was consummated, was to transfer to the new corporation the property of the three constituent companies wherever it might be located. When the new corporation issued its stock, it was put upon the markets of the world, and the persons becoming owners thereof acquired an interest, measured by the shares of stock owned by them respectively, in the franchise and property of the new corporation. No restriction was placed upon its ownership, and all persons everywhere were at liberty to acquire it. Although the corporation was a *quasi* public one, its property was the property of its stockholders, and subject to the general regulation and police power of the States in which the corporation was situate. The owners of the railway property stood on an equal footing with the owners of other species of property as to its right of control and management. An essential element of the

consent and authority given by the State to the consolidation was the right of the Illinois corporation to acquire, under the laws of the other States named, an interest in property situate beyond the limits of this State, and forming an integral part of a great railway thoroughfare, with a right to issue its bonds and stock, based on the property of the railway in the three States, whose domestic corporations were the constituent elements of such new company. The object to be attained was the corporate union of properties and interests in different States, under the management and control of a single board of directors, thereby securing the concerted and harmonious operation of a through line of railway from St. Louis to Cincinnati. If effect is to be given to the words of the Constitution as contended by appellee, the consolidated corporation must necessarily be dissolved, unless the States of Ohio and Indiana acquiesce in the assumption by this State of jurisdiction over the personnel of the directory; and also, unless the owners of appellant's stock consent to become citizens and residents of Illinois in sufficient number to constitute a majority of the directory, and a majority of the stockholders consent to commit the interests of the corporation to such resident stockholders. If all this could not be attained, appellant must forfeit its charter in this State, and its property here as well as its interest in this continuous line of railway be lost to those interested therein. Such construction would place this State in the condition of repudiating its acts upon the faith of which sister States have acted, and upon which private interests have been acquired. And although States may not enter into formal treaties and conventions, or agreements and compacts, they may, and we venture to say should, be exemplars of good faith and fair dealing, by faithfully observing such obligations as legitimately spring from their co-operating legislation. The framers of the Constitution must be presumed to have known of the status of appellant and its relation to the State at the time the language referred to was selected, and if they had intended the dissolution and destruction of appellant corporation as then existing, it is also to be presumed they would have used language expressive of such intent. The language employed applies only to corporations existing by virtue of the laws of this State, and finds ample scope for application to the multitude of corporations thus existing. No reason has been suggested, nor has any occurred to us, for extending the language of this constitutional provision beyond its plain and obvious meaning; and especially would this be so, in view of the results that would follow the more latitudinous construction contended for by appellee. What would be the effect upon like corporations brought into existence since the declared policy of the State, as expressed in this constitutional provision, is not before us, and need not be discussed or determined. Ill. Sup. Ct., Jan. 18, 1888. *Ohio & M. Ry. Co. v. People*. Opinion by Shope, J. Scott and Magruder, JJ., dissent.

**SCHOOLS—AUTHORITY OF SCHOOL COMMITTEE—LIABILITY.**—Where a town has given no direction in regard to the care of its school-houses, the school committee have authority, under the Public Statutes of Massachusetts, chapter 44, section 46, to order a tree standing in a school-house lot to be cut down, and having employed a proper person to do the work, they are not liable for his negligence. The language is: the school committee "shall keep such houses in good order, and shall provide a suitable place for the schools where there is no school-house, and provide fuel and all things necessary for the comfort of the scholars therein at the expense of the town." The defendants were not themselves negligent, and if their vote was an official act, they are not responsible for

the negligence of those whom they employed in carrying it out. The doctrine of *respondet superior* is founded on the supposed benefit to the master of the act of the servant, and does not apply to a public officer employing agents in the discharge of a public duty. *Nowell v. Wright*, 3 Allen, 166; *Hill v. Boston*, 122 Mass. 344; *Story Ag.*, § 319. The case is then narrowed to the single question whether the school committee had authority to remove the tree from the lot on which the high-school building was situated. If they had, they were the judges of the necessity and propriety of its removal, and it was not necessary to recite in the vote the occasion for their action. It is immaterial whether the tree endangered the school building or the children attending the school, or what the reason for its removal was. The right to remove it involved or rather arose from the duty of determining whether the removal was necessary. The town owned the school building and lot, but it had appointed no agent to have charge of it, and no officer had any authority over it except the school committee. The duty expressly put upon the committee by statute to keep the school-house in good order and to provide all things necessary for the comfort of the scholars, included the care of the lot on which the house stood, as well as of the house. It was their duty not only to take proper measures to protect the school-house from threatened danger, but to see that the access to it over the lot from the adjoining street was safe and comfortable for the scholars, and that the lot was kept in proper condition for them to use in connection with the school-house. This would be included in their general duty of charge and superintendence of the school if it was not within their specific duty in regard to school-houses. But we cannot doubt that the statute made it their duty to keep the lot, as well as the house upon it, in good order. If snow or if a fallen tree incumbered the lot, they could remove it; and they were not obliged to wait until the tree fell. It was their duty to exercise and to act upon their judgment and discretion as to the necessity and propriety of cutting it down, and in so doing they were acting as public officers in the discharge of a public duty. Mass. Sup. Jud. Ct., Jan. 6, 1888. *McKenna v. Kimball*. Opinion by W. Allen, J.

**SHIP AND SHIPPING—NEGLIGENCE—CONTRIBUTORY—UNLASHING WHEEL—RIGHT OF INJURED PARTY TO BE CURED AT EXPENSE OF SHIP.**—Libellant, an experienced seaman, was placed to await orders in the wheel-house of a steam-barge which was being towed. He unlashed the wheel without orders, and as the rudder came into contact with an obstruction on the bottom, the wheel revolved and injured libellant who tried to hold it. *Held*, (1) that he was guilty of contributory negligence. (2) It is now further urged in behalf of the libellant that even if he was negligent, and if the injury occurred without any negligence on the part of the officers of the barge, the libellant is entitled to be cured or properly treated medically at the expense of the ship. There is no dispute as to the rule which prevails that a seaman shipped for a voyage, who is taken sick, or who has received injury by accident, even where he is partly at fault, is entitled to medical treatment during the voyage or until he is cured; but I do not think this libellant stood in such a relation to this barge as to be entitled to invoke this rule in his own behalf. This ship was not bound upon a voyage, within the meaning of the cases in which this rule has been applied, or of the circumstances out of which the rule originated. The libellant did not ship for a voyage, but only for a temporary movement of the barge from one place in the harbor to another. It was not a case where it was expected to earn freight, or in any way engage in commerce. No shipping articles were signed; no special employment as seaman

was given to the libellant. The barge, as the libellant must have known, was proceeding from one location in the harbor to another by the aid of tugs, and the main burden of handling the barge was upon the tugs. As a matter of special precaution, the captain secured the services of these few men, very few compared with those required for the navigation of such a craft if bound upon a voyage, and the libellant was directed to take his place in the wheel-house. This did not make him a seaman or put him in such a relation to this vessel as to entitle him to all the rights of a seaman who had been duly shipped for a voyage. He was merely in the position of an employee rightfully on board of the vessel, and if while there he had been injured by reason of the fault or negligence of the officers of the barge, he might have had his action either at law or his libel in admiralty to recover damages for such injury. All the cases which have been cited, where the rule now invoked has been applied, are cases where the seaman was shipped for a voyage from one port to another, and where the sickness or injury for which he claimed to be treated was incurred while in the discharge of his duty under such engagement. They all agree that the obligation to "cure," as the old cases say, or to give "medical treatment," as the later cases term it, only continues to the end of the voyage. Here this man was employed to aid, we will say, in transferring this barge from a position on the North branch to the Illinois Central slip, a distance of less than two miles. Unless some unexpected delay intervened, it could not be expected to last more than an hour or an hour and a half, and at the end of that time, if you call it a voyage, the voyage would be over; so that even in the event that this man had been entitled to this right, the right would be gone so very soon that it would be of very little value to him. I think therefore that no recovery can be had for damages to the libellant by reason of his rights as a seaman under the rule referred to. *U. S. Dist. Ct. N. D. Ill., Dec. 5, 1887. The John B. Lyon.* Opinion by Blodgett, J.

**WITNESS—DEFENDANT IN A CRIMINAL ACTION—IMPEACHMENT.**—A defendant in a criminal prosecution, who voluntarily takes the stand in his own behalf, subjects himself to the same rules as to cross-examination and impeachment as other witnesses; and in impeaching his credibility as a witness the inquiry is not restricted to his general reputation for veracity, but involves his whole moral character. The act undertakes to distinguish him from other witnesses in only three particulars: (1) He is not to be called except upon his own request; (2) his failure to take the stand is not to create any presumption against him; (3) he must be the first to testify for the defense when he proposes to become a witness. The first two are privileges not enjoyed by other parties; the last is a burden. The Legislature having seen fit to make the three exceptions, the courts are not authorized to make any other. With the wisdom and the policy of the act we have nothing to do; this concerns the Legislature only. It is a natural step in the line of progress that began with the removal of the disqualification of interest in civil suits, now removed by legislation in England, and in almost all of the American States, and to a large extent applied to criminal trials by most of the States of this Union. Speaking for myself, I agree with the views expressed by the learned writer quoted in the notes to Wharton's *Criminal Evidence*: "But though the new rule may tend, and very properly, to an increase in the number of convictions, there is not the slightest doubt that it will also prevent a number of wrongful convictions, if not make wrongful convictions almost impossible." To return to the objections made to the evidence in the case at bar. It is earnestly insisted that such rul-

ing operates to destroy the elementary principle of law that the State cannot go into proof of the general character of the accused until he first opens the door. The contention is not logical; the general rule remains unaffected. The accused is still safe from such an attack so long as he remains the accused only; but when he voluntarily places himself upon the stand, he assumes the character of a witness, and as such must expose himself to be attacked to the same extent as other witnesses. Surely the courts would be slow to place a construction upon an act of the Legislature (if there were room for construction) that would allow a witness to be sworn and give his testimony against that of good and true men, when the State's attorney knows and is ready to prove him wholly devoid of moral sense and utterly unworthy of belief, and at the same time prevent the State from showing the character of the witness as affecting his credit. Under this act a man repeatedly convicted of the crime of perjury can go before the jury in a community where he is unknown, and with a good manner and fair exterior give evidence in his own behalf, and the State remain powerless to impeach him, if the position contended for were tenable. Prior conviction of an infamous crime, it would seem, does not incapacitate him, as the statute gives him the right to testify on his own behalf, as was held by the courts of New York under a statute in the main similar to our own. *Newman v. People*, 63 Barb. 630. But under the rule contended for the record of such conviction could not be introduced, because as a defendant, evidence of a distinct felony could not be proven against him. The statement of the proposition would seem to carry with it its own refutation. That such conviction can be shown to affect his credibility as a witness has been expressly adjudged. *State v. Kelsae*, 76 Mo. 505. It must be borne in mind that in Tennessee it has been long and well settled that in impeaching the credibility of a witness, the inquiry is not, as in some of the States, restricted to the general reputation for veracity, but it involves his whole moral character. It has been regarded as essential to the ends of justice that both the court and jury should have full opportunity of knowing the entire moral character of the witness whose credit is sought to be impeached; "in view of all of which," as was said by Judge McKinney in *Gilliam v. State*, 1 Head, 38, "it may be safely left to the jury to determine what degree of credit the witness is entitled to for truth, notwithstanding his other vices and immoralities of character, as his claim to veracity is the primary and important consideration." According to our practice then, the proper inquiry is whether the witness knows the general character of a person whose credibility is in question, and whether from such knowledge the witness would believe him on oath. *Ford v. Ford*, 7 Humph. 82; *Merriman v. State*, 3 Lea, 394. So we see this witness has only been made to carry the same burden that rests upon all witnesses under our practice. The charge of the court, as far as language can do, so confines the effect of the testimony to his credibility. If such evidence, notwithstanding the charge, may by possibility prejudice him with the jury (and we have no right to suppose that the jurors, on their oaths, will not be controlled by the charge), the defendant cannot complain, since he voluntarily placed himself in a position where such evidence was admissible. But we are not left alone to reason out our conclusions upon this question. It and kindred questions have been presented and adjudicated in accordance with the views here expressed in other States. The best-considered case perhaps to which we have had access is *State v. Clinton*, 67 Mo. 380, where many cases are cited sustaining the conclusion there reached—that the defendant, as a witness in a criminal case, subjects himself



to the same rules as to cross-examination and impeachment as other witnesses. Similar statutes have been similarly construed in Nevada, New York, California, Massachusetts, Indiana, Connecticut, New Hampshire and other States. *State v. Cohn*, 9 Nev. 179; *Brandon v. People*, 42 N. Y. 265, where on cross-examination, "Have you ever been arrested for theft?" was held a proper question, no suggestion of privilege having been made; *Connors v. People*, 50 N. Y. 240; *McGarry v. People*, 2 Lans. 227; *State v. Pfefferle*, 36 Kan. 90; *People v. McGungill*, 41 Cal. 429; *Mershon v. State*, 51 Ind. 14; *State v. Ober*, 52 N. H. 459; *Town of Norfolk v. Gaylord*, 28 Conn. 309. The rule as to the general character of witnesses is the same in Missouri as in this State. *State v. Breeden*, 58 Mo. 507. In Massachusetts it is held that where the defendant is a witness he may be asked "whether he has been in prison on other charges." *Com. v. Bonner*, 97 Mass. 587. See also *Whart. Crim. Ev.*, § 427 *et seq.*, where the author takes this view of similar statutes. *Tenn. Sup. Ct.*, Jan. 14, 1888. *Peck v. State* Opinion by Fulkes, J.

### CORRESPONDENCE.

#### A QUESTION OF CONTRACT.

*Editor of the Albany Law Journal:*

A. asks B. to let him have the job of threshing his oats and receives an affirmative reply. He entered upon the performance thereof and threshed 200 bushels, reserving and retaining to himself six bushels on each hundred, which together with board of team and two men, was shown to be the general custom of the neighborhood and so understood and agreed between the parties. B. (without cause) refused to allow A. to thresh the balance of the grain, which upon the trial was shown to be 1,200 bushels. His readiness and willingness to continue and his inability to find work during the period which it would have required to complete defendant's job were facts duly proven. Plaintiff testified that while working he paid his men \$1 per day, and that they threshed 250 bushels per day, and that oats were worth forty cents per bushel. The defendant having put in no evidence, was a case made out, and if so, for how much?

Yours truly,

LAW STUDENT.

### NEW BOOKS AND NEW EDITIONS.

HEARD'S SHORTT ON CRIMINAL INFORMATIONS (CRIMINAL AND QUO WARRANTO), MANDAMUS AND PROHIBITION.

This English work, edited by Mr. Franklin Fiske Heard, of Boston, seems to be the first volume of a new series of English text-books with American notes, to be called American Law Series, and published monthly, by Charles H. Edson & Co., of Boston, at \$15 a year. It is a beautifully printed book of 800 pages, but is in paper sides and with trimmed edges, which in our judgment is injudicious, because it must be bound, and in binding it must be still more cut down. The price of course is amazingly cheap, and of course is only to be accounted for by the fact that there is no international copyright. We have often said we do not much care for English books with American notes. Our own text-books are infinitely superior, with few exceptions, as to the law common to both countries, and every English book has much that is superfluous to us. This criticism is fairly applicable to this work, and yet it may well be that with the notes of Mr. Heard, a very competent editor, it may prove useful, especially as to Informations and

Prohibition. It has a large number of Forms, its principal virtue however, and that a very important one, is probably its marvellous cheapness. We shall await future volumes with interest and curiosity.

### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Friday, May 4, 1888:

Judgment affirmed with costs—Henry K. Stevens, appellant, v. Ella S. Comstock and others, respondents.—Judgment affirmed with costs—Charles Burley and another, appellants, v. Orsell H. Hartson and others, respondents.—Judgment affirmed with costs—John Langford and another, respondents, v. Orsell Cook, impleaded, etc., appellant.—Judgment affirmed with costs—Martin Mulligan, respondent, v. Knickerbocker Ice Company, appellant.—Judgment affirmed with costs—Frank D. Wright, respondent, v. William D. Andrews and another, appellants.—Appeal dismissed with costs—Bridget Cashen, appellant, v. City of Auburn, respondent.—Motion to prefer cause granted—George L. Kingsland and others v. City of New York.—Conviction of murder in the first degree affirmed—People v. Edward A. Deacons.

Ordered: That the court take a recess until Monday, June 4, then to meet in the town hall in the village of Saratoga Springs, and proceed with the call of the present calendar until its numbers are concluded. It is also ordered that a new calendar be prepared for that date, upon which will be placed only those cases in which the returns, with notices of argument and proofs of service, shall have been filed with the clerk in Albany on or before Saturday, May 28.

Motion days will be Tuesdays, June 5 and 12.

### NOTES.

The *Troy Times* supplies us with the best legal stories that we meet with. We like them a great deal better than its editorial opinions about law and lawyers. But then its stories are selected. The two following are from its columns: Miss Jane Wyatt, a bulky Englishwoman, educated at Kensington, and now teaching music at Eau Claire, Wis., had a misunderstanding with little grocer Kneeland over his bill, and the result was a suit against the grocer for \$5,000 damages for assault and battery. Mr. Kneeland's lawyer, it is reported, furnished more fun for the large audience that heard the trial than a circus, and it was such passages as the following that led the jury to bring in a prompt verdict of "No cause of action:" "Gentlemen of the jury, compare the proportions of the parties in this action, and remember, gentlemen, that several dollars' worth of the ailment which has gone to make up the large physique of this plaintiff was furnished by the defendant, and that it is claimed that he has not received adequate pecuniary return therefor."—Senator Wade Hampton tells this story about Senator "Zeb" Vance's first case in the North Carolina Supreme Court: His client had been worsted in the lower court, and Vance took an appeal. It was his first argument in the court, and he took great pains with it. When the court came to render a decision the chief justice quoted Vance's argument in full. As he was proceeding Vance looked proudly around at the other lawyers and cheerfully rubbed his hands. To his mind that was the greatest argument ever presented to a court. The court read Vance's argument through, and then said: "For these reasons we affirm the decision of the court below." Vance was dumbfounded. His own argument was used as the basis of a decision against his client.



# The Albany Law Journal.

ALBANY, MAY 19, 1888.

## CURRENT TOPICS.

IN the May number of *The Forum* is an article by Judge Barrett entitled "Miscarriages of Justice," which is generally a very sensible, temperate and timely utterance. The first cause of miscarriage noticed is the delay of the law. The writer recommends the consolidation of the three highest courts in the city of New York—the Supreme, Superior and Common Pleas—"into one great tribunal with an appellate branch of five judges, sitting throughout the legal year." The special advantage of this would be to "release four of the present appellate judges for the duties of *nisi prius* and equity." There is every thing in favor of this recommendation. The present system is extremely unwise and without a single reason in its favor—a remnant of old days and a memorial of the growth of the city. In respect to relief of the Court of Appeals, the judge disapproves a commission and the limiting of appeals, and prefers two chambers and a division of the calendar. To this we should prefer one chamber and an alternation of the judges so as to afford a constant session. The judge gives a good deal of attention to the inconvenience of the rule in the city to postpone a trial on account of the engagement of counsel in another court. It seems that at the judge's suggestion a proposal was once made to abrogate the rule, but it met with little favor. Much can be said against the rule, but it would seem that the injustice of abolishing it would overbalance the benefit. The judge comes to the rescue of the judges, which they hardly needed, but his analysis of the matter of reversals is worth reproducing. He says: "Some day, for instance, the court *in banc* hands down a list of one hundred decisions, in which we find forty reversals. At once the thoughtless critic cries out that the judges of first instance are wrong about as frequently as they are right. He fails to recognize the fact that these hundred cases represent, in all probability, five hundred actual trials, four hundred of which were conducted with such accuracy that the defeated party did not venture to appeal. The fair statement would be that there were forty reversals out of five hundred trials, or one in twelve. An analysis of these forty reversals would prove that the great majority were *nisi prius* appeals, where the judge below had little opportunity for reflection or deliberation. Reversals in equity cases, where opinions are written below, are infrequent, while the percentage in motions is infinitesimal. A judge at chambers has a monthly calendar of some seven hundred motions. He hears and decides at least one-half of these, say, at a low estimate, three hundred. Subsequent scrutiny of the appellate calendars will bring to light possibly half a dozen of these motions, indicating that ap-

peals are taken in about one out of every fifty decisions. The average of reversals will not exceed two out of the six, or one out of every one hundred and fifty disposed of. The same rule applies to the second appeal. Probably not more than one case out of every three disposed of by the General Term goes to the Court of Appeals, while the percentage of reversals, after the deliberation of three judges, is naturally less than on the first appeal. There will always be reversals in close or evenly balanced cases until the human mind is trained to act automatically, or until appellate courts are abolished. Indeed, the percentage of reversals on the occasional appeals by writ of error which the Federal system permits to the Supreme Court of the United States from our Court of Appeals is quite as large as the percentages below. In all human probability it would again be as large upon a further appeal to a still higher tribunal, could such be called into being." The judge continues: "The most fruitful source of miscarriages of justice is certainly weakness of judicial rule." By this he seems to mean rule of the jury. In this he thinks "there is a middle course between the heavy hand of English authority and the criminal Utopia of Illinois," where the trial judge is prohibited in criminal cases not only from commenting on the facts, but even from charging colloquially upon the law. In regard to juries the writer says: "The time is coming when the principle of unanimity will have to be modified. The demand for such a change will be greater as the juries improve and as the difficulty in securing conscientious unanimity is found to increase. The presiding justice of this department lately made what seems to me a happy suggestion on this head. He advocated a constitutional amendment making a vote of nine jurors, when approved by the court, equivalent to unanimity. That would prevent disagreements in all but the most evenly balanced cases, while the requirement of judicial approval would operate upon the contending parties—the majority and the minority in the jury room—as a wholesome check and balance." This recommendation is right, in our judgment, except as to the approval of the court. That requirement would vest a dangerous authority in the judges, and give them a power which they have never had in this country. It would be better to make a rule for all cases—say a verdict by nine in all cases except felonies. The judge is rather mild on the subject of judge-made law, but he says: "miscarriages, resulting from uncertainty, are more frequent in the *casus omisus* and doubtful construction of a code than in judicial conclusions drawn from the general principles of the common law." What then? Abolish all statutes? This will hardly work in an age when the current is overwhelmingly toward turning the common law into statutes, as in England and in some parts of this country.

A long established law-book publishing enterprise is discontinued, and another takes its place.

Mr. John D. Parsons, Jr., has sold the "American Reports," established by Isaac Grant Thompson, and conducted since volume twenty-five by Irving Browne, to the Bancroft-Whitney Company of San Francisco, California, the publishers of the American Decisions, which series was originated by John Proffatt, and since his death has been conducted by A. C. Freeman. The "Decisions," beginning with the earliest report and connecting with the "Reports" in 1869, will be finished on the 4th of July next in one hundred volumes. The "Reports" are in sixty volumes, with three digests, and a table of all the cases reported. These two series have been a great boon to the profession of this country, and are widely cited, and their elaborate notes are frequently referred to by the judges. It is not too much to say that in these one hundred and sixty volumes almost every case of general interest and importance, and not merely cumulative, is embraced, and by the system of notes all others of that description are referred to and frequently quoted from. The California house proposes to take up the work where the "Reports" lay it down, and to issue six volumes a year instead of four, at \$4.00 instead of \$4.50 or \$5.00, on the general plan of the "Decisions." Mr. Freeman has proved himself a perfectly competent editor, and in his hands the continuation will not be inferior to the two preceding series. The practitioner will now have his choice between this series and the West Company's weekly series, aggregating forty volumes a year and professedly reporting every thing, albeit they are sometimes behind the official series. The one gives the cream in six volumes bound at \$24.00 a year, with elaborate notes; the other gives every thing in forty volumes unbound for \$40.00, with a moderate annotation. To our thinking, "every thing" means three-fourths utterly useless and burdensome. Physicians greatly rely on reports of cases in the medical journals, but these never report cases of chicken-pox, measles, hives, croup, and the like. So we think there is room for choice in legal reporting. Of the West Company's monthly digest, however, we cannot speak too highly. This gives all the average practitioner wishes to know of "every thing." Their "Federal" and "Supreme Court" also are unrivalled, and fairly essential. The California series however make two mistakes, in our judgment. They alter the name to "American State Reports." We cannot conceive any reason for doing it, and it will certainly make confusion in citation, as does the English system of "Law Reports" and "Division" reports. They also will publish every opinion in full, not eliminating questions of fact, evidence, practice, construction of charges, local statutes, and the like, instead of omitting and indicating the omission. The publisher's circular does implied but unintentional injustice to the "American Reports" in this respect. Nothing was ever omitted from the opinions which had the slightest connection with the syllabus. We deem the alteration a mistake, which will account to some extent for the

increase of volumes. One statement in the circular will not bear an arithmetical test. The circular states that the "Reports" have given only one-twentieth of the whole number of decisions, but that the new series will give one-sixth. If four volumes gave only one in twenty, six volumes cannot give one in six. But the fact is that the "American Reports" gave somewhere from a twelfth to a fifteenth, and including the notes, all that were useful. But the subscriber will get his money's worth, and much more, in any event. The editor of the "American Reports" regrets to part with that congenial work, but he now will have time for the work, which he has assumed in connection with John T. Cook, of editing the new series of New York Court of Appeals Reports, published by Weed, Parsons & Co., which he hopes to give to the profession at the rate of six books, or thirty volumes of the original reports, a year.

A convention of delegates from all the State Bar Associations has been called to meet at Washington on the 23d inst., to discuss the practicability of obtaining a uniform system of laws in respect to the execution of laws, formalities of conveyancing, powers of non-resident executors and administrators, marriage and divorce. We do not understand that the scheme embraces the law-merchant, which is next in importance to marriage and divorce. Some discussion has arisen as to the propriety of calling this convention rather than leaving the matter to the rather slow-going American Bar Association. We see no impropriety in it, but the proposal to ask Congress to provide for its expenses is rather cheeky. Doubtless there are a great many lawyers who would enjoy a week's junketting at the national capital at the national expense, but these gentlemen should pay their own bills.

We need not spend much time over the governor's veto of the high license bill. In a legal sense it is unanswerable, because it scarcely makes a pretense of any serious legal objection. It is absolutely beneath criticism by a lawyer. It is simply a partisan paper in the rum interest. The only thing for a legal journalist to do with it is to imitate Pitt when he struck his pen through his notes of Erskine's speech and threw them on the floor, thus indicating his opinion that his antagonist said nothing worthy of an answer. Never mind. The people will sometime have comprehensible laws and put the rum interest under their feet.

#### NOTES OF CASES.

**I**N *Grigsby v. Stapleton*, Missouri Supreme Court, March 5, 1888, plaintiff sold cattle to defendant at a sound price, knowing that they had Texas fever, and that some of them had died from the disease. Defendant did not know that they were

diseased, nor that any had died. Texas fever is a disease not easily detected except by those acquainted with it. *Held*, a fraudulent concealment by plaintiff of a latent defect, and that the doctrine of *caveat emptor* did not apply. The court said: "*Caveat emptor* is the general rule of the common law. If defects in the property sold are patent, and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. Parsons says the rule seems to be that a concealment or misrepresentation as to extrinsic facts which affect the market value of the things sold, is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. 2 Pars. Cont. (6th ed.) 775. When an article is sold for a particular purpose, the suppression of a fact by the vendor, which fact makes the article unfit for the purposes for which it was sold, is a deceit; and as a general rule a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided. 1 Whart. Cont., § 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of the disease is not disclosed. Cooley Torts, 481. Kerr says: 'Defects however which are latent, or circumstances materially affecting the subject-matter of a sale, of which the purchaser has no means, or at least has no equal means of knowledge, must, if known to the seller, be disclosed.' Kerr Fraud (edition by Bump), 101. In *Cardwell v. McClelland*, 3 Sneed, 150, the action was for fraud in the sale of an unsound horse. The court had instructed that if the buyer relies upon his own judgment and observations, and the seller makes no representations that are untrue, or says nothing, the buyer takes the property at his own risk. This instruction was held to be erroneous, the court saying, if the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it. In *Jeffrey v. Bigelow*, 18 Wend. 518, the defendants, through their agent, sold a flock of sheep to the plaintiff. Soon after the sale a disease known as the 'scab' made its appearance among the sheep. It was in substance said, had the defendants made the sale in person, and known the sheep were diseased, it would have been their duty to have informed the purchaser, and the defendants were held liable for the deceit. In the case of *McAdams v. Cates*, 24 Mo. 223, the plaintiff made an exchange or swap for a filly, unsound from the loss of her teeth. The court, after a careful review of the authorities as they then stood, announced this conclusion: 'If the defect complained of in the present case was unknown to the plaintiff, and of such a character that he would not have made the exchange had he known of it, and was a latent defect such as would have ordinarily escaped the observa-

tion of men engaged in buying horses, and the defendant, knowing this, allowed the plaintiff to exchange without communicating the defect, he was guilty of a fraudulent concealment, and must answer for it.' This case was followed, and the principal reasserted, in *Barron v. Alexander*, 27 Mo. 530. *Hill v. Balla*, 2 Hurl. & N. 299, seems to teach a different doctrine; but the cases in this court, supported as they are, must be taken as the established law of this State."

In *Porter v. Day*, Wisconsin Supreme Court, March 27, 1888, it was held that trotting or racing horses for a premium or award is not illegal either at common law or under the statutes of Wisconsin, and the winner of such a race may maintain an action to recover the amount of the premium. The court said: "That the mere trotting or racing of horses, when done in a proper manner and not in the public streets or highways, is not an illegal act at common law is well settled by the authorities, and it is equally well settled that betting on the result of a horse-race was not illegal at common law. See the following authorities: *Da Costa v. Jones*, Cowp. 729; *Good v. Elliott*, 3 T. R. 698; *McAlister v. Haden*, 2 Camp. 488; *Blaxton v. Pye*, 2 Wils. 309; *Gibbons v. Gouverneur*, 1 Denio, 170; *Van Valkenburgh v. Torrey*, 7 Cow. 252; *Bunn v. Riker*, 4 Johns. 426; *Campbell v. Richardson*, 10 id. 406. By the statutes of this State trotting or racing horses is not declared illegal. It is only 'betting and wagering upon a horse or other race' which is declared to be illegal. See sections 4582, 4536, 4538, Rev. Stat. 1878. The only question on the first point made is whether competing for a reward, purse or stake offered by a third party, to one whose horse shall win in a trotting or running race, is illegal. It seems to us this question must be answered in the negative. As stated above, the mere racing or trotting of horses, when conducted in a proper place and in a proper manner, is not an illegal act. Offering a reward or premium to the successful competitor in such a race or trot is therefore just as lawful as the offering a reward for competing in any other lawful business. If the mere offering a premium or reward to the competitors in a lawful transaction is a violation of the laws against gaming and betting, then all the premiums offered by our State and county agricultural societies would be a violation of that law. The fact that the parties competing for the reward or premium offered are required to pay something in the way of an entrance fee before they are allowed to compete does not make the transaction a betting or gaming transaction. All competitors for premiums in these societies are required to pay an entrance fee, and these entrance fees go to make up in part the premiums offered to the competitors. It is only when it is shown that the offering a reward or premium to the competitors is a mere subterfuge for betting and gaming on a horse-race or any uncertain event, that it comes under the law prohibiting betting and

gaming. If two or more men owning trotting-horses should contribute equally or otherwise a sum of money, and put it into the hands of some other person for the purpose of offering it as a premium or reward to them only, and to the owner of the horse who should win the race, such a transaction would undoubtedly come within the rule which prohibits betting on a horse or other race; and it was so held in the case of *Gibbons v. Gouverneur*, *supra*. Where there is no claim that the competitors are the sole contributors to the premium or purse which is offered to them as competitors, we are unable to find any decided case which holds that the competing for such purse or premium is illegal or prohibited, unless the same be expressly prohibited by the laws of the State in which such rewards were offered. On the other hand, in those States where the legality of offering rewards or premiums has been considered, and where they are not expressly prohibited by law, the courts have uniformly held the transaction a lawful one, and that it is not within the prohibition against betting and gaming. *Harris v. White*, 81 N. Y. 532; *Misner v. Knapp*, 9 Pac. Rep. 65; *Delier v. Society*, 57 Iowa, 481; *Abord v. Smith*, 63 Ind. 58. In *Harris v. White*, *supra*, the court state the difference between betting and gaming, and offering purses or premiums, as follows: 'A bet or wage is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at the present uncertain, and the stake is the money or thing thus put upon the chance. There is in this an element that does not enter into a modern purse or premium, viz., that each party to the former gets a chance of gain from others, and takes a risk of his own to them. \* \* \* A purse or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and if he abide by his offer, that he must lose it and give it over to some of those contending for it, is reasonably certain.' This is perhaps as good a statement of the difference between a bet and a premium or prize as can be given. And when a purse or prize is offered in good faith to the winner in a competitive contest, which contest is not unlawful in itself, the transaction is a lawful one, and the person offering the prize or premium will be held liable in the law to make good his offer to the winner. This appears to be the rule in all States where the statutes do not forbid the offering of such rewards or premiums. In the State of Michigan the law prohibits the offering of such rewards or premiums in certain cases, and it is therefore held that a person competing for and winning such reward in a case prohibited by law cannot recover the same in an action at law. See *Agricultural Ass'n v. Ramsdell*, 24 Mich. 441-443. That the speeding of horses is not illegal or against public policy in this State is evident from the fact that the

Legislature expressly authorizes it to be done by certain corporate bodies. Section 1779, Rev. Stat. It is not to be presumed that the Legislature would authorize corporate bodies to do that which was against the public policy of the State. We must hold therefore that the mere racing of horses is not illegal or against public policy, and the offering of a reward or premium to those competing in such races, when such rewards or premiums are not a mere cover or disguise for betting on such races, is not illegal." To the contrary is *Comly v. Hillegass*, 94 Penn. St. 132; S. C., 39 Am. Rep. 774.

In *Bailey v. Gardner*, West Virginia Supreme Court of Appeals, Feb. 25, 1888, it was held that where a wife, during coverture, while living with her husband earned money by sewing and washing, and by his consent bought two lots with the money and the deed therefor was made to her, the husband's creditors have a right to subject such lots for the payment thereof on their claims. The court said: "We have made diligent search for precedents, and except in the State of New Jersey have not found a single authority that holds, in the absence of a statute authorizing it, the wife, with her husband's consent, can as against his creditors hold her earnings. In New Jersey the decisions are not uniform. In *Stall v. Fulton*, 30 N. J. Law, 480, it was held that the earnings of the wife, upon express promise to pay her, belong to her and not to her husband, until he does some act with intent to reduce them into possession, and if he dies first they survive to his wife; and if with such proceeds she buys land, and the deed is made to her before the conversion by the husband, the land belongs to her, and cannot be seized and sold by his creditors under judgments against him; that the husband is not obliged nor is he guilty of any fraud against creditors if he does not convert to his or their use the earnings of the wife. This decision was rendered in 1864, yet in 1866 (*Cramer v. Renford*, 17 N. J. Eq. 367) it was held that the wife's earnings and the avails of her labor, during coverture, belong to her husband, and he cannot, as against his creditors, give or agree to give them to her; that real estate purchased with the wife's earnings during coverture belongs to the husband, and is subject to be taken for his debts. In *Quidrot's Adm'r v. Pergeaux*, 18 N. J. Eq. 472, it was held that a husband may, as against his creditors, allow his wife to have for her separate use the earnings of herself, and of the labor of their minor children. In this case however it appears that the wife had a separate estate outside of her earnings. In *Bank v. Sprague*, 20 N. J. Eq. 1, it was decided that although a husband may give to the wife her services and earnings as against his creditors when she carries on a separate business without his assistance, with her own means and on her own account, yet in all cases where a business is carried on by a husband and wife in co-operation, and the labor and skill of the husband are contributed and united with those of the wife,

the business will be considered as that of the husband and not of the wife, and the proceeds will not be protected for her as against his creditors; that the fruits of the wife's labor and skill, under such circumstances, are not her separate property within the terms or intention of the act for the better securing the property of married women. In *Peterson v. Mulford*, 36 N. J. Law, 481, it was decided that a husband may permit a wife to labor for herself and to appropriate to her own use the avails of her labor, and may give to her or allow her to appropriate to her own use the proceeds of her own labor when received by her; and that such permission or gift is good against the creditors of the husband if such proceeds have not actually been reduced into his possession. As opposed to the New Jersey decisions are the following, among numerous others: *Coleman v. Burr*, 93 N. Y. 17; S. C., 43 Am. Rep. 160; *Hinman v. Parkis*, 33 Conn. 188; *Elliott v. Bently*, 17 Wis. 591; *Laing v. Cunningham*, 17 Iowa, 513; *McMurtry v. Webster*, 48 Ill. 124; *Johnson v. Johnson*, 4 Har. (Del.) 171; *Apple v. Ganong*, 47 Miss. 189; *Simmons v. Kincaid*, 5 Sneed, 450; *Pinkston v. McLemore*, 31 Ala. 308; *Merriwether v. Smith*, 44 Ga. 541; *Campbell v. Bowles*, 30 Gratt. 652.

\* \* \* It is strange that our Legislature did not make some provision whereby a wife might, with the consent of her husband, be entitled to her earnings, produced by her extra exertions after she had discharged all her ordinary household duties. Many good women toil early and late to support the sick or disabled husband and her children, oftentimes by her needle, by teaching music, or in school, and it seems very hard indeed, after she has in this way accumulated something with which she wishes to purchase a piano or sewing machine, necessary to assist her in performing the extraordinary duties thrust upon her of supporting the family when their natural supporter is either unable, or from sheer worthlessness refuses, to discharge the obligation to support his family, and when she has bought and paid for the piano or sewing machine from her own hard earnings, to have an old creditor of her husband snatch it from her, and thus it might be visit suffering on her and her helpless children. But hard as this case, and thousands like it are, no relief can be afforded except by the Legislature. It is not for the courts to correct such hardships in the common law. Courts, as it is, are often charged with legislating — of producing 'judge-made law.' The learned counsel for the appellant wax eloquent in their brief when they say that 'the opinion of men in reference to the capacity of women to engage in and manage ordinary business affairs have undergone a great change within the last half century. They were prone to regard them very much as do the Turks, who believe that women have no souls, and restrict them to the seclusion of the harem, with its candies and coffee, cigarettes, intrigue and insipidity. The Christian woman, at least in modern times, gets a different training and attains a higher standard, and with a little experience shows a good capacity

for business.' If she is not sufficiently protected in her rights, and encouraged to put forth all her energies in times of trial for the protection, support and education of her children, when he who has vowed to do all these things fails through affliction or folly, then the Legislature must afford the remedy — the courts dare not do so; for by so doing they would burst through that barrier the respect to which gives them all their power and influence." *Contra, Mason v. Dunbar*, 43 Mich. 407; S. C., 38 Am. Rep. 201.

#### PARTNERSHIP—AUTHORITY OF PARTNER—DISSOLUTION.

VIRGINIA SUPREME COURT OF APPEALS, FEB. 9, 1888.

WOODSON V. WOOD.

P. and W. dissolved partnership, and by the notice of dissolution either partner was authorized to use the firm name in liquidation. P. afterward took from a debtor of the firm, in settlement, a negotiable note, payable to "P. and W. in liquidation," which he afterward transferred to plaintiff by like indorsement, "P. & W. in liquidation." Held, that an instruction to the jury that it devolved upon defendant W., who denied his liability, to show that it was not used for partnership purposes, otherwise they must find for plaintiff, was error, as it improperly throws the burden of proof on defendant.

ERROR to Circuit Court, Prince Edward county; Henry E. Blair, judge.

Richard Wood brought this action against C. R. Palmore, John R. Palmore, and B. B. Woodson, partners and members of the firm of Palmores & Woodson, as indorsers in the firm name, on a negotiable note. Judgment for plaintiff, from which defendant, Woodson, brings error.

J. P. Fitzgerald, J. O. Reynolds and Samuel T. Coleman, for plaintiff in error.

P. W. McKinney, for defendant in error.

LACY, J. This is a writ of error to a judgment of the Circuit Court of Prince Edward county, rendered at the March Term, 1885. The case is as follows: The mercantile firm of Palmores & Woodson, doing business at Ca Ira, in Cumberland county, on the 14th of October, 1871, was dissolved by mutual consent, and notices thereof published in *The New Commonwealth*, a newspaper published in Farmville, a town in the vicinity, as follows:

"NOTICE.—The business heretofore existing under the firm and style of Palmores & Woodson is this day dissolved by mutual consent. Either of the partners is authorized to use the name of the firm in liquidation.

"PALMORES & WOODSON."

"CA IRA, Cumberland, October 11, 1871.

"Dr. C. R. Palmore and John R. Palmore, Jr., will continue the business at Ca Ira under the firm and style of C. R. Palmore & Brother.

"Oct 19-2w."

Subsequently, on the 18th day of April, 1872, George William Palmore, a brother of C. R. and J. R. Palmore, made his note, payable to "Palmores & Woodson in liquidation," for \$711.60 at ninety days, payable at the Commercial Savings Bank, at Farmville, Virginia, which note was indorsed by the Palmores, "Palmores & Woodson in liquidation," and negotiated. In April, 1876, the defendant in error, Richard Wood, instituted suit on this note, claiming to be the owner.

thereof, against B. B. Woodson, C. R. Palmore and J. R. Palmore, late merchants and partners, trading under the name and style of Palmores & Woodson, seeking to hold the late firm responsible because of the indorsement thereon by the Palmores of the dissolution of "Palmores & Woodson in liquidation." The Palmores made no defense, and as to them judgment went by default, but Woodson defended the action, and after the suit was removed to Farmville, the county seat of Prince Edward county, the trial was had on the defenses of Woodson, which were, first *nil debet*, and two special pleas under oath. "First. That the indorsement 'Palmores & Woodson in liquidation' was made by the Palmores not in the scope of the business of the late firm, nor in the course thereof, not to carry on nor to aid the carrying on the said business, nor for any purpose connected therewith, but as an accommodation to George W. Palmore without the knowledge or consent of said Woodson, and after the firm of Palmores & Woodson had been dissolved, and had ceased to exist, and had ceased to do business, and after notice thereof had been published. Second. That he did not sign the said indorsement, nor authorize any other person to sign the said names of Palmores & Woodson for him, and that at the time the notice was made and rendered he was not a member of such alleged firm of Palmores & Woodson." At the trial the plaintiff offered no evidence except the note. The defendant proved the dissolution of the firm in October, 1871, and produced the notice published in the newspaper of such dissolution as set forth above, and proved that notice was posted at the former place of business in Ca Ira to the same effect; that the indorsement made on the note was, he believed, made by one of the Palmores, who had so indorsed the note without his knowledge and consent, and that he knew nothing of what disposition was made of said note, nor the proceeds arising thereon, and did not know for what purpose it was given. This was not contradicted nor denied by the plaintiff, who claimed the right to recover on the evidence afforded by the note, and asked for and obtained from the court the following instruction: "The court instructs the jury that the presumption of law is that a note executed by a firm is for partnership purposes, and within the scope of the partnership business, if the note was given while the partnership was in existence, and that if the notice of dissolution authorized the partners to use the name of the firm in liquidation, and that the note in question shows upon its face that it was so indorsed, it devolves upon the defendant to show that it was not used for partnership purposes; and unless they believe from the evidence that it was not used for partnership purposes, they must find for the plaintiff"—and gave certain instructions not objected to, asked for by the defendant, which are not claimed to be erroneous. But the defendant excepted to the foregoing instruction asked for by the plaintiff and given by the court. Verdict was rendered for the plaintiff for the amount claimed, which verdict the court refused to set aside at the motion of the defendant, who again excepted, and judgment being rendered in accordance with the verdict, the defendant brought the case here by writ of error.

The first assignment of error to be considered here is the action of the court in giving the said instruction and in refusing to set aside the verdict for error appearing in the said instruction. Nothing is better settled than that the power of a partner ceases upon the dissolution of the firm, and the surviving partners or ex-partners can enter into no contract which will bind the estate of the deceased (in case of a surviving partner) or the other members of the firm in the case of ex-partners, except such as is necessary or appro-

priate in settling the affairs of the concern. "Dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle and pay those created." "The power of a surviving partner does not extend to giving a note, drawing a check or accepting a bill in the firm's name." 1 Dan. Neg. Inst., § 370; *Darling v. March*, 22 Mo. 184; *Gale v. Müller*, 54 N. Y. 536; *Morrison v. Perry*, 11 Hun. 33. Where a note is issued by a partner after dissolution, it will not bind the other partners, even though given for a debt due by the firm. 1 Dan. Neg. Inst., § 371; *Whitman v. Leonard*, 3 Pick. 177; *Bank v. Humphreys*, 1 McCord, 388; *Haddock v. Crocheron*, 32 Tex. 276. If authorized verbally or in writing one ex-partner may bind the firm, after dissolution, as a party to a bill or note, but authority to settle or close up the business of the firm does not imply authority to one partner after dissolution to give a note in the name of the firm for the firm's debt, or to renew one given before the dissolution. Nor will authority to give or renew a note be implied by authority "to settle business of the firm and sign its name for that purpose;" "to use the name of the firm in liquidation of past business;" "to settle all demands in favor of or against the firm;" or by the use of any similar expression. 1 Dan. Neg. Inst., § 373; *Martin v. Kirk*, 2 Humph. 529; *Lockwood v. Comstock*, 4 McLean, 383. The case of *Haddock v. Crocheron*, *supra*, decided in the Supreme Court of Texas in 1869 (32 Tex. 276), is a case much in point. In that case Justice Lindley, speaking for a unanimous court, said: "There is really but a single question presented for our consideration by this record, and that is can one partner \* \* \* after a dissolution \* \* \* of the partnership, by a novation general, or by a new engagement with his creditor, in consideration of being discharged and released from a liability contracted during the existence of the firm, bind the retired partner by such new engagement or new obligation? This is not now an open question in this State." In *Speake v. White*, 14 Tex. 368, it was decided that "the acknowledgment of an antecedent indebtedness by one partner, after dissolution, did not bind the firm." In *White v. Tudor*, 24 Tex. 641, it is even held that a general authority to one partner, after dissolution, to settle the business of the firm, does not warrant him to "give a note in the name of the firm for a firm debt, or to renew one given before the dissolution." This general concession and these authoritative decisions upon the vital point in this case supersede the necessity of investigating the propriety of the exclusion of the testimony in relation to the entries of the creditor. For the proof, if it had been admitted, would only have conduced to prove that the partner had executed new notes, after dissolution, for an existing obligation of the firm which would not be binding upon the retired partner, according to the decisions of this court. Nor does the fact of the want of knowledge of the dissolution in the creditor, up to the time of giving the new obligation, alter the force and effect of this new arrangement, since the knowledge was necessarily brought home to him at the time of the arrangement by the contracting partners signing the firm name "in liquidation." In the case of *Wilson v. Forder*, 20 Ohio St. 95, decided in the Supreme Court of Ohio in 1870, Judge White said: "After the dissolution of the firm neither partner was authorized to renew the firm notes. There was no express authority, and the law does not imply it," citing *Palmer v. Dodge*, 4 Ohio St. 21. In that case Judge Ranney, in an elaborate and able opinion, reviews this subject. He says: "As the dissolution finds the engagements of the company, they must remain until liquidated and paid, unless all the partners consent to come under new engagements

or otherwise change their character." Speaking of the following words appended to the notice of dissolution, to-wit, "the remaining unsettled business of the firm will be adjusted by E. Short, who is hereby authorized to close all business transactions of the late firm," he said: "There is not one word in it to indicate an intention to confer upon him the authority to create new obligations. He is therefore remitted to his power as a partner; and considered in that light, it is very clear he possessed no such authority. The elementary books and adjudged cases speak an almost uniform language upon the subject." In the case of *Abel v. Sutton*, 3 Esp. 110, which is cited as the leading case on this subject in England, a promissory note due to the firm at the time of the dissolution was afterward indorsed in the name of the firm by a partner who had authority to settle and liquidate the partnership effects, of which notice had been given in the *Gazette*, suit was brought by the indorsee to charge all the members of the firm as indorsers of the note. For the plaintiff it was insisted—First, that if the note existed before the dissolution, a partner having authority to settle and liquidate the partnership accounts, had a right to put the partnership name upon it, and that a *bona fide* holder might resort to all the partners; second, that if the partner indorsing raised money by the sale of the note, and applied it in payment of the partnership debts, it was money had and received to the use of the partners, and all would be liable." Lord Kenyon most emphatically denied both of these propositions, and held that a recovery could not be had on the indorsement or on the money counts against any but the indorsing partner. He says: "To contend that this liability to be bound by the acts of his partner extends to time subsequent to the dissolution, is in my mind a most monstrous proposition. A man in that case can never know when he is to be at peace and retired from all the concerns of the partnership." In that country, from that day to this, there has been a constant and most decided leaning against giving effect to new contracts, notes or other instruments made by the partner for the firm, after dissolution, as will be seen by the cases of *Pindar v. Wilks*, 1 Marsh. 248; *Kilgore v. Finleyson*, 1 H. Bl. 155. See *Hackley v. Patrick*, 3 Johns. 536; *Martin v. Walton*, 1 McCord, 18; *Sandford v. Nickles*, 4 Johns. 227; *Bank v. Norton*, 1 Hill, 572. In that case the court, after reviewing the cases of *Abel v. Sutton*, *Martin v. Walton*, and *Hackley v. Patrick*, said: "These were all cases of express authority to settle after dissolution, yet the first holds that the power did not extend to indorsing a partnership note, even in liquidation of the partnership debt. In the second it was denied to be a power of renewal; and in the third a power of adjustment was denied to operate as an authority to sign an account stated. In the case at bar an express power to use the name is given, but it is confined to the purposes of adjustment (settlement). The words did not work an extension of power in any respect beyond the form of doing the business." The case of *Parker v. McComber*, decided by the Supreme Court of Massachusetts, and reported in 18 Pick. 509, is to the same effect; also the case of *Perrin v. Keene*, 19 Me. 357, and *Darling v. March*, 22 id. 184. In the Supreme Court of the United States, in *Bell v. Morrison*, it was said: "The light in which we are disposed to consider this question is that after a dissolution of a partnership, no partner can create a cause of action against the other partners except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be a supposed pre-existing debt of the partnership or any auxiliary consideration which might prove beneficial to them, unless adopted by them, they are not bound

by it." 1 Pet. 352. See also *Woodford v. Dorwin*, 3 Vt. 82, and *Lony v. Story*, 10 Mo. 636. In this last case the court said: "The principle is well established that after the dissolution of a partnership, one partner cannot bind the other by drawing a note in the partnership name, unless he has a particular power vested in him for that purpose. A general authority to settle the partnership concerns does not create such a power." In *Humphries v. Chastain*, 5 Ga. 166, it was said "that after the dissolution of a copartnership, one copartner cannot bind the other by indorsing a note in the copartnership name is, we think, well settled both upon principle and upon authority, and that the note so indorsed is in payment of a debt due by the copartnership makes no difference." In the case of *Sandford v. Nickles*, *supra*, the court said, per Yates, J.: "The decided manner in which Lord Kenyon (*Abel v. Sutton*, *supra*), denies the right of one partner, after dissolution of the partnership, to indorse bills given before, if he even had authority to settle the partnership accounts, induces me to believe the doctrine is settled. It would be a peculiar hardship to put a partner retired from the whole concern so completely in the power of the other as to charge him by negotiating bills given during the partnership. This power being denied, it follows that they must all join in the transfer of a bill negotiated after the dissolution for the purpose of vesting the title in the indorsee." In the case of *Fellows v. Wyman*, 33 N. H. 355, Chief Justice Perley said: "One partner, after dissolution, may sell and dispose of the partnership property for the benefit of the partnership, and to wind up its concerns, but as a general rule, he cannot create any new contracts or obligations binding on the partnership, and the indorsement of securities belonging to the firm falls under this general rule. The cases which hold that one partner, after dissolution, cannot indorse a note or bill, have been determined with a view of protecting one partner from a responsibility which might be created against him in consequence of the negotiation of the bill or note, and an authority to settle the partnership business does not authorize a partner, after dissolution, to indorse the negotiable paper of the firm, though with such an authority, he may transfer a note payable to bearer by delivery." In the case of *Myatts v. Bell*, 41 Ala. 231, Justice Byrd said: "By that law (the law of partnerships) one partner, after the dissolution of the firm, has no authority in law to renew a promissory note made by the partnership by signing the partnership name, and thereby bind the partners; but it would be the note of the partner executing it and binding on him," citing *Cunningham v. Bragg*, 37 Ala. 436; and *Para. Partn.* 391 and references *t* and *u*. Mr. Story says (*Prom. Notes*, § 125): "But where the partnership is dissolved during the life-time of the partners, neither partner can afterward indorse a note payable to the firm in the name of the firm," citing *Story Partn.*, § 323. In section 322 of the last-named work it is said: "None of the partners can create any new contracts or obligations binding upon the partnership; none of them can buy or sell or pledge goods on account thereof; none of them can indorse or transfer the partnership securities to third persons, or in any other way make their acts the acts of the partnerships; in short, none of them can do any act or make any disposition of the partnership property or funds in any manner inconsistent with the primary duty now incumbent upon all of them of winding up the whole concerns of the partnerships," citing *Gow Partn.*, chap. 5, § 2, p. 230; *Crawshaw v. Collins*, 15 Ves. 218, 223, opinion of Lord Eldon. In *Byles Bills*, marg. p. 52, it is said: "After a dissolution and due notice thereof, the ex-partners become tenants in common of the partnership effects, and their authority as mutual agents is at an end.



One partner cannot therefore indorse in the name of the firm a bill which belonged to the firm, but all must join, though the ex-partner indorsing has authority to settle the partnership affairs." "I even doubt much," says Lord Kenyon, "if an indorsement were actually made on a bill or note before the dissolution—but the bill or note were not sent into the world until afterward—whether such indorsement would be valid." *Abel v. Sutton*, *supra*. Citing *Lockwood v. Comstock*, *supra*, and the case in this court of *Parker v. Cousins*, 2 Gratt. 372. In 2 Collyer Partn., § 541, it is said: "When a *bona fide* dissolution has taken place, the retiring partners are not to be bound by instruments negotiated in the name of the original firm after such dissolution, even though they are negotiated by a partner authorized to settle the partnership concerns." "After dissolution, no valid draft, acceptance or indorsation can be made by the firm, and it is no authority to do so if any one partner is in the notice empowered to receive and pay the debts of the company. The indorsation, draft or acceptance must be done by all the partners or by one specially empowered to act for them."

The instruction given by the Circuit Court and excepted to is in direct opposition to these well-settled principles. The jury were instructed that the words "in liquidation" put the burden of proof upon the defendant to show that the note was not used for partnership purposes, and that unless they believed that it was not used for partnership purposes, they must find for the plaintiff. The note showed that it was given after the dissolution of the firm. It was dated long afterward, and the indorsement thereon "in liquidation" has been often held to give notice of the dissolution of the partnership, and that being so, it is settled law that no recovery could be had thereon against the other partner, and the jury should have been so instructed, and a verdict and judgment rendered for the defendant Woodson and the suit as to him dismissed.

The judgment of the said Circuit Court will therefore be reversed and annulled.

#### MARRIAGE—BREACH OF PROMISE—ACTION AGAINST PERSONAL REPRESENTATIVES OF PROMISOR—SURVIVAL OF CAUSE OF ACTION—SPECIAL DAMAGE.

ENGLISH COURT OF APPEAL, FEB. 15, 1888.

FINLAY V. CHIRNEY.\*

An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor.

The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only, and not for general damages.

**A**PPPEAL of defendants from the judgment of the Queen's Bench Division (Field and Wills, JJ.) ordering a new trial.

The defendants were the executors of one G. B. Chirney, and were sued in respect of a breach of promise of marriage committed by their testator during his life. The plaintiff, a widow, was housekeeper to the testator, and was seduced by him under a promise of marriage, a child being born in August, 1884. In April, 1886, Chirney died. At the trial at Newcastle-upon-Tyne, before Cave, J., the plaintiff was non-

sued upon the ground that there was no corroboration of the promise, no other point being then taken by the defendants. The plaintiff moved before the Divisional Court to set aside the nonsuit, when the objection was taken on behalf of the defendants that an action for breach of promise of marriage would not lie against the executors of a deceased promisor; but no judgment was given upon this point, the court being of opinion that the proper course was to send the case down for a new trial. The defendants appealed.

The pleadings contained no allegation that the plaintiff had suffered any special damage by reason of the breach of promise, but the Divisional Court gave leave to the plaintiff to amend the statement of claim in that respect, and to deliver particulars of the special damage to the defendants. By special leave of the Court of Appeal these particulars, verified by an affidavit of the plaintiff, were used during the argument before their lordships.

It is unnecessary to set out the particulars at length in this report; they fell under the following heads: (1) Amount expended by plaintiff in preparation for marriage in the purchase of underclothing and of other material for clothing; (2) maintenance of the plaintiff from the date of the promise to the death of the testator; (3) costs occasioned by the birth of the child, including costs of its maintenance until the testator's death; (4) loss of a parish allowance for each of her three legitimate sons until they attained the age of sixteen, withdrawn before they attained that age in consequence of the birth of the illegitimate child; (5) loss, owing to the birth of the child, of a legacy of 100*l.*, which would otherwise have been left to her by her mother in common with her brothers and sisters.

Waddy, Q. C., and H. F. Boyd (*Ernest Pollock* with him), for appellants.

Digby Seymour, Q. C., and J. Lawson Walton, for respondent.

LORD ESHER, M. R. This was an action brought against the executors of a deceased man in respect of a breach of promise of marriage; it was tried before Cave, J., and evidence as to the facts was gone into, and the only objection raised by the defendants at the trial was not that such an action would not lie, but that there was no corroboration of the alleged promise. The plaintiff was nonsuited, and she then went to the Divisional Court; there besides the contention as to want of corroboration, the further point was taken by the defendants that the action would not lie; this was decided in favor of the defendants, and upon the case as it was presented to them the Divisional Court might have entered judgment for the defendants, but upon the suggestion that special damage might be laid and proved, they granted a new trial, giving leave to the plaintiff to amend by adding allegations of special damage. An appeal is now brought to us, and three questions present themselves for our consideration: First, whether the action will lie without special damage; secondly, whether it will lie with special damage; and thirdly, whether if special damage be proved, the action will lie only for the amount of such special damage, or whether it will lie for all the damages ordinarily given in actions for breach of promise of marriage; all these three formulas are of great importance.

Upon the first question I entertain no doubt whatever; the authority of English law is overwhelming to the effect that no action for breach of promise of marriage can be brought by executors or will lie against them. The authority for this proposition consists in the fact that in the case of *Chamberlain v. Williamson*, 2 M. & S. 408, it was decided that such an action would

\* 20 Queen's Bench Division, 494.

not lie, at least at the suit of an administrator, and in the additional fact that there is no case to be found in the books where such an action has been maintained either by executors as plaintiffs or against them as defendants, and this in spite of the fact that circumstances must frequently have arisen which would invite a decision of the question. And besides authority there is the principle expressed in the maxim *actio personalis moritur cum persona*. Is an action for breach of promise of marriage a personal action in the sense that the cause of action or complaint or injury is one affecting solely the person both of the promisor and promisee? It is clear that it is not a complaint of any thing affecting property, whether personal or real; it is an injury; that is, it is a cause of action purely personal on both sides, personal both to the person to whom and the person by whom the promise is made. It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action, but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in an action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behavior; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise. A consideration of these facts goes to show that an action for breach of promise of marriage is strictly personal, and that although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff.

Of course it is said, and said justly, that the damages recovered in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action itself is one which affects property. The question is therefore concluded both upon principle and by authority. The same has been held to be the law in America, and all the American cases to which I have been able to obtain access are clear upon the point. I am therefore of opinion that the action as brought, there being no allegation of special damage, was wrongly brought, and that judgment was properly given, though upon a wrong ground, for the defendants at the trial.

But in the only English case on the subject, that of *Chamberlain v. Williamson*, 2 M. & S. 408, there is an exception suggested to this rule which is expressed in the words, "except there be special damage," and on looking at the American cases I find that they say the same thing. I know however of no case in which special damage has been laid and the action has been maintained, and there is no authority to enable us to decide how such a case should be dealt with. Indeed I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage would arise as would support the action; but assuming that there were such damage, is its existence to open the whole case against the executors and make them liable, not only for the special damage resulting from the breach

by their testator, but for all the damages which could be recovered in such an action against a living person? Does the action against the executors become an action for breach of promise of marriage with all the ordinary consequences of such an action because of the existence of special damage to the plaintiff, or does it lie only for the amount of the special damage? If we were to say that in such a case the whole matter was open for consideration, we should in effect be doing away with the principle that a personal action dies with the person affected by it, and that by reason of the personal nature of the cause of action the executors are not liable; we should have to say that they would be liable in an action for personal injury, which is nothing but a personal action, and this would break both the rule and the principle. I entertain no doubt whatever that even if the action will lie upon proof of special damage, it must be confined to a claim for the special damage only, and that a claim for general damages, which could be recoverable from the defendant in his life-time, must be struck out. Therefore the damage to be considered must be a damage affecting the property of the plaintiff, and for that only can the action be brought.

What is the kind of special damage that can exist under such circumstances? I think it can only exist in cases where the plaintiff can show, that besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other. Such a promise, if made and proved, would be one of the considerations, or part of the consideration, for the promise of the other party, and there would be one promise moving upon two considerations or upon one complicated consideration. If such an express promise could be proved, it might be sued upon as part of the consideration for the plaintiff's promise; and even though there were no such express promise, yet if circumstances were proved to exist showing that both the parties contemplated that a breach must affect the property of one or the other, and action might be brought; that is to say, if the case were within the rule laid down in *Hudley v. Bazendale*, 9 Ex. 341, an action would lie in respect of a damage to property or a loss of money through the breach.

I think therefore that this action will not lie without special damage, and that if special damage be proved, it will not lie for any thing that is not special damage. If there be special damage an action will lie for it, and the cause of action will still be for breach of promise of marriage, but the action will lie only for that special damage, whether the damage arises by reason of an express promise which was part of the contract to marry, or whether circumstances existed at the time of the contract which show that such special damage was then within the contemplation of the parties; and it seems that the American cases point to a like state of the law in that country.

The plaintiff therefore was rightly nonsuited at the trial, although upon a wrong ground; she had then upon the pleadings no cause of action, but the Divisional Court granted her the indulgence of a new trial, and gave her leave to amend her statement of claim by inserting an allegation of special damage. In mercy to both the suitors, we have thought it right to look carefully into that question, and we gave leave to the plaintiff to say what was the special damage alleged, and particulars have been delivered to us. In my opinion they disclose nothing that can be called special damage within the meaning of the rule that I have enunciated. It is suggested that the plaintiff had bought her trousseau, but it cannot be said that in all cases of a contract of marriage the lady is justified in at once providing herself with clothes in anticipation of the fulfilment of the contract; in the

present case, the plaintiff being in the position of a housekeeper to a farmer, it scarcely seems a reasonable thing to have done. Even in higher ranks of life the same remarks would apply; the man who is going to be married has nothing to do with the bride's trousseau, which is provided by her father; if a breach of the promise is committed, the lady still has the clothes, and I cannot think this a good specimen of special damage; besides such a fact has always been allowed to be given in evidence as an aggravating circumstance, and it is in my opinion not special damage. Then it is said also by the plaintiff that she had given up a better place, and if at the time of the contract to marry, the plaintiff had agreed to give it up at once, or before the wedding-day, it might be special damage, as being part of the consideration for the promise to marry; but it must be brought to the knowledge of the other party at the time of the contract in order to bring it within the principle in *Hadley v. Baxendale*, 9 Ex. 841; if the agreement to give up the place were made after the contract to marry, it would be no part of the promise.

There is one other point which remains to be noticed. It is said that the promise to marry was made as part of an invitation to seduction, and that a child was subsequently born. That would indeed be a matter existing at the time of the contract and forming part of the negotiations between the parties, but it would not be special damage, for such a contract would be contrary to public policy, morality and decency, and such a claim could never be allowed. The special damage recoverable in such an action as this must, as I have said, be something affecting the money value of the contract to the plaintiff, and there is no such class of special damage in the particulars. If the whole of these particulars were inserted in the statement of claim, the same result ought to follow; there would be no case for the plaintiff, and the defendants ought to have judgment.

I think therefore that we ought to go beyond the Divisional Court, and say that there shall be no new trial, and that judgment shall be entered for the defendants. The defendants should have the costs of the trial, and there should be no cause to either side in the Divisional Court or before us.

BOWEN, L. J. The judgment which I am about to read is that of my brother Fry and myself.

That there was in this case some evidence which, if the jury believed it, would be in corroboration of the plaintiff's own story, we do not doubt, for the reasons indicated during the course of the argument. But a more serious question has been raised as to the liability of an executor in respect of an alleged breach of promise of marriage by the testator whose estate he represents.

The liability of an executor in respect to the acts and defaults of his testator has been in the English law a matter of slow growth. The maxim "*actio personalis moritur cum persona*" is one of some antiquity, but its origin is obscure and post-classical. Unless indeed some very restricted sense is affixed to the word "*personalis*," it is by no means true at the present day that a personal action always dies with the person. Upon the other hand, if the meaning of the maxim is to be limited, it is difficult to reconcile its phraseology with the ordinary classifications of ancient English law. Judges and text-writers since the reign of Queen Elizabeth have been in the habit of explaining upon fit occasions that only actions *ex delicto* were within the operation of the principle. "The rule," says the learned editor of Williams' Saunders (1 Wms. Saund. 240), "was never extended to such personal actions as were founded upon any obligation,

contract, debt, covenant, or any other duty to be performed." This remark is true, if confined to the law of recent times, but it is inexact, if it be taken as applying to the older English law under which actions based upon an obligation as a rule died with the person. As applied however to modern times the proposition is supported by abundance of authority. "*Actio personalis*," says Willes, C. J., in *Sollers v. Lawrence*, (Wilkes, 413, at p. 421), "is always understood of a tort," and similar expressions occur elsewhere in plenty. But though this gloss or limitation has been forced upon the Latin maxim in later times by the exigencies of a growing society, we are left still in the dark as to the maxim's exact meaning or source. The truth is that in the earliest times of English law survival of causes of action was the rare exception, non-survival was the rule. Moreover the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action. Actions of trespass were formerly actions of a quasi-penal character and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. "All private criminal injuries or wrongs, as well as all public crimes, are buried," says Lord Mansfield in *Hambly v. Trott* (1 Cowp. 375), "with the offender." But survival was also denied to other actions which did not fall within this category. In Bracton's time the general law was that an obligation was got rid of by the death of either of the contracting parties. Bracton, fol. 101. "*Item tollitur morte alterius contrahentium, vel utriusque, maxime si fuerit pœnalis, vel simplex—st autem duplex, scilicet pœnalis et rei persecutoria, in hoc quod pœnalis est tollitur, et non extenditur contra hæredes, nec datur hæredibus, quia pœna tenet suos auctores, et extinguitur cum persona.*" In debt the executor could not be sued where the testator could have waged his law, see *Pinchon's case*, 9 Rep. 88a; a condition of things which continued even down to 1805. *Barry v. Robinson*, 1 New Rep. (B. & P.) 293. And when we consider that all actions on the case (as is said by Blackstone, J., in *Mast v. Goodson*, 2 W. Bl. 848, at p. 250, decided in 13 Geo. 3) were originally for torts, and that it was only in the time of Queen Elizabeth that the familiar action of assumpsit was after a controversy introduced, it becomes plain that it is within the last three centuries that the contractual liabilities of an executor have expanded to their present limits.

Modern jurisprudence has however since the reign of Queen Elizabeth adopted a rough but convenient interpretation of the maxim, which is set forth in the passage above cited from Williams' Saunders. On the one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys. *Phillips v. Homfray*, 24 Ch. D. 439, at p. 454. On the other side of the line lie actions founded on any contract, express or implied, "or any other duty to be performed."

Early in the reign of James an action was allowed against executors for payment of a debt, if clothed in the form of an action on the case in *assumpsit*. *Pinchon's case*, 9 Rep. 89b; and this remedial view of the law has been adopted and followed ever since.

The question we have to decide to-day relates to a class of action, which though in its form and substance contractual, differs from other forms of actions *ex contractu* in permitting damages to be given as for a wrong. This double aspect of an action for breach

of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner? How far is such an action within, how far without, the maxim, "*Actio personalis moritur cum persona*?" The problem is one which in the nature of things is of later date than the Year Books. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognized by our law as a temporal benefit, and a breach of promise of marriage is recognizable by the temporary courts. *Baker v. Smith*, Styles, 295; see also Rolle's Abridgment, tit. "Action on the Case," fol. 22, par. 20; *Hebden v. Rutter*, Sid. 180, and *Harrison v. Cage*, Carthew, 467, a case supposed erroneously by Willes, J., in *Smith v. Woodfine*, 1 C. B. (N. S.) 680; see p. 667, to be the earliest recorded case of an action for breach of promise of marriage. No authorities of a very early date can accordingly be expected to throw light upon the question, and it must be solved mainly upon principle.

It is a striking and not an immaterial fact that no action for breach of promise of marriage against the executors of a deceased person is to be found in the books. We have moreover a case decided by Lord Ellenborough in the Court of King's Bench toward the beginning of the century which affords us some guidance in the matter. In *Chamberlain v. Williamson*, 2 M. & S. 408, the converse of the present case occurred in an action brought by the representative of a deceased against a living person for breach of promise. It was held that an action of the sort, in which no special damage was alleged, would not lie, on the ground that except when such special damage had been occasioned the action was in reality an action arising out of a personal injury. "The general rule of law," says Lord Ellenborough (2 M. & S., at p. 415), "*is actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of the personal estate." This judgment has been adopted as a guiding one by the American courts in the cases of *Stebbins v. Palmer*, 1 Pick. (Mass.) 71; *Lattimore v. Simmons*, 12 Serg. & R. (Penn.) 183; *Smith v. Sherman*, 4 Cush. (Mass.) 408, at p. 413; and *Hovey v. Page*, 55 Me. 142. It does not indeed follow that the same reasoning applies in  *toto*  to actions brought against the executors of a deceased person. See per Bramwell, L. J., in *Twycross v. Grant*, 4 C. P. D. 40.

But the decision in *Chamberlain v. Williamson*, 2 M. & S. 408, shows at all events that the courts of this country will, even although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim "*actio personalis*" to so much of the damages as are a remedy for the mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of actions *ex contractu*. In order accurately to draw the dividing line, it becomes necessary to analyze the damages which are recoverable in cases of breach of promise, and their measure and character has nowhere been better explained than in Sedgwick on Damages, vol. 2, p. 146, in a passage cited with approval by Willes, J., in *Smith v. Woodfine*, 1 C. B. (N. S.) 680, at p. 697. "This action," says the

learned author, "is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affectional and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject of course to the general restriction that a verdict influenced by prejudice, passion or corruption will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages." It is, as it seems to us, by way of enhancing damages, and not as a special head of damage flowing naturally from the breach, that evidence of the means of the defendant is usually given at the trial. If it were otherwise, such head of damage would require special averment on the record. But it is treated as part of the history of the circumstances of the case, and as enabling the jury to estimate properly the conduct of the defendant. "The value of the defendant's property," says Cresswell, J., in *Smith v. Woodfine*, 1 C. B. (N. S.) at p. 686, "is invariably gone into in cases of this sort." But where there is no special averment on the record of pecuniary loss arising out of the breach, the general allegation of the breach of promise imports, according to Lord Ellenborough, only a personal injury (*Chamberlain v. Williamson*, 2 M. & S. 408), though the jury may consider such personal injury with reference to all the circumstances of the case.

There may of course be an actual loss to the temporal estate of the promisee, arising out of the breach of contract. If such loss is to be relied on as independent and special damage in an action against executors, it ought to be specially pleaded, and in order to see if such damage is in fact recoverable, the ordinary line as to remoteness of damages will have to be drawn according to the well-known doctrine of *Hadley v. Baxendale*, 9 Ex. 341.

If the above is a correct account of the damages recoverable in an action for breach of promise it would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss flowing directly from the breach, or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case. In the present action there is no special averment of temporal loss, and we ought not to allow the pleadings at this late stage to be amended and to send down the case to trial again, unless we are satisfied that there is a substantial claim under this head fit for the consideration of the jury. By special leave of the court the plaintiff has now filed an affidavit as to particulars of special damage. The only items which are entitled even to plausible consideration are two: First, the expense to which the plaintiff was put in maintaining herself as a *feme sole* subsequently to the breach; and secondly, the amount expended by the plaintiff in the purchase of underclothing, etc., in preparation for her marriage. The plaintiff's expense in maintaining herself after she was forsaken clearly cannot be recovered. It cannot be a consequence naturally arising out of a breach of promise of marriage that the woman is to be entitled during the remainder of her life to charge the expenses of her living and maintenance to her faithless lover. With respect to the claim for underclothing,

etc., it is sufficient to say that the materials furnished by the plaintiff's affidavit do not show that such purchase was made under circumstances which would bring the expenditure within the head of damages flowing directly from the alleged breach of contract or within the contemplation of the parties at the time. We do not desire to intimate any opinion that expenditure in respect of a marriage trousseau or other marriage preparations must necessarily be too remote to be recovered against executors in an action for breach of promise of marriage—the matter must in each case depend upon the circumstances of the case—but though invited to do so, the plaintiff has not given us the means of seeing that this particular head of damage can be sustained by evidence, or what case she has for asking for an amendment to be made in the statement of claim which would include it. The action therefore must be dismissed with costs, but as to the only point taken by the defendants at the trial was one as to corroboration, and as that point was a bad one, we think that there ought to be no costs of the hearing of the Divisional Court or of this appeal.

Judgment for the defendants.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**CARRIERS—OF PASSENGERS—INJURIES TO PASSENGERS—NEGLIGENCE.**—Plaintiff's clothing caught in a hook as she was attempting to get out of defendant's car and she was injured. It was a summer car, and the hook served to fasten curtains together. The spring of the hook was broken, thus exposing its point; but it did not appear how long it had been broken, nor that by any diligence defendant could have known of its condition. *Held*, not sufficient proof of negligence to support a finding of the jury for plaintiff. March 20, 1888. *Kelly v. New York & S. B. Ry. Co.* Opinion by Earl, J.; Danforth, J., dissenting.

**CONTRACT—INTERPRETATION—PROVINCE OF JURY.**—It is the province of the jury to decide what an oral contract is where the evidence is conflicting as to the intent of the parties to such contract and as to its terms. March 20, 1888. *Patten v. Pancoast.* Opinion by Gray, J.

**PERFORMANCE—CONDITIONS PRECEDENT.**—A provision in a contract that within ten days after the final estimate of a chief engineer of the work done, the full amount due upon such contract shall be paid, may be pleaded in bar to an action to recover for work done under such contract, where there is no evidence that any demand had been made of such engineer for such certificate. The action was not brought upon a *quantum meruit*—upon the ground that the contract had been rescinded and no longer subsisted, or to rescind or annul it. On the contrary it was brought to enforce it, and necessarily affirmed it. *Quinn v. Van Pelt*, 56 N. Y. 417. It went upon the theory that there had been a full and final performance, since the work not done was omitted by the defendant's direction and not through the fault of plaintiff. As to that, readiness to perform was equivalent to performance, and the plaintiff came into court standing upon the contract, demanding payment according to its terms, and damages for the work withdrawn. That he had a right to do. In *McMaster v. State*, 15 N. E. Rep. 417, recently decided, we held that a breach in one respect was not necessarily waived by a continued performance thereafter, but that the contractor could go on and complete his contract so far as possible and recover according to its terms, with damages for the breach, but those damages themselves founded upon the stipulations of the agreement. That is what this plaintiff did. The part of his work at Broadhead's

creek was, without difficulty, severable from the body of the contract. The defendant wrongfully—as we must assume from the verdict of the jury—in September of 1881 gave that work to others. The plaintiff notwithstanding continued his performance of the contract for a year or more, obeying its requirements and taking payments according to its terms. He now sues upon the contract to compel performance or its equivalent by the defendant, and necessarily stands upon and affirms it. He cannot in the present form of action affirm it for one purpose and repudiate it for another. April 10, 1888. *Byron v. Low.* Opinion by Finch, J.

**CRIMINAL LAW—HOMICIDE—INDICTMENT—FINDING—FAILURE TO INDICT FOR THE ASSAULT.**—Where an assault is committed, and during the life of the party assaulted, the grand jury, upon the case being presented to them, fail to find an indictment, an indictment for manslaughter, found after the party assaulted had died from the injuries received in the assault, is not defective because found without leave of court, as provided in the Code of Criminal Procedure of New York, § 270 (a charge once dismissed by a grand jury cannot again be submitted without direction of the court), the offenses not being the same. A conviction even of the offense of assault and battery would have been no bar to a prosecution for the graver crime subsequently developed. *Burns v. People*, 1 Park. Crim. 182; *People v. Saunders*, 4 id. 196; *People v. McCloskey*, 5 id. 57. March 20, 1888. *People v. Warren.* Opinion by Ruger, C. J.

**KIDNAPPING—FRAUD.**—Where defendant induced a female voluntarily to take passage for a foreign port, under pretense that he had there obtained employment for her, but intending to place her in a house of prostitution, and it appears that she would not have consented to go but for such false pretense, he is guilty of the offense defined in the Penal Code, § 211. The section defines the crime of kidnapping, and in the first subdivision declares that a person who "seizes, confines, inveigles or kidnaps another, with intent to cause her, without authority of law, to be securely confined or imprisoned within this State, or to be sent out of the State, or to be sold as a slave or in any way held to service, or kept or detained against her will," is guilty of kidnapping. Did the defendant under the circumstances intend that the prosecutrix should be sent out of the State against her will, within the meaning of the statute, or is the statute only applicable where the intent to cause another to leave the State contemplates physical coercion to that end? In *Reg. v. Hopkins, Car. & M.* 254, the case of an indictment for the abduction of an unmarried girl, under sixteen years of age, "against the will" of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained, and Gurney, B., said: "I mention these cases to show that the law has long considered fraud and violence to be the same." The language is very comprehensive, and if taken in its broadest meaning, seems scarcely consistent with the English cases which hold that the false personation of the husband, whereby a married woman consents to intercourse with a stranger, does not constitute a ravishment of the wife. *Reg. v. Clark*, 6 Cox Crim. Cas. 230; *Reg. v. Young*, 14 id. 114. In *Queen v. Dee, Jebb Cr. Cas.* 6 Crim. Law Mag. 220 (1884), the court refused to follow the English cases, and adopted the contrary view, upon what seems to us very satisfactory grounds. The case of *Beyer v. People*, 86 N. Y. 370, is quite apposite on the question of what constitutes a taking "against the will." The defendant in that case was indicted under a section of the Revised Statutes which declared that "every person who shall take any woman unlawfully against her will, with intent to

compel her by force, menace or duress to marry him, or to marry any other person, or to be defiled," etc., shall, upon conviction, be punished, etc. It was held that the defendant, having by the false representation that he had procured for the prosecutrix a situation as a servant in a respectable family, induced her to go with him to a house of prostitution, with intent to compel her to be defiled, was guilty under the statute; and that the inducing the prosecutrix to accompany him, under the circumstances, was a taking "against her will" within the statute. The principle decided covers the present case. The consent of the prosecutrix, having been procured by fraud, was as if no consent had been given; and the fraud being a part of the original scheme, the intent of the defendant was to cause the prosecutrix to be sent out of the State against her will. April 10, 1888. *People v. De Leon*. Opinion by Andrews, J.

**DAMAGES—MEASURE OF FOR BREACH OF CONTRACT TO SUPPLY MANUFACTURED ARTICLE.**—Defendant manufactured for plaintiff milk-coolers, each consisting of an iron frame supporting a vat in which was placed an enameled pan. The parts were separable, and the pans could at once be taken out and replaced by others. In an action to recover damages for defective coolers, where the only defect was in the enamel of the pans, held, that the measure of damages was the amount necessary to replace the defective pans by perfect ones. The plaintiff in every instance took back the pan and replaced it with a new one, and so made the original bargain good at the cost of the new pans alone. That was the plaintiff's damage. It never lost at all the cost or the value of the standards and vats, but keeping that in its treasury as received from the purchasers, it got it a second time in the judgment appealed from. The standards and vats, which were not claimed to be defective, and which could be as easily equipped with good pans as with poor ones, were first paid for by the purchasers, and then again by the defendants. April 10, 1888. *New York Monitor Milk-Pan Co. v. Remington*. Opinion by Finch, J.

**EVIDENCE—FRAUDULENT SALE—BOOKS OF ACCOUNT.**—Under allegations in an answer that a purchaser by an insolvent firm of certain property, which it afterward pledged, was fraudulent and void, the books of the firm are admissible to show the condition of its affairs and its knowledge of such condition at the time of such purchase. March 20, 1888. *Adams v. Boverman*. Opinion by Danforth, J.

**HIGHWAYS—ESTABLISHMENT BY STATUTORY PROCEEDINGS—WAIVER OF OBJECTION—MANDAMUS TO OFFICERS TO OPEN AND WORK—DISCONTINUANCE OF ROAD.**—(1) In an action for mandamus to compel a highway commissioner to attach a road to some road-district where it appears that the road was laid out by a former commissioner, who expended money and labor thereon, and that the damages were assessed and paid to the land-owners, who had notice of the proceedings, defendant cannot, in the appellate court, first question the legality of the laying out of the road. (2) An order of the highway commissioners, made subsequently to the motion, and before its decision, discontinuing the road in question, cannot be considered, the relator not having had notice of such order. March 20, 1888. *People ex rel. Huntley v. Mills*. Opinion per Curiam.

**NEGLECT—TRIAL—OBJECTIONS TO EVIDENCE—WITNESSES—EXAMINATION—INSTRUCTIONS TO JURY—APPEAL—REVIEW.**—(1) In an action for injuries to plaintiff's pier by neglect of defendant's servants, one of defendant's witnesses, who had testified that he was familiar with the locus in quo, was asked, "Was

the slip wide enough for the scow to get much force in going through on either side?" Another of defendant's witnesses, after testifying as to the rotten condition of the pier, was asked how long he had noticed its rotten condition. To both questions plaintiff's counsel said, "Objected to." Held, that such objection was too general to raise the questions whether the first question was objectionable in form, or whether that witness had qualified as an expert, and that such objection to the second question did not disclose any defect. (2) After the defendant had concluded, plaintiff called a witness who denied certain declarations which had been attributed to him, and was cross-examined thereon, and on redirect examination plaintiff asked how much of these repairs were necessary to repair the injury occasioned, held, that the question was inadmissible in substance, the witness' testimony showing no knowledge or information on the subject in dispute, and was a reopening of the case. (3) The defense was that the damaged condition complained of was the result of natural causes. The judge submitted to the jury the issue of fact, whether the injuries complained of were the result of such neglect of defendant's servants or of natural causes, there being evidence on the part of the defendant that the pier was rotten, and did not confine their attention to the mere question of plaintiff's damage. Plaintiff made no request to withhold the case from the jury, nor did it except to the charge. Held, that the Appellate Court could not disturb the finding of the jury for defendant. (4) The court refused to charge the jury "that it was an improper use of the pier to moor heavy boats to the piles," but charged that defendant was liable for any damage occasioned by neglect of its servants, and that it was their duty, if the pier was not safe to moor boats to, to refrain from so doing and not to tie boats to piles so as to break them off. Held, that the charge was properly refused, that being a question of fact and not of law, and that the charge given properly submitted the question. March 20, 1888. *New Jersey Steamboat Co. v. City of New York*. Opinion by Danforth, J.

**PARTNERSHIP—FIRM AND PRIVATE CREDITORS—JUDGMENT—PRIORITIES—LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE.**—(1) A judgment for a firm debt has no priority over a judgment previously obtained against the several members of the firm on their individual liabilities; and the purchaser at a sale under execution to enforce the latter judgment takes a good title as against the purchaser at a sale under the former. *Saunders v. Reilly*, 105 N.Y. 12. (2) When a defendant does not take the right to occupy premises under any agreement with plaintiff, nor in any way accept him as landlord, there is no estoppel to deny plaintiff's title. March 20, 1888. *Davis v. Delaware & Hudson Canal Co.* Opinion by Danforth, J.

**RAILROAD COMPANIES—CHARTERS AND FRANCHISES—AMENDMENT OF DEFECTIVE ARTICLES—NEW YORK RAPID TRANSIT ACT—POWERS OF COMMISSIONERS—AMENDED PLANS OF CONSTRUCTION—FAILURE TO SUBMIT TO PROPERTY OWNERS.**—(1) Laws of New York, 1870, chap. 135, authorizing directors of any corporation organized under any general act to file an amended certificate of incorporation in case of any informality existing in the original certificate, is inapplicable to companies sought to be organized under the Rapid Transit Act of New York (Laws 1875, chap. 606), which gives to the commissioners therein directed to be appointed by the mayor, the exclusive authority to make articles of incorporation and deliver the certificate of incorporation to the directors, and which was intended to embrace the whole law as to the formation of companies thereunder. (2) Under the Rapid Transit Act, providing for the appointment of com-

missioners to organize a county railroad, whose terms of office "shall determine and expire with the performance of their functions as herein provided," and prescribing with particularity such functions, and the time within which they are to be performed, the power of the commissioners is not continuing, so as to enable them to reconvene after the prescribed time, and reform the articles or certificate of incorporation. (3) Under the Rapid Transit Act the commissioners were empowered to locate the route of a proposed railway upon the consent of the property owners, or if that is unobtainable, upon the decision of commissioners appointed by the Supreme Court and confirmed by it. The original submission of plans to the property owners was not made within the requirements of the act, so as to enable the property owners to make an intelligent judgment. *Held*, that the refusal of the property owners to consent to such plans does not empower the commissioners to make a decision upon amended plans to conform to the act, nor the Supreme Court to confirm the same, where the amended plans have never been submitted to the property owners. March 20, 1888. *In re New York Cable Ry. Co.* Opinion by Gray, J.

— NEGLIGENCE — FIRES — EVIDENCE — COMPETENCY. — (1) In an action for damages by fire to plaintiff's property by defendant's engine, because of a defective spark-arrester — there being evidence already in the case that an engine on another road with a different spark-arrester had passed near the property a short time before the fire, it was error to exclude the engineer's testimony as to which kind of spark-arresters used on the two engines in the course of his observation allowed the most and largest sparks to escape. (2) Plaintiff was allowed to prove the size of the sparks emitted from the engine several months after the fire, without any proof that the construction of the arrester was clearly defective in the first place, or that the engine and arrester were in the same condition of repair as at the time of the fire. *Held*, error. April 10, 1888. *Collins v. New York Cent. & H. R. R. Co.* Opinion by Peckham, J.

REFERENCE—APPOINTMENT OF REFEREE—EQUITY—CANCELLATION OF INSTRUMENTS—TENANCY IN COMMON—RIGHTS AND LIABILITIES INTER SE—RENTS—TAXES PAID FOR LIFE-TENANT—APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.—(1) Under conclusions of law, in an action to set aside deeds, that defendant shall account to plaintiff for his dealings with the property, and pay her what shall appear to be due, it is proper to include in the interlocutory judgment an order appointing a referee to take the account. (2) In an action to set aside deeds for plaintiff's interest in realty, of which she and defendant were tenants in common, on the ground of fraud and undue influence, plaintiff may recover rent from the time of delivery of the deeds, she having then left the premises in defendant's possession. The counsel cites a number of cases holding that the mere occupation by one of several tenants in common of an estate does not make the occupant liable to his co-tenants for the rent of the premises. Such are the cases of *Woollever v. Knapp*, 18 Barb. 265; *Dresser v. Dresser*, 40 id. 300; *Roseboom v. Roseboom*, 15 Hun, 300. These cases refer to the leading one of *Henderson v. Eason*, 9 Eng. Law & Eq. 337, where such a proposition was decided, and there is no doubt of its correctness. But that case and all the others resting upon it contains the qualification that the other tenants shall not be excluded or ousted from the possession of the premises or their title denied, in which event the other tenants may maintain ejectment to recover possession, and then an action to recover the means profits. 1 Co. Litt., § 184, 4 Bac. Abr., tit. "Joint Tenants," L, p. 518. And in

order to prove an ouster it is not necessary to prove a violent ejectment, or as one of the cases has it, it is not necessary to prove the party was set out by the shoulders. It may be inferred from circumstances. *Doe v. Prosser*, Cowp. 217; *Horublower v. Read*, 1 East, 568; *Goodlittle v. Tombs*, 3 Wils. 118, cited in 1 Coke, 906; 4 Kent Comm., marg. p. 370, note a. Obtaining title to the whole property held in common, by virtue of fraud and undue influence practiced on the co-tenant, who thereupon leaves the premises is, as we think, an ouster of such co-tenant, and would enable him to bring ejectment. (3) In an action to set aside deeds for plaintiff's interest in realty, of which she and defendant were tenants in common, where an accounting is adjudged, defendant cannot charge plaintiff with taxes on the property paid by him during the continuance of a precedent life-estate for the benefit of the life-tenant. (4) Where appellant gives notice of appeal from an order overruling his motion to vacate an interlocutory judgment, such order not appearing in the record, will not be reviewed in the appellate court. March 20, 1888. *Zapp v. Müller*. Opinion by Peckham, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

BANKS—NATIONAL—TAXATION OF SHARES—CONSTITUTIONAL LAW—SHARES OWNED BY OTHER NATIONAL BANKS.—(1) Taxes levied under the Public Statutes of Massachusetts, ch. 13, § 8, which provides that all bank shares shall be assessed at their cash value, and at the same rate, and no greater than other moneyed capital in the hands of citizens is by law assessed, are not invalid, either under the Massachusetts Statutes or the Revised Statutes of the United States, § 5219, because under statutory provisions the tax on savings banks is based on the amount of their deposits, excepting deposits invested in loans secured on taxable real estate, since savings banks, being substantially public institutions, under public management, are organized for the purpose of investing the savings of small investors, and not for banking purposes in the commercial sense. (2) A tax levied under the Public Statutes of Massachusetts, chap. 13, § 8, which provided that bank shares shall be assessed at their cash value, is not in violation of the Revised Statutes of the United States, § 5219, or unconstitutional, by reason of the tax being "at a greater rate than other moneyed capital in the hands of citizens," because disproportionate and unequal to the tax imposed, under Public Statutes of Massachusetts, chap. 13, relative to the taxation of the corporate franchise of corporations, excepting banks, on life insurance companies, based on the number of its policies, on trust and like companies, based on the amount of its deposits, and on telephone companies, based on the number of telephones used by it, these corporations not being banking institutions, and the investments made by them, their only capital not being "moneyed capital in the hands of citizens." (3) Under the Revised Statutes of the United States, § 5219, which provides that all shares of any banking association may be included in the valuation of the personal property of the owner or holder in the State within which the association is located, but each State may determine the manner of taxing the shares of national banks, a State may tax the shares of a national bank without regard to their ownership, the shares of stock of a national bank owned by another national bank, by reason of such ownership, not being exempt. The question of the exemption from taxation of deposits in savings banks, as affecting the rule for the State taxation of national bank



shares, was very deliberately considered by this court in the case of *Bank v. New York*, 121 U. S. 138, 160, and the conclusion reached in that case was reaffirmed in the case of *Bank v. Board of Equalization*, 123 U. S. 83. In the former case deposits in savings banks in the State of New York to the amount of \$437,107,501, with an accumulated surplus in addition of \$68,660,001, were exempted by the laws of the State from all taxation, neither the bank itself nor the individual depositor being taxed on account thereof. It was said in that case (p. 161): "However much there may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of a State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens, otherwise subject to taxation." It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks, or those of Iowa considered in the case of the Davenport bank. The principal distinction indeed between the case of the New York savings banks and those of Massachusetts involved in the present inquiry is, that the latter pay a tax of one-half of one per cent on the amount of their deposits, while the New York banks were exempt from all taxation whatever. The argument on behalf of the plaintiff in error indeed seeks to establish another distinction. It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case. A similar objection to the tax in question, founded on a comparison of the taxation of national bank shares with that of insurance companies and trust companies, the American Bell Telephone Company, and the Massachusetts Hospital Life Insurance Company, is equally untenable. Within the definition of that phrase established in the case of *Bank v. New York*, 121 U. S. 138, the interest of individuals in these institutions is not moneyed capital. The investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State. *People v. Commissioners*, 4 Wall. 244. It is further contended however on the part of the plaintiff in error that the taxation in question is not only at a greater rate than that imposed upon other moneyed capital held by individual citizens, but that it is repugnant to the Fourteenth Amendment to the Constitution of the United States, because it operates to deny to the tax payer the equal protection of the laws, and also that it is disproportionate and unequal, in violation of the provisions of the Constitution of Massachusetts. The two branches of this proposition are equivalent; if the tax is not disproportionate and unequal within the meaning of the Constitution of the State, the tax payer is not denied the equal protection of the laws within the sense of the Fourteenth Amendment. The point is fully

met by the reasoning and judgment of the Supreme Judicial Court of Massachusetts in the cases of *Institution for Savings v. City of Boston* and *Jewell v. City of Boston*, 101 Mass. 575, 585. It is contended that no tax is thereby authorized upon the national bank itself as a corporation, nor upon the personal property of any such, and that therefore these shares in the National Bank of Redemption are exempt from taxation by virtue of their ownership. This however is not a reasonable interpretation of the language of the section. The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership, on the same footing with all other shares. March 19, 1888. *National Bank of Redemption v. City of Boston*. Opinion by Matthews, J. Bradley, Gray and Blatchford, JJ., did not sit.

PATENTS FOR INVENTION—PATENTABILITY—IMPROVEMENTS IN TELEGRAPHY—BELL TELEPHONES.—(1) Prior to March 7, 1876, the date of letters-patent No. 174,465, to Alexander Graham Bell, for "improvements in telegraphy," it had long been believed by those experienced in the art, that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. Bell discovered that these vibrations could be electrically reproduced by gradually changing the intensity of a continuous current of electricity, so as to make it correspond exactly to the changes in the density of the air caused by the human voice. He then devised a way in which these changes of intensity could be made, and speech actually transmitted. *Held*, that discovery in finding this art, and invention in devising the means of making it useful, were both involved, and that the patent was properly issued, under the Revised Statutes of the United States, § 4898, providing that "any person who has invented or discovered any new and useful art \* \* \* may obtain a patent therefor." (2) The fact that the particular instrument which Bell had, and which he used in his experiments, did not under the circumstances in which it was tried reproduce the spoken words so that they could be clearly understood, does not invalidate this patent; the proof being abundant, and of the most convincing character, that other instruments, carefully constructed, and made exactly in accordance with the specifications, did and will operate successfully, though not so perfectly as instruments made upon the principle of the microphone, or the variable resistance method. (3) The fifth claim of letters-patent No. 174,465, of March 7, 1876, to Alexander Graham Bell, for "improvements in telegraphy," is as follows: "The method of and apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth." *Held*, that though articulate speech was not mentioned by name in the patent, the sound of articulate speech was one of the "vocal or other sounds" referred to, and that the claim embraced the art of transferring to or impressing upon an undulatory current of electricity the vibrations of air produced by the human voice in articulate speech, in such a way that the speech would be carried to and received by a listener at a distance on the line of the current. (4) Said claim is not for the use of a current of electricity in its natural state as it comes from the battery, but for putting a continuous current in a closed circuit, under such condi-

tions that changes of intensity therein may be produced exactly corresponding to the changes of density in the air caused by the vibrations which accompany vocal or other sounds, and for using that electrical condition, thus created, for sending and receiving articulate speech telegraphically. So construed, the claim is not for the mere use of electricity, as distinct from the particular process with which it is connected in the patent. (5) Bell, after describing clearly and distinctly in his patent his process of transmitting speech telegraphically, pointed out two ways in which this might be done: One by the "vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies;" and the other, "by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery." He then said that he preferred to employ for his purpose "an electro-magnet, \* \* \* having a coil upon one of its legs," and proceeded to describe the construction of the particular apparatus, in which the electro-magnet, or magneto method, was employed. *Held*, that the fifth claim, set out above, being first, for the process, and second, for the apparatus, it was not to be confined to the magneto instrument, and such modes of creating electrical undulations as could be produced by that form of apparatus; but that it included both the magneto and variable resistance methods, and the particular magneto apparatus described, or its equivalent. (6) In the apparatus made by Reis, of Germany (who was himself anticipated by Bourseul), in 1860, with its several modifications, as described in his prospectus of 1865, and his catalogue of 1866, and also by Legat, Van der Weyde, Ferguson and others, an intermittent or pulsatory current of electricity was employed; the transmitter, when actuated by the sound waves, making and breaking the circuit at each vibration. *Held* that the apparatus was, from its very nature, unable to send and receive articulate speech, and that it was not an anticipation of letters-patent No. 174,465 of March 7, 1876, to Alexander Graham Bell, for "improvements in telegraphy," the essential elements of which are the employment of the undulatory, as contradistinguished from the pulsatory, current of electricity, to transmit and copy air vibrations corresponding exactly in amplitude, rate and form to those produced by the human voice, and the apparatus therefor. (7) Nor was the Bell patent anticipated by James W. McDonough; his application of April 10, 1876, for a patent, which was rightly refused, on the ground of anticipation by Reis, making a "circuit-breaker," so adjusted as to "break the connection by the vibrations of the membrane," one of the elements of his inventions. (8) Nor is anticipation to be found in the patents of Cromwell Fleetwood Varley, of London, England—granted one June 2, 1868, and the other, October 8, 1870—for "improvements in electric telegraphs;" the specifications thereto not indicating that the patentee had in mind "undulations," resulting "from gradual changes of intensity, exactly analogous to the changes in the density of air occasioned by simple pendulous vibrations," which was Bell's discovery, and on which his art rests; and it being apparent that Varley's only purpose was to superpose upon the ordinary signal current another, which by the action of the make and break principle of the telegraph, would do the work he wanted. (9) In support of the claim of Daniel Drawbaugh that he "was the original and first inventor and discoverer of the art of communicating articulate speech between distant places by voltaic and magneto electricity," it was in evidence that he had never told any one how

earlier instruments with which he experimented were made, or what his purpose was, until he was called as a witness in December, 1881, in the case of American Bell Tel. Co. v. People's Tel. Co. This was nearly twenty years after he had begun his experiments, nearly seven after he had made and used "perfectly adjusted and finished magneto instruments," and more than five after microphones as good, or nearly as good, as those of Blake, which were not invented until 1878, had been constructed, and kept in his shop. It was also nearly six years after the date of Bell's patent (March 7, 1876), more than five after the success of Bell's discovery had been proclaimed at the Centennial Exposition in Philadelphia, four after his process had got into public use, three after it had become an established success, and two after Bell had brought his first suit for infringement. In the meantime the discovery of Bell had been heralded to the world, and Drawbaugh had had abundant means and ample opportunities to make his claim known. During part of this time he had treated his discovery as of secondary importance, and had devoted himself to the advancement of certain other inventions of his of comparatively small merit. In addition the instruments of Drawbaugh were fairly tested in March, 1882, and failed to produce satisfactory results, and when offered in evidence they were in no condition, being mere "remains." *Held*, an abandonment. Field, Bradley and Harlan, JJ., dissenting. (10) The charge that after Bell swore to his application on January 20, 1876, and after the application thus sworn to had been formally filed in the patent-office on February 14, 1876, an examiner, who got knowledge of the Gray caveat, put in afterward on the same day, disclosed its contents to Bell's attorneys, and that they were then allowed to withdraw the application, change it so as to include Gray's variable resistance method over Bell's signature, and over the jurat, and then to restore the application to the files thus materially altered, as if it were the original, and all this between February 14 and February 19, examined, and *held* not sustained. (11) Letters-patent No. 186,787, of January 30, 1877, to Alexander Graham Bell, for "improvements in electric telephony," are for the mechanical structure of an electric telephone, to be used to produce the electrical action on which letters-patent No. 174,465 of March 7, 1876, to said Bell, for "improvements in electric telegraphy," rests. The fifth claim of the patent of 1877 is as follows: "The formation in an electric telephone, such as herein shown and described, of a magnet, with a coil upon the end or ends of the magnet nearest the plate." *Held*, the claim as a whole, being for an electric telephone, in the construction of which the plate or diaphragm, the permanent magnet, sounding-box, speaking-tube, etc., or any of them, are used, and not for the several things in and of themselves, it was not anticipated by the magnet in Hughes' printing telegraph, as described in Schellen's work. (12) The authority granted by the Massachusetts act of March 19, 1880 (Laws & Resolves, 1880-81, chap. 117, p. 74) to the persons named therein, to organize as a corporation under the provisions of Laws & Resolves, 1870, chap. 224, relating to corporations, gave them the right to select a corporate name; and such persons having selected the name of the American Bell Telephone Company, and brought suit in that name, proof of the special act under which they were incorporated, and a certificate of the secretary of the Commonwealth in the form required by Laws & Resolves, 1870, chap. 224, § 11, is conclusive evidence of the corporate existence. March 19, 1888. *Dolbear v. American Bell Tel. Co.; Molecular Tel. Co. v. Same; American Bell Tel. Co. v. Molecular Tel. Co.; Clay Commercial Tel. Co. v.*

*American Bell Tel. Co. v. People's Tel. Co. v. Same; Overland Tel. Co. v. Same.* Opinion by Waite, C. J. [From 8 Sup. Ct. Rep. 778.]

### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CHARITIES—BEQUEST—DESCRIPTION OF OBJECT.**—A testator's will provides: "I do will and bequeath to the Methodist Episcopal Church South, to be applied to foreign missions, all of my property, real and personal, after the payment of my just debts, for their use and benefit exclusively." *Held*, a sufficient indication of the testator's purpose to enable the court to determine his intentions. The trustee is named in the will, and the language used by the testator indicates definitely the purpose to which he desired his bounty to be applied. So far have the English courts gone in favoring charities that where it is evident a testator intends one to devise, but leaves the object to the selection of a trustee, who dies without making it, they will lay hold of it and administer it under a scheme. *Mills v. Farmer*, 1 Mer. 55. Or if the specified objects cease to exist, they will remodel the charity; and it will not be allowed to fail, if it be apparent that charity was intended, although the particular mode pointed out may be impossible of execution. 2 Story Eq. Jur., §§ 1170-1181. It is true that the doctrine of *cy pres*, as broadly administered by the English courts, has been rejected in this State; but if it were equally in force here, there would be no need of a resort to it in this instance, because the donor has definitely fixed the purpose to which his charity is to be applied. And while this court has seen fit not to aid charities to the extent of making or changing a will, and has refused to go so far as to apply the testator's bounty to an object never contemplated by him, and to which he probably would not have contributed, yet because they are blessings in which all are more or less interested, they are looked upon with peculiar favor by our courts. They will not be allowed to fail for the want of a trustee; and if their object as intended by the donor be ascertainable, and consistent with law and public policy, they will be upheld. Ky. Ct. App., Jan. 28, 1888. *Kinney v. Kinney's Ex'r.* Opinion by Holt, J.

**CRIMINAL LAW—MISCONDUCT OF JURY AND COUNSEL.—TREATING.**—During a recess in the trial of a charge of riot and unlawful assembly, the prosecuting attorney and his assistant were seen in company of two jurors in a restaurant, accused and his counsel also being present, and the assistant district attorney treated all present. The meeting appeared to have been accidental, and the jurymen not present upon invitation by the State's attorneys. *Held*, that accused not having brought this matter to the notice of the court at his earliest opportunity before submission, but several days after verdict, a new trial would not be granted. The law undoubtedly regards with scrupulous jealousy every attempt of any party or counsel to bias or improperly influence members of the jury pending trial. Such cautious regard is commendable. With an occasional exception, the proverbial integrity of jurymen, and the difficulties and dangers of attempting such an intermeddling with so large a body of men, each of whom is supposed to be on his guard, has deservedly given a very remarkable permanency to the jury system. However desirable it may be that no perpetrator of crime should go unpunished, it is still more important that the law should be administered with impartiality and fidelity, as well as firmness. The decisions of the courts are

not entirely harmonious as to the effect upon the verdict for one or more of the jurymen to partake of intoxicating drinks pending the trial. Several courts of high authority have held that such indulgence, even without the knowledge or agency of either party, vitiates the verdict. *People v. Douglass*, 4 Cow. 26; *Brant v. Fowler*, 7 Id. 563; *Gregg's Lessee v. McDaniel*, 4 Har. (Del.) 367; *State v. Bullard*, 16 N. H. 139; *Leighton v. Sargent*, 11 Fost. 119; *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Id. 494; *Davis v. State*, 35 Ind. 496; *People v. Gray*, 61 Cal. 164; 44 Am. Rep. 549. In most of these cases however the drinking was after the cause had been submitted to the jury, and of course during the time for their deliberations. In Iowa a different rule prevails, notwithstanding the cases cited above, where the drinking takes place before such submission, as will appear in cases cited below. The rule stated was relaxed in New York many years ago, to the extent of holding that where the drinking was not to excess, nor upon invitation or at the expense of either party, and with no reason to suspect that it influenced the final result, it should not be allowed to overturn the verdict. *Wilson v. Abrahams*, 1 Hill, 207. In that case Mr. Justice Bronson ably reviews the earlier cases, and in effect deduced the rule last stated. Substantially the same rule was followed in this State several years ago. *Roman v. State*, 41 Wis. 312; *Crockett v. State*, 52 Id. 211. The same is true in other States. *Van Buskirk v. Daugherty*, 44 Iowa, 42; *State v. Bruce*, 48 Id. 530; 30 Am. Rep. 403; *State v. West*, 69 Mo. 401; 33 Am. Rep. 506; *State v. Baber*, 74 Mo. 292; 41 Am. Rep. 314; *Jones v. People*, 6 Colo. 452; 45 Am. Rep. 526; *State v. Jones*, 7 Nev. 408; *Larimer v. Kelly*, 13 Kans. 78. See South. Law Rev. 524-526, and cases there cited. It is to be regretted that any treating of the jurymen should have been indulged under the circumstances claimed by either party. If the jurymen were in fact invited into the saloon, and there treated, as claimed on the part of the accused, then they, as well as the others implicated, might justly have been censured and punished by the court. If on the other hand, the jurymen went into the saloon first, and of their own motion, and the meeting there was purely accidental, then the treating, under the circumstances admitted, was not as bad, but nevertheless a gross impropriety, which should have met with a prompt refusal, if not rebuke, from the jurymen. We are inclined to think that the trial court might fairly, and probably did, take this latter view of the facts. But notwithstanding such impropriety, yet its does not necessarily follow that the verdict should have been set aside upon the showing made. As indicated, the treating took place three days before the cause was finally submitted to the jury. The accused and his two able counsel were present at the time, and knew all about the alleged misconduct. During the three days no action of the trial court was invoked therein. In fact the matter does not appear to have been brought to the attention of the court during that time. On the contrary, the accused and his counsel, for aught that appears in the record, remained silent on the subject until four days after the verdict, and then assign it as a ground for a new trial. The motive for thus remaining silent does not appear. It may have been supposed that such impropriety would tend to bias the jury in favor of the accused. With some men it probably would have that effect. In fact one of the two jurymen in question swore that "he was one of the last of the jury, after due deliberation, to vote for the conviction." Whatever may have been the motive for the delay in bringing the matter to the attention of the court, the law will not allow a party to secure a benefit by thus speculating upon the chances. In the trial of causes, as well as other matters conducted by human agencies, there

will unavoidably be more or less inadvertence, irregularity, mistake, impropriety and error. As often reiterated, the administration of the law is not an exact science; and yet it aims at substantial justice, and generally secures it. By reason of these things, parties and their counsel, in criminal as well as civil cases, are required to bring any supposed impropriety or error to the attention of the court, and obtain a ruling or action thereon at the earliest opportunity, in order to become available. Even then the party feeling aggrieved must promptly take, and preserve in the record, his exception, or the supposed error will be deemed waived. This has been the uniform ruling of this court, even in cases of murder. *Knoll v. State*, 56 Wis. 249. The courts go to the extent of holding that an application for a new trial on the ground of the misconduct or incompetency of a jurymen, is insufficient if it fails to show that such misconduct or incompetency was unknown to the applicant and his counsel before the submission of the cause to the jury. *Brown v. La Crosse Co.*, 21 Wis. 58; *State v. Vogel*, 22 id. 471; *Bennet v. State*, 24 id. 57; *Bonneville v. State*, 53 id. 680; *Rollins v. Ames*, 2 N. H. 349; 9 Am. Dec. 79; *State v. Tuller*, 34 Conn. 280; *Hill. New Trials*, pp. 83-87, §§ 2-6. Mich. Sup. Ct., Jan. 10, 1888. *Grottkau v. State*. Opinion by Cassoday, J.

### THE LAWS OF PROPERTY.

[Extracts from an address by Lord Chief Justice Coleridge.]

IT seems an elementary proposition that a free people can deal as it thinks fit with its common stock, and can prescribe to its citizens rules for its enjoyment, alienation and transmission. Yet in practice this seems to be any thing but admitted. There are estates in these Islands of more than a million acres. These Islands are not very large. It is plainly conceivable that estates might grow to fifteen million acres or to more. Further, it is quite reasonably possible that the growth of a vast emporium of commerce might be checked, or even a whole trade lost to the country by the simple will of one, or it may be more than one, great land-owner. Sweden is a country, speaking comparatively, small and poor; but I have read in a book of authority that in Sweden at the time of the Reformation three-fifths of the land were in mortmain, and what was actually the fact in Sweden might come to be the fact in Great Britain. These things might be for the general advantage, and if they could be shown to be so, by all means they should be maintained. But if not, does any man possessing any thing which he is pleased to call his mind, deny that a state of law under which such mischiefs could exist, under which a country itself would exist, not for its people, but for a mere handful of them, ought to be instantly and absolutely set aside? Certainly there are men, who if they do not assert, imply the negative. A very large coal-owner, some years ago, interfered with a high band in one of the coal-strikes. He sent for the workmen. He declined to argue, but he said, stamping with his foot upon the ground, "All the coal within so many square miles is mine, and if you do not instantly come to terms not a hundredweight of it shall be brought to the surface, and it shall all remain unworked." This utterance of his was much criticised at the time. By some it was held up as a subject for panegyric and a model for imitation; the manly utterance of one who would stand no nonsense, determined to assert his rights of property and to tolerate no interference with them. By others it was denounced as insolent and brutal; and it was suggested that if a few more men said such things, and a

few men acted on them, it would very probably result in the coal-owners having not much right of property left to interfere with. To me it seemed then, and seems now, an instance of that density of perception and inability to see distinctions between things inherently distinct of which I have said so much. I should myself deny that the mineral treasures under the soil of a country belong to a handful of surface proprietors in the sense in which this gentleman appeared to think they did. That fifty or a hundred gentlemen or a thousand would have a right, by agreeing to shut the coal-mines, to stop the manufactures of Great Britain and to paralyze her commerce seems to me, I must frankly say, unspeakably absurd.

Take again, for a moment, the case of perpetuities, to which I have more than once alluded, as exemplified in gifts *inter vivos*, or in what, by a common but strange abuse of language, are called "munificent bequests," after a man has had all the enjoyment possible to him, to religious or charitable objects. Persons either not capable of attributing definite meaning to their language, or at least not accustomed to do so, talk of any interference with such dispositions as immoral, and brand it as sacrilege. The wisest clergyman who ever lived, as Mr. Arnold calls Bishop Butler, pointed out nearly a hundred and fifty years ago that all property is and must be regulated by the laws of the community; that we may with a good conscience retain any property whatever, whether coming from the Church or not, to which the laws of the State give title; that no man can give what he did not receive, and that as no man can himself have a perpetuity, so he cannot give it to any one else. No answer has ever been attempted to Bishop Butler; none seems possible; yet men go on, like the priest and levite, pass it by on the other side, and repeat the parrot cry of immorality and sacrilege without ever taking the trouble to clear their minds, perhaps being congenitally unable to do so, or to ascertain whether there is any argument which will "hold" upon which to justify the charge. These are they who

"might move  
The wise man to that scorn which wisdom holds  
Unlawful ever,"

and from whom I part with this one word. There may be abundant and very good reasons for maintaining the inviolability of all gifts or bequests in perpetuity; there may be abundant and very good reasons for maintaining the contrary; but to call names does not advance an argument, abuse is not reasoning, and moderate and reasonable men are apt to distrust the soundness of a cause which needs such arts and employs such weapons.

Parliament supplies the funds for a great public and national harbor, created by a huge breakwater, which the officers of the sovereign construct. The effect of this great national work is to turn the tide of the sea full on to the lands of a beach-bounded proprietor some miles off, who could only save his lands from utter destruction by the erection of a long and massive sea wall. Has he a claim, a legal right, to compensation? Again I answer most certainly not. *Salus populi suprema lex*. Many other cases might be put to which the answer would be the same, but these are enough for my purpose. And now as to the sufficiency of the compensation. The property is taken, and often in the opinion of him who loses it no compensation is sufficient. Suppose the possessor of an ancient and beautiful house, endeared to him by a thousand tender and noble memories, is told that he must part with it for the public good. The public good comes to him perhaps represented by an engineer, a contractor, an attorney, a parliamentary agent and a parliamentary counsel. He is very likely

well off in point of money, and does not at all want the compensation; but he is a man of feeling, or if you will, of imagination, and he does want his house. He does not believe in the public carling two straws for the railway between Eatonswill and Mudborough. He thinks it hard that the engineer and the rest of them should pull down his old hall, and root up his beautiful pleasure-grounds. But he is told that the public good requires it; that a jury will give him compensation, and that he has no cause for complaint; and told sometimes by the very people, who when it is proposed to apply the same process for the same reasons to other rights or laws of property, are frantic in their assertion of the sacredness of these laws, and vehemently maintain that to touch one of them is to assail the existence of property and dissolve society. Once more let us see things as they are, recognize distinctions, admit consequences, clear our minds, and if we must differ, as probably we must, let us differ without calling names or imputing motives.

It is interesting in this relation to note the very different views taken by the same persons of substantially the same things, according to the point of view from which they are regarded. We have heard a good deal lately—I do not say too much—of the enormous importance of maintaining the Eighth Commandment; and there can be no doubt that the Eighth Commandment is an elementary law of morals, and should be regarded as one of the vital principles of political ethics.

But till very lately the Eighth Commandment had no application, at least in England, to the money of a wife if it came to her after marriage. As Lord Lyndhurst once said, a man might steal his wife's money to keep a mistress, and somehow or other this was not forbidden by the Eighth Commandment. As matter of history, the great difficulty in getting this Commandment applied to the wife's property was raised by those who are most emphatic as to its obligations in other matters. After many struggles the power of stealing was forbidden up to £200. At this point the matter remained for some years. Then an attempt was made to extend the prohibition to all the wife's property; but the measure was swept away with scorn by a great nobleman, who on questions of this sort held the House of Lords in the hollow of his hand. A few years passed, and the same great nobleman carried the same bill as his own, without a word of acknowledgment on his part, or of remonstrance on that of the authors of it, who were too glad of the result to say a single syllable as to his breach of this great precept.

Again there are points connected with the law of distress, and I presume, of hypothec (though here I speak with the becoming diffidence of an ignorant English lawyer), the justice of which, at least to the ordinary and uninstructed mind, certainly seems to need explanation. To seize one man's goods who owes nothing to any one, to pay the debt of another, does at first sight seem a breach of the Eighth Commandment. But it is still the law in England as to agisted cattle, and as to all goods except such as are protected by the Lodgers' Act of very recent times. And I remember very well a very honorable man, a friend of mine, who rented a handsome set of rooms in London, and who was also a landlord of a large farm near London. He had duly paid his rent, but some valuable property of his was seized by the superior landlord of the house, to whom he owed nothing, and this he thought oppressive and unjust; but he seized without a pang the cattle of a man who owed him nothing which had been agisted on land occupied by his tenant, who owed him rent, and this he maintained to be a just and proper exercise of the rights of property. I have not invented

this example. My friend was a very intelligent man, and I give the facts as an instance of how the point of view may distort the vision, and how hard it is for even the best of us to keep the head cool and the mind unclouded. How the owner of the agisted cattle looked upon my friend's seizure I may guess perhaps, but I do not know.

Again a great nobleman or a millionaire, who owns half the land in a county, hungers after the possession of the other half; and the indulgence in this land-hunger is a dignified and honorable taste, inspired by high feeling worthy of a man of rank and wealth, and by all means to be encouraged. A poor peasant hungers after the possession of a few acres which he occupies, but his land-hunger for that which is to him, as Lord Chancellor Blackburne said, a necessity of life, for the soil which he has reclaimed, and for the hut which he has built, this is a breach of the spirit and letter of the decalogue, something between petty larceny and highway robbery, to be condemned of all well-educated and rightly-affected men, forbidden by the rules of political economy, and its indulgence to be discouraged, and as far as may be, made impossible by law. Yet surely both hungers are alike defensible, alike permissible; nay, perhaps the hunger of the peasant is the better of the two, so far as the desire for subsistence is better than the love of power.

We may assume that as a rule no changes in the laws of property or the conditions of its enjoyment are likely to be made, or ought to be made, except with the consent of persons affected by the change, or with compensation if his assent is not given. What should be the terms of compensation, and whether any but the actual owners of property should receive it, are details, not principles, and it would be unprofitable to discuss them. The rule no doubt will always be what I have stated. But a very slight acquaintance with English history is enough to tell us that this rule has been by no means universally observed; and the long series of parliamentary resumptions of crown grants from the time of Henry III to the time of William III proves this statement beyond question. Some of these acts were no doubt procured by the kings themselves; but some certainly were passed by no means to please the reigning sovereign; and when the lands and other revenues allotted for the service of the king and of the State have been parted with, parliaments, at least in England, have seldom failed to relieve and to restore affairs by acts of resumption.

It is very true that all change, or almost all change, of the laws of property affects either existing rights or rights which reversioners might naturally regard as certainly coming to themselves. This is a reason why, as I have already said, every such change should be made with care and tenderness, without unnecessary disturbance, with compensation satisfactory, if it may be, even to the persons unfavorably affected by the change, and doing no violence to the great principle, that right must not be compassed by wrong, nor evil done that good may come of it. But it is not wrong to change the law on good reason and fair terms; it is not evil to vindicate the supremacy of the State over that which is being employed for its destruction.

## CORRESPONDENCE.

### ROOM FOR EXPERT EVIDENCE.

*Editor of the Albany Law Journal:*

Is there not an opportunity for the development of an entirely new line of expert evidence, suggested by the following statement, taken from a verified petition

of defendant, the wife, in a motion for alimony in an action for divorce? The defendant's petition alleged that "after a full and fair statement to her said counsel of all the facts relating to her defense, as she verily believes," she is "advised by her said counsel, after statements made as aforesaid, that she has never been guilty of adultery since her marriage with the plaintiff, and that the allegation of adultery in the complaint is false and untrue."

ROCHESTER, May 7, 1888.

G. F. S.

### NEW BOOKS AND NEW EDITIONS.

#### BLACKSTONE PUBLISHING COMPANY'S TEXT-BOOK SERIES.

This series is now in its second year of monthly publications of English text-books with notes and references by American editors. The works thus far published are Smith on Master and Servant, Challis on Real Property, DeColyar on Guarantees, Principal and Surety; Smith on Negligence, Blackburn on Sales, Pollock on Torts, Taylor on Evidence (4 vols.), Wright on Criminal Conspiracies, May on Fraudulent Conveyances, Odgers on Libel and Slander, Shirley's Leading Cases in the Common Law, Lewin on Trusts (3 vols.), Shortt on Informations, and Lindley on Partnership in press. These books are handsomely printed in small but clear type, at Philadelphia, bound in leatherette or sheep, and sold at \$15 or \$20 for twelve volumes, aggregating above 6,000 pages, and delivered free in leatherette. The price is wonderfully low, little more than that of two ordinary volumes, and as the publishers state, less than one-tenth the cost of importation. Notwithstanding the price we discover no signs of slighting. Our remarks last week on the similar Boston edition of Shortt on Informations will apply to this series, but we must qualify them by saying that the editorial work seems uniformly thorough and judicious, and many of the works are of prime importance and reputation, as Smith's Master and Servant, Blackburn, Pollock, Taylor, Odgers, Shirley, Lewin and Lindley. Among future numbers are to appear Pollock on Contracts, Snell's Equity, and Archbold's Criminal Pleading and Evidence. We commend the series, and we still more heartily commend this company's announcement of a similar series of American text-books for \$5 additional for twelve volumes. This is the era of cheap law books, and we think that this series thus far is entitled to the prize for the cheapest.

#### SHEARMAN & REDFIELD ON NEGLIGENCE.

The learned editors of this standard treatise have now done what for some time we have been wishing they would do—rewritten their work and brought the citations down to the present time. The last edition was in 1880. The development of the law of negligence since the first edition—this is the fourth—is indicated by the statement that for 4,000 citations in the first edition, there are now some 10,000. The single volume of the earlier editions is succeeded by two large volumes. Words or praise are almost superfluous. The work was the first on the subject in this country, and has never ceased to be a favorite. Few books have been more frequently cited or more depended on as authority, and justly, for two more competent lawyers and legal scholars have never prepared a text-book in this country. The publisher's work is well done by Baker, Voorhis & Co. of New York.

### NOTES.

What is a "venue?" An incident which recently occurred before a judge of the Queen's Bench Division in chambers serves to show that every one cannot answer the question. An application being intrusted to an artioled clerk, he appeared before the judge, when the following interesting colloquy is said to have taken place: Judge (looking over the papers): Where's the venue? Artioled Clerk: I left that at the office. Judge (with twinkling eye, but kindly): Are you quite sure? Artioled Clerk: Yes, my lord, I remember leaving it on the office table. (He probably meant the revenue.)

In his recently-published reminiscences Sir Frederick Pollock gives this account of his first appearance in court to try a case after being called to the bar: "It fell to me of course to examine the first witness. I knew my brief by heart, but got up in the greatest funk to do my duty. The court swam round me; I did not know what questions I asked, or what answers came from the witness-box, and sat down thinking it was all over with me, and wishing the floor would open to let me disappear as completely and quickly as possible. At the close of the case a little scrap of paper, two inches square, was passed to me in the cleft of the orier's white wand, and to my vast surprise and pleasure I read a note from Dundas (the judge), which said, 'You examined your witnesses like an old and experienced hand, reminding us of your sire, *pater Pollock filius Pollocktor*.'" This, we suppose, is an imitation of the Horatian "*matre pulchra filia pulchrior*."

The Philadelphia Record tells the following stories of Congressman Pettigrew of South Carolina: I heard two good stories to-day of Pettigrew, the great lawyer and Unionist, which I had never heard before. He was practicing at one time before a judge who was a Presbyterian of the straightest sect and a very hard-working officer. It came to be Maunday Thursday, and Pettigrew and the Episcopalians and Roman Catholics thought they would like an adjournment of court over Good Friday. Pettigrew was selected to make the motion. "Your honor," he said, "I desire to move that the court adjourn over to-morrow." "Why should the court adjourn over to-morrow, when the docket is so crowded?" asked the judge. "Because," said Pettigrew, "to-morrow is Good Friday, and some of us would like to go to church." "No," said the judge, decidedly, after a moment's thought, "the court will sit to-morrow as usual." "Very well, your honor," replied Pettigrew, adding, as he turned away, "I know there is a precedent, for Pontius Pilate held court on the first Good Friday." The same judge was a great stickler for etiquette, and when one hot July day Pettigrew came into the court room in a black coat and yellow nankeen trousers the judge took him sternly to task, asking him whether he did not know that the rules of that court required its counsellors to appear in "black coat and trousers." "Well, your honor," said Pettigrew innocently, "I submit that I am within the rule, for I have on a black coat and trousers." "But they're not black trousers," insisted the judge; black coat and trousers means that both shall be black." "Then," said Pettigrew, "I call your honor's attention to the fact that the sheriff of this court is in contempt of its rules, for they require him to attend upon its sessions in a cocked hat and sword, and while his hat seems to be cocked his sword certainly is not." The judge said no more about the trousers.

# The Albany Law Journal.

ALBANY, MAY 26, 1888.

## CURRENT TOPICS.

IT is to be hoped that the president has a more accurate view of "the situation" than Mr. Nathaniel Paige of Washington, who, according to the *Tribune*, says: "The present reorganization of the Supreme Court, with a younger man like Fuller at its head, who can co-operate with Strong, Hunt and Matthews, is a good move." Mr. Paige should turn over a new leaf, and the *Tribune* news-reader should take counsel of a lawyer. It would be extremely difficult for Mr. Fuller to "co-operate" with Mr. Strong, inasmuch as he has been out of the court many years, and is above eighty years of age. As to Mr. Hunt, we cannot conceive that anybody less gifted than Madame Dis De Bar, or possibly the "Lawyers' Co-Operative Publishing Association," can reach him, for he has been in his grave several years. What a deserved influence a great journalist doth wield!

The seventh volume of Mr. Horace Howard Furness' unequalled variorum edition of Shakespeare is devoted to the "Merchant of Venice," a play especially attractive to lawyers, because of the trial scene. What a commentary on the inferiority in interest of fact to fiction that this "feigned issue" should have survived almost three centuries and is likely to live forever, while no one except a few historical scholars cares for any real trial of the same day, and will care less and less as time goes on. This volume is not inferior in interest to any of its predecessors. One very peculiar item is the musical notation of several of Edmund Kean's renderings of passages from this play, illustrating very vividly the vocal power and oratorical method of this wondrous actor. The readers of this journal will be pleased to know that Mr. Furness reproduces Mr. Esek Cowen's report of *Shylock v. Antonio*, written for this journal in 1872. The subject of "Law in the Trial Scene" occupies some seventeen pages in fine type. There certainly is no other edition of Shakespeare that throws so much light on these dramas, gives such an interesting view of what has been written about them, and shows how they have been dressed and acted.

Our contributor, Mr. Ellwanger of Rochester, who has some practical ideas concerning the utilization of dogs, will be gratified to learn, as probably he has already learned, that the usefulness of dogs as bearers of dispatches has been demonstrated by recent experiments in Europe. In competition with cavalry and bicyclers they beat the former out of sight and the latter considerably. They have

the advantage of not being bound to highways and beaten paths, and of being able to go "across lots" and save many a long circuit. So in the next unpleasantness, the combatants can "cry havoc! and let loose the dogs of war." That is the proper way to dispatch dogs, rather than by clubbing or poisoning "buttons."

We have been pining for a funny case, and one comes opportunely from Texas. In *McAllen v. Western Union Tel. Co.*, Texas Supreme Court, March 20, 1888, it was held that plaintiff's mental sufferings and apprehensions upon not being met at the station by the family carriage, which he had ordered by telegram upon hearing of his father's illness, are not a proper element of damages, and also that damages for bruises alleged to have been received in consequence of plaintiff's being obliged to take a rough vehicle, instead of the family carriage, to a certain point, are too remote. Judge Maltbie, apparently in a merry mood, said: "The carriage had not arrived. It was only seventy-five miles from that point to the home of his father by the usual travelled route; but no conveyance could be obtained, and he was compelled to take passage in a 'jerkey' and on a 'buckboard,' and by way of Rio Grande City to Edinburgh, a distance of about two hundred miles. It was alleged that when plaintiff realized the fact that the family carriage had not been sent to Pena his mind became possessed with dreadful forebodings as to the cause of its not being there. He had learned while in San Antonio that his father was sick, and this was the occasion of the dispatch for the carriage, though the defendant was not informed of this or any other reason for the sending of the message. During the entire journey from Pena plaintiff's mind was racked with doubt and uncertainty as to his parent's condition, suffering the most excruciating agony for fear some dreadful calamity had befallen him. It was further averred that plaintiff was severely battered and bruised by the jars and jolts of the 'jerkey' and 'buckboard,' inflicting great physical pain and suffering upon him. \* \* \* Had it been a fact that no other conveyance could be procured from Pena to Edinburgh except such as those upon which plaintiff took passage, it could not have been anticipated that in the usual course of such a journey plaintiff's posterior would become bruised or lacerated to such an extent as to cause serious physical pain. \* \* \* In this case it seems that the plaintiff's mental anguish was not the result of any real or adequate cause. It does not appear that the father was dead, or in such condition as demanded the personal presence or attention of his son. On the contrary, the sorrows of the plaintiff were imaginary, and were caused by the failure on the part of the father to send the carriage to Pena, which the affectionate son attributed to the fact that the father was dead, or too dangerously ill to attend to ordinary business, when in truth the failure was due solely to the fact that no request to send forward the carriage had been



received. The deduction of the son was not logical, or at all events the occurrence might have been well accounted for on other hypotheses than the disability of the father. If grief or sorrow produced by things unreal, mere pigments of the brain, are held to give a cause of action for a breach of a contract or a tort, an individual of a somber, gloomy imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy, for the same breach of duty, would not be entitled to any thing; and damages, instead of being measured by the rules of law as applied to the rule of facts, would largely depend upon the fertility of the imagination of the suitor." But for all this, we think it would be no joke to be condemned to an unnecessary ride of one hundred and twenty-five miles over a Texas road on a "jerkey." How can the judge say the plaintiff's pains were too "remote?" We should think them very near if we had suffered them.

Our friends and relatives, the Holland Society of New York, propose to take a trip to their ancestral land, or rather ancestral water, starting on July 28th on the steamship *Amsterdam*, under the conduct of Judge Van Vorst as skipper and Mr. Van Sicklen as mate or bo'sun. We are surprised that they did not charter a sailing vessel like the *Goede Vrouw*, on which the original settlers of New Netherlands came out, built, according to Mr. Knickerbocker's veracious history, on the model of the belle of Amsterdam, of equal dimensions in length, breadth and depth, "full in the bows, with a pair of enormous cat-heads, a copper-bottom, and withal a most prodigious poop," with a figure-head of St. Nicholas, floating "sideways like a majestic goose," making as much leeway as headway, sailing as fast with the wind ahead as when it was a-poop, and "particularly great in a calm." Perhaps they thought they had not time enough, but a Dutchman ought never to be in a hurry. The expense for the contemplated five weeks' absence is very low, "including wine," or perhaps schnapps. They propose to go through some of the canals of Amsterdam, and we are glad to note that they are going to church at Haarlem. Seventy-two can go, forty have shipped. It is really unwise to risk so much legal talent in one small craft. We would very much like to go, but are afraid that some one would change the politics of this journal in our absence. Let our friends take along that delightful book on Holland, by George Boughton, the London artist, formerly an Albanian. This with a few bound volumes of this journal will furnish all the necessary reading. *Bon voyage, messieurs!* — we wish we knew the Dutch for that.

It is always risky for a lawyer to attempt to be witty before an appellate court. Many judges do not understand jokes, others do not approve them, and none of them can laugh or evince any appreci-

ation of them. This jesting before an audience who will not laugh reminds us of a story Artemus Ward told us, of a conspiracy of college boys who came to hear one of his funny lectures and did not smile even once. It nearly "broke up" Artemus. It takes a bold man to essay humor before our Court of Appeals, for example, although the present judges all understand and do not disapprove jokes in private. Poor men! We should think a witty argument now and then would be a relief to the graveyard monotony of the ordinary course of proceedings. We are led into this train of thinking by a story recently told us of the late John Ganson of Buffalo, who narrated it with great glee at his own expense. In an argument before our old Court of Appeals he allowed himself to say, "if that proposition is law, then I should agree with Bumble, that the law is an ass." Not a smile nor a twinkle lighted up the face of a single judge; several looked stupefied and one or two rather shocked. But when his antagonist replied — a gentleman from a rural deestricht — he scathingly rebuked Ganson for his "undignified reference to some country justice of the name of Bumble." Ganson said he gave it up — never joked again in the Court of Appeals. It does indeed require a stretch of the imagination to conceive Denio, or Comstock, or Selden tolerating a witticism in court. But to us one of the greatest joys of life is getting off a jest and having it ignored — in private; we do not say how we should feel about it in court. It is this which led us, in lecturing before the law school, to persist in one particular jest which for several years no class seemed to appreciate, but finally when we struck a class who did understand it, we dropped it — *jam satis*.

#### NOTES OF CASES.

**I**N *Cary v. Western Union Tel. Co.*, 47 Hun, 610, it was held that an attorney cannot recover for lobby services in importuning the attorney-general, comptroller and members of the Legislature concerning proposed legislation. The court, by Van Brunt, P. J., said: "In the case of *Mills v. Mills*, 40 N. Y. 543, it was held that such a contract was void as against public policy, in that it furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. In the case of *Sedgwick v. Stanton*, 14 N. Y. 289, the grounds upon which the invalidity of such a contract rest are set forth with great distinctness and precision. The court say: 'Persons may, no doubt, be employed to conduct an application to the Legislature as well as to conduct a suit at law; and may contract for and receive pay for their services in preparing documents, collecting evidence, making statements of facts, or preparing and making oral or written arguments, provided all these are used or designed to be used before the Legislature itself, or some committee thereof, as a body; but they cannot, with propriety, be employed to exert their personal influence with individual members,

or to labor in any form privately with such members out of the legislative halls. Whatever is laid before the Legislature in writing, or spoken openly or publicly in its presence, or that of a committee, if false in fact, may be disproved, or if wrong in argument, may be refuted; but that which is whispered in the private ear of individual members is frequently beyond the reach of correction.' The particular services for which compensation is sought in this action was for whispering into the ears of individual members of the Legislature, 'urging that they take an interest in the passage of the bill, and facilitate its passage as best they could.' In the case of *Lyon v. Mitchell*, 36 N. Y. 235, the right to employ counsel to appear before a legislative committee, or before the Legislature itself, to advocate the passage of a measure in which the individual has an interest is recognized. But it is held that personal solicitation of the president, the governor, or the heads of the departments for favors or for clemency are not the lawful subjects of contracts. The apprehension that considerations other than those of a high sense of duty and of the public interest may thus be brought to influence their determination forbids this employment. And this court in the case of *Harris v. Simonson*, 28 Hun, 818, lays down the rule which must govern in the construction of contracts of the description under consideration with great clearness and force. The verdict was recovered for what was claimed to have been the value of personal services rendered by the plaintiff under the employment of Samuel Wood, the testator, in and about procuring the passage of an act of the Legislature for the incorporation of musical colleges, etc. The court said: 'Claims for services of the nature of those alleged to have been performed require to be carefully, cautiously and minutely examined in order to avoid the judicial sanction of demands arising out of the exercise of improper and vicious influences over members of the Legislature. Some portion of the services relied upon in support of the claim made consisted in direct appeals to individual members of the Legislature. They were not of the character which has been sanctioned, permitting recoveries in cases of this nature, for they were not clearly made to appear to consist of mere information or arguments tending to expedite the proper passage of the act. Such information and arguments are more appropriately directed publicly to the committee as such, having the bill in charge, or to the body considering the propriety of its enactments. The prevailing principles of law have been very cautiously adopted upon this subject, for the purpose of avoiding the effect of sanctioning direct or indirect influences brought to bear upon members of a legislative body to secure the passage of an act required to be officially considered by them, and for that reason it has been held that legislators should act with a single eye to the true interests of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by pernicious importunity and

indirect influences of interested and unscrupulous agents or solicitors; and public policy and sound morality did therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every act, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided. To warrant a recovery in such a case as this the evidence should be required to establish the fact, with reasonable clearness, that the services alleged to have been performed were such as the law will sanction in aiding and promoting legislative action.' Under the principles thus enunciated it is clear that no recovery can be had for services consisting of personal application to legislators or other officers of the government."

In *Rolland v. Batchelder*, Virginia Supreme Court of Appeals, March 29, 1888, it was held that under a statute providing that "all words, which from their usual construction and common acceptance are construed as insults, and tend to violence and breach of the peace, shall be actionable," a letter sent by a man by his servant to a neighbor's wife falsely intimating that she has invited the writer to meet her, and proposing a private interview on a street corner at night, or in his office on the Sabbath day, constitutes a good cause of action. The court said: "That the words used are insulting words cannot be questioned; that they tend to violence and breach of the peace is equally clear. But it is argued that this letter is not a libel, because it was not published by the defendant, and it was so held by the corporation court. If publication was necessary to constitute insulting words actionable, it is established in this case that the letter was written by the defendant, and given into the hands of one person, Nancy, the servant, with money and directions to deliver it to Harriet, another person, and the servant of the plaintiff, with directions to deliver it to the wife of the plaintiff, T. J. Rolland. The defendant thus parted with the letter, sent it forth, and the result of this carefully prepared train is that the contents became known. This might properly be held to be a sufficient publication if such were required to render the words actionable. In the case of *Miller v. Butler* a similar letter was sent through the mail, and this was held sufficient publication, although directed to and received by the person addressed. 6 Cush. 71. And Judge Tucker says in his admirable work on the Laws of Virginia, that writing a libelous letter to the person libelled is a publication, and is actionable. Tuck. Bl. Comm., bk. 3, p. 68. And while this is doubtless true, in the case of *State v. Avery*, 7 Conn. 366, it is held punishable as an offense of a public nature, because it tends to create ill blood and cause a disturbance of the public peace. But we do not think any publication is necessary under our statutes cited above; that the words, according to their usual construction and

common acceptance, are construed as insults, and tend to violence and breach of the peace, is sufficient to render them actionable. If they are so written or spoken as to tend to violence and breach of the peace, that is all the statute requires. If a libel is published, or a slander communicated to some third person, the action accrues. But whatever may have been the original object of the statute, about which we find some of the judges not entirely agreed, the intention of the law expressed therein is clearly to render all words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, actionable. Insulting words written to the person insulted, tend to violence and breach of the peace, whether exhibited to a third person or not, and such words spoken to another, without the presence of third persons, tend also to violence and breach of the peace. Now here is a letter written to the wife of a neighbor, one living upon an adjoining lot, artfully asserting that in response to an invitation contained in a letter from her (which is entirely false, no letter having been written by her) the writer is ready and proposes to meet her on the street corner after dark, or at a private interview in his place of business on the Sabbath day. This was an insulting proposal to a married woman, and being written to a woman of unimpeached honor and virtue, it was a letter to her husband as well, as the first impulse of every such married woman would be, as was the first impulse of this married woman, to send her husband and lawful protector to punish the would-be seducer who had cast his lewd eyes upon her across their dividing fence. If the intimation to the married woman that she had opened this correspondence, the object of which was to accomplish and conceal an adulterous intercourse with the writer, was other than such words as the statute contemplates, then the statute is a vain thing. Such words are insulting, and certainly tend to violence and breach of the peace, within the meaning of the statute. To render insulting words actionable they need not be spoken in the presence of a third person, and to render written words which are insulting actionable it is not necessary that they should be published to the world. If they are such, and are so used as to tend to violence and breach of the peace, they are by the law made actionable, and such action must be tried by a jury, and must be heard upon its merits, for 'no demurrer shall preclude a jury from passing thereon.' See *Larison v. State*, N. J. Sup. Ct., 36 ALB. LAW JOUR. 77.

In *Settlage v. Kampf*, the Court of Common Pleas of Anglaize Co., Ohio, held that to publish of another that he is a political traitor, a liar, official recalcitrant, nondescript and nincompoop, is not actionable *per se*. The court said: "It may be conceded that if defendant meant that plaintiff was a liar in its worst sense—that he is a common everyday, all the time, willful and malicious liar, that he

deliberately and designedly falsifies in material matters in all the relations of life, in his business, social, religious and political relations—the charge is *per se* a libel. But if he meant that he was unreliable in a political sense, or in a particular personal matter, or that he advocated false doctrines in theology or politics, it would not be so. A traitor is one who violates or disregards his allegiance. It may mean a man who commits treason by betraying his country into the hands of its enemies, or one who has thrown off his allegiance to a political organization. To falsely charge the first would be a libel; while to charge the latter would, in some cases, be to exalt, glorify and popularize the person charged. Here 'political traitor' is alleged in the petition. An 'official recalcitrant' is an officer who kicks backward, one who objects, shows repugnance and refuses to follow. He may be a disagreeable kind of a fellow, but not infamous. 'Nondescript,' if intended to be applied to plaintiff, would indicate that he is a bewildering, indescribable kind of a person, which fact would not necessarily lower him in the estimation of the public. 'Nincompoop' means a silly fellow, a blockhead. It is the opposite of a philosopher, and is only one way of saying the plaintiff is not a statesman. Of course it is very annoying and inconvenient not to be a statesman, but there is nothing in it that has a tendency to disgrace and degrade. Upon the whole the conclusion reached is: The words employed by the defendant in his tirade against the plaintiff are very plain and vigorous English, are not at all complimentary to the plaintiff, but they are believed not to be *per se* libelous."

COVENANT IN RESTRAINT OF TRADE—"SO FAR AS THE LAW ALLOWS"—PUBLIC POLICY—REASONABLENESS.

ENGLISH COURT OF APPEAL, AUG. 9, 1887.

DAVIES V. DAVIES.\*

A father and two sons carried on business in partnership as galvanizers and galvanized iron manufacturers at Wolverhampton, with an office in London. By a deed of the 11th October, 1884, entered into upon the dissolution of the partnership, J. D., one of the sons, sold his share in the capital and good-will of the business to his father and brother for valuable consideration, and covenanted "to retire wholly and absolutely from the partnership, and so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act or deal in any way so as to either directly or indirectly affect" his father and brother. The business was subsequently assigned to the plaintiff company. In 1885 J. D. commenced business in Old street, Shoreditch, in the county of Middlesex, in partnership with a former agent and traveller to the original firm, as galvanized iron manufacturers and merchants; but they did not themselves galvanize goods. The plaintiff company having brought an action to restrain the alleged breach of the covenant—  
Held, that the covenant to retire from the business "so far as the law allows" was too vague to be enforced by the court.

\* 58 L. T. Rep. (N. S.) 209.

Held also, that the covenant not to trade, act or deal so as to either directly or indirectly affect the father and brother was personal to them, and their assignees of the business could not sue upon them.

**ACTION** for injunction. The head-note states the case. The injunction was granted below.

*Barber, Q. C., Cock, Q. C., and Russell Roberts, for appellant.*

*Warmington, Q. C., and C. Walker, for plaintiffs.*

**COTTON, L. J.** This is an appeal by the defendant against a judgment of Kekewich, J., which enforced by injunction a covenant contained in a deed which was executed by the defendant shortly after he separated from his father and his half-brother, who is one of the plaintiffs, on the dissolution of the partnership, the defendant assigning to them all his interest in the business, including the good-will. The other plaintiff is the company which has bought from the co-plaintiff, the half-brother of the defendant. It was argued that it was a question of considerable importance, and so I think it is; and there are many questions which arise as to whether we ought to enforce, or can enforce, a covenant like that which is contained in the present deed. I need not refer to any thing else than the deed. It is a deed in which both parties covenant one with the other, and then there follows the covenants applicable to each. The particular covenant on which the defendant is sued, and which is his covenant, is this: "James Davies to retire wholly and absolutely from the partnership, and so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said Edward Davies" (that is his father) "and Edward Albert Davies" (that is his half-brother). Now of course there is no difficulty about the covenant to retire absolutely from the partnership, but what follows is the point on which the first question arises, and as I understand, it is substantially the branch of the covenant in consequence of which Kekewich, J., granted the injunction. I should state that the partnership, having been carrying on business partly in London and partly in Wolverhampton, the defendant, shortly after the dissolution, joined one who had been formerly connected in business with the partnership, and proposed to start a business somewhere in London. The injunction was to restrain him from carrying on business there, not defining what place would or would not be within the covenant, but to restrain him from carrying on business there, and then also restraining him from acting in violation of the second branch of the covenant, the words being, "that he be restrained from carrying on the business of galvanized iron manufacturers at 380 Old street, in the county of Middlesex, and also from trading, acting or dealing in any way so as either directly or indirectly to affect the plaintiff Edward Albert Davies or the company in such business." I will deal first with the first portion of the covenant, on which, as I understand, Kekewich, J., has acted, and I must say that there is an example here which ought not to be followed. Where parties have entered into an agreement to execute a deed to contain certain covenants, they ought certainly to work on their agreement, and not to come to the court simply to construe what was intended to be an executory agreement. For what we have here is this: the court is not asked to order performance of what was an agreement originally by directing a proper deed to be executed, but we have to decide a question of construction, to say what is the proper effect of this covenant, and for my part I shall decline, when the matter comes before us in this way, to treat it as executory, and to see how and in what way the court

would direct an agreement with these words in it to be construed. That is not the ground on which I intend to decide this case. Is this covenant one which the law will allow? That is the point I intend to take. It was said that this is a contract to retire from the trade or business in all its branches if and so far as the law allows. Now in my opinion, if that is the covenant, the law does not allow it, because if that is so, it is an absolute covenant to retire from this trade or business; that is to say, it is an absolute restraint upon the defendant during his life-time from carrying on anywhere within England the business in which he was engaged. Kekewich, J., held that in consequence of the change of circumstances which now exist in England, the old rule which was laid down from very early times, that covenants in restraint of trade are bad, was no longer to be considered as the law of the court, and after the discussion which has taken place, and with my view of this covenant, we must consider that question. Now that that was the old law is undoubted, and in the Year Books in the reign of Henry V there was a case which laid down generally that covenants in restraint of trade are bad (2 Hen. 5, Term. Pasch. pl. 26), that it is contrary to public policy, and contrary to the interests of the public, that any man should be restrained from carrying on an honest business for his own advantage, and for the best advantage of the public. That was originally so said, but undoubtedly to some extent that has been modified; and in the first instance it was modified in this way, that partial restraints might be good. Even when that was established, it was first of all said that the court must, when it is asked to enforce such a covenant, see whether the consideration was sufficient. Now that is gone; because if there is a valuable consideration, then the court will not consider, but will leave the parties to consider, whether that consideration is or is not sufficient. Then the courts have done this. Where there has been a partial restraint only the court has gone into the consideration as to whether that is reasonable—namely, whether it is reasonably required for the protection of the party with whom the covenant is entered into. Then has it gone further than that? It is said that there are cases which have laid down that the only thing to be considered in judging whether these covenants can be enforced or not, and whether they are valid or not (for it is not only a question of equity), is to see whether they are reasonable. Mr. Warmington contended that the reasonableness required had reference to what was reasonably necessary for the protection of the covenantee; and it is very probable that the first rule which I mentioned, that absolute covenants in restraint of trade are bad, was established on the ground that they are not reasonable; and in that sense it may be that what we have to consider is whether they are reasonable. But in my opinion, if we look at the cases on which Mr. Warmington relied, there is this to be observed, that where there has been a limited restraint, and a limited restraint only, then the court has considered, with reference to the validity of that covenant, whether though the restraint is limited, the restraint is reasonable; and of course that must come in, even stating the rule as I have endeavored to do, namely, that an absolute restraint is bad, and that a limited restraint may be good, provided that the restraint is reasonable only and such as was required for the protection of the person with whom the covenant is entered into. If one looks and sees what are the cases which have been referred to by Mr. Warmington in argument, I think it will be found that they really are cases where the judges, though admitting the general rule, and sometimes doing so expressly, have considered as regards a partial cove-

nant which was before them whether the case was one in which the restraint was reasonable. I think the first case to which he referred, or the first case to which I intend to refer, is *Hitchcock v. Coker*, 6 A. & E. 488. That case got rid of the rule of inquiring into the sufficiency of the consideration, but in other respects it dealt with the question whether the particular restraint in that case was reasonable or not. The case was twice considered, once before the Divisional Court and then again in the Exchequer Chamber. There the covenant was of the most limited description, because it purported to restrain the defendant from carrying on his business at Taunton, or within three miles thereof. It was most limited as regards space, and therefore the observations of the judges which are relied on must be considered with reference to that covenant, and not generally with reference to covenants which are not so limited. What Tindal, C. J., says is this (6 A. & E. 456): "We cannot therefore hold the agreement in this case to be void merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction." That I think introduced what I may here mention, that undoubtedly now, if a covenant is in any way limited, either sufficiently as regards space, or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint, and then the question as to whether that limit is reasonable will come into consideration. Now that case was decided in the year 1837, and to my mind it showed no departure at all from the old rule, unless it was a departure from the old principle of considering the sufficiency of the consideration. I will not go through all the cases, but we find afterward *Mallam v. May*, 11 M. & W. 653, and there we have the rule laid down, as I understand it, most clearly by Parke, B. In that case, which was heard in the year 1843, he says (11 M. & W. 664): "The rule as laid down by Lord Maclesfield and Willes, C. J., is that total restraints of trade which the law so much favors, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad." That I think has been modified to this extent, that the presumption is not that such a covenant is bad, but it is rather for the court to consider whether on the facts it is or is not bad. Then he proceeds: "But if the circumstances are set forth, that presumption may be excluded, and the court are to judge of those circumstances, and determine whether the contract is valid or not." Then he refers to *Mitchel v. Reynolds*, 4 P. Wms. 181, and he quotes it undoubtedly not as his own opinion, but as expressing the rule that is laid down by earlier judges; he does not in any way deal with it as a rule which is departed from, although there has been a very great alteration in the circumstances of the kingdom between the year 1843 and the time when *Mitchel v. Reynolds* was decided. Then Parke, B., continues (p. 666): "Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced." And that is what he was considering when he entered into the question as to whether or not in that particular case the restriction was reasonable or not. I have passed over several cases in which there have been these considerations, but all of them are cases where there was a partial restraint to be dealt with, and the judges were applying their minds, not to the general rule, but to the general rule as applicable to restraints so limited. But then it is said that not only are there these expressions of opinion, which I think in their application were misunderstood, but that there is authority which now

leads to the conclusion that the old rule is gone, and is a thing of the past. Now what were those cases? I will take them in chronological order, because I think that is probably the best way of dealing with them. *Whittaker v. Howe*, 3 Beav. 383, before Lord Langdale, was first in date, and undoubtedly that was a strong case, because it was an absolute covenant to restrain a solicitor from practicing within the kingdom for a period of twenty years. I doubt myself whether the time was not so large there that it ought not to be considered as a limited covenant. It was treated by Lord Langdale and considered by him as a covenant limited, and therefore it was open to him to consider whether the limit was a reasonable one. He held that it was, but that does not show a departure from the general rule. The next case is *Leather Cloth Co. v. Lonsont*, 21 L. T. Rep. (N. S.) 661, before James, L. J., when vice-chancellor. That undoubtedly was a strong case, having regard only to the expression used by the learned judge when he decided the case; but in fact what really was in contest there was a contract as to the divulging of a trade secret, and the covenant not to carry on the trade was only connected with and in order to give effect to the contract not to divulge the trade secret, and although he does make general observations in his judgment, yet in my opinion the case must be considered, so far as it is a decision, a decision only on a contract applicable to a trade secret, and not to a covenant generally in restraint or in prohibition of trade. I find that Wickens, V. C., in *Allsopp v. Wheatcroft*, 27 L. T. Rep. (N. S.) 372; L. R., 15 Eq. 59, treats that case before James, V. C., as being the case of a trade secret, and not as an ordinary case of a covenant to restrain trade. What he says is this (27 L. T. Rep. [N. S.] 372; L. R., 15 Eq. 14): "No doubt in the case of the *Leather Cloth Co. v. Lonsont*, James, L. J. (then James, V. C.), threw some doubt on the existence of a hard-and-fast rule which makes a covenant in restraint of trade invalid if unlimited in area, but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trading was only a consequence of a clearly lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis v. Day*. Assenting as I do to every thing that was said in the *Leather Cloth Co. v. Lonsont*, I can hardly treat it as authorizing me to depart from the recognized rule as to limitation of space in a case so different from it as the present is, and unless that rule be departed from, the covenant here is clearly bad." Wickens, V. C., on whose opinion I lay great store, not only treats it as I do, but what is probably more important, he treats the old rule in the year 1872 as still subsisting, and as the law of the court. I may observe here, with reference to that observation of his, that the covenant was limited, that it really was limited to the period during which certain patents, the right to obtain which throughout Europe was granted to the plaintiff, were to last, and it may be that it was limited in time, though not in space, in such a way as to make it a limited and not a general covenant. With great respect to the late James, L. J., if he intended to express his opinion that the cases had authorized him to say that on the ground of policy the old rule had been departed from, I think he could not have sufficiently considered what that was to which the observations of the judges relied on by Mr. Warmington were addressed, viz., not to the general question as to whether absolute covenants were good, but to the question whether limited covenants were, in the particular cases, good. It is clear that Wickens, V. C., was not aware that the old rule had been de-

parted from, and his view was confirmed by what was said in *Collins v. Locke* by Sir Montague Smith when giving the decision of the Privy Council, because what he says (41 L. T. Rep. [N. S.] 204; 4 App. Cas. 686) is this: "Numerous cases which have been decided on this subject" (covenants in restraint of trade) "are collected in the note of *Mitchel v. Reynolds*, in the first volume of Smith's Leading Cases (7th ed.), p. 408. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration and are reasonable." He clearly therefore lays down the two things that are necessary; they must not be unlimited; and then also if they are limited there is the further question to be considered, viz., whether even having regard to the limit, they are reasonable; and in my opinion that old law, notwithstanding the opinion of Kekewich, J., of the change which has taken place in the country, still ought to be recognized and regarded by us as the law, and ought not to be departed from by us. If any one is to do it, it must not be this court, but the House of Lords. Then if that be so, and the covenant bears the construction which at one time was contended for by Mr. Warmington, in my opinion the covenant is bad, because the law does not allow an absolute covenant to give up trade. I need not go into the reasons why that is so, but there are plenty of reasons for it. No man ought to be prevented during his life from earning his livelihood by carrying on his trade, and the public ought not to be prevented from the benefit which they may get from a man who is skilled in a trade carrying on that trade. There is one other case which I have omitted to mention in its regular order, but I was diverted from it by that case before Wickens, V. C., and the Privy Council case. I refer to the case which was decided by Fry, L. J. I think undoubtedly he used expressions which showed that he took a somewhat wider view than I do of the law—a looser view perhaps I may say without disrespect. In that case of *Roussillon v. Roussillon*, 42 L. T. Rep. (N. S.) 679; 14 Ch. Div. 351, there was the limit of time which might have made the covenant a limited one, and not a general covenant in absolute restraint of trade, and if so, it comes within what I think is now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is a reasonable one. About that case I say no more after what I have said on the cases generally. Then it was said here that this is not a general covenant, but "so far as the law allows." What Mr. Warmington said in that part of his argument was, "It is a covenant not to carry on trade within such limits of time and space as the law will consider reasonable." Now construing it in that way, which I hardly think is the right construction, it is a covenant which the court, in my opinion, ought not to enforce. If parties wish to ask the court to assist them in restraining those with whom they are dealing from breaking a limited covenant against carrying on a trade, they must, in my opinion, themselves fix the limits within which there is to be no carrying on of the trade, and then they do it at their peril. The law will determine whether that limit is a good one, or whether it is one which is so unreasonable that the covenant must fail. It is entirely different from the covenant to settle property in a certain line of family "so long as the rules of law and equity will allow." There are certain definite rules laid down as regards the limitation of property which will prevent it from being so settled as to exceed the rules against perpetuities, and those are definite fixed rules. There is no definite fixed rule as to the limits within which trade can be restrained. That

must depend upon the circumstances of each case, and in my opinion, it is wrong to make a covenant in this form, and wrong for the court to enforce it, because one sees at once what difficulties will arise if an injunction is granted. Kekewich, J., has said that carrying on business in Old street, in the county of Middlesex, is within reasonable limits, but he has not defined what else will be so; and are we again and again to have this question to arise on the covenant where the parties have left the covenant entirely indefinite, and have sought to get the court, without risking the validity of their covenant, from time to time to say whether a particular space and a particular time is within the limits? In my opinion, if one looks at it in that which is the modified form, the answer to it is this: There are no limits fixed by law which can be regarded as introduced into this covenant. A covenant in this form, indefinite as it is, in my opinion, is one which neither a court of equity nor a court of law ought to enforce. The parties must make up their minds to say what they agreed to as regards the limits of time or space within which there is to be no trading. Then one comes to the second branch of the covenant, on which Kekewich, J., to some extent acted, though as I understand his judgment, he principally relied on that which I have been already discussing. This is the stipulation "not to trade, act or deal in any way so as to either directly or indirectly affect Edward Davies and E. A. Davies." Mr. Barber did not argue the point, because he thought it was covered by a previous decision of the Court of Appeal (*Jacoby v. Whitmore*, 49 L. T. Rep. [N. S.] 335), but in my opinion, there is one great objection to enforcing this covenant: that I do not think it is a covenant the benefit of which would pass with the good-will to the purchaser, the company. The case to which he referred was a case where there was a contract not to trade within certain limits. That was evidently a covenant in order to protect the business and the good-will of it, and therefore it was one which would pass with the good-will to a purchaser of the good-will; but there is no such absolute covenant here, and to my mind it is a covenant which points to the personal benefit of the father and of the half-brother rather than to any protection of the good-will. So far as the parties intended, the good-will was defended by the previous covenant in restraint of trade, which in my opinion was an invalid covenant; and this could not be intended as an addition to that which in their minds was absolutely provided for, but as something which the son and brother should covenant for the benefit of his father and half-brother personally, and not that which was to affect the trade which he had parted with to them. In my opinion, having regard to the great indefiniteness of this covenant and to the fact that it is not one which the purchasers from the surviving son would be entitled to say passed to them with the good-will, no relief ought to be granted on that branch of the covenant either. In my opinion therefore the action fails, and ought to be dismissed.

BOWEN, L. J. We are asked to enforce the covenant which the lord justice has read, which divides itself into three parts. The first part is an agreement that James Davies is to retire wholly and absolutely from the partnership; the second, that so far as the law allows, he shall retire (I incorporate the words "he shall retire" from the previous section), or else that he shall undertake to retire (because it is immaterial to my argument which of these reasons is adopted) from the trade or business thereof in all its branches; and the third part of the covenant provides that "he is not to trade, act or deal in any way so as to either directly or indirectly affect Edward

Davies or Edward Albert Davies." Now with regard to the first part, that he shall retire from the partnership, there is no question that that is both a covenant which may be made lawfully, and that it has been performed in the present instance. The difficulty arises with regard to the two further parts of the covenant which I have endeavored to divide, and I will take them separately. First, with regard to the provision that "so far as the law allows, he shall retire, or undertake to retire, from the trade or business thereof in all its branches." At first sight that would appear, and I think it must be, equivalent to a covenant either to retire absolutely from the trade altogether, if the law allows such a covenant to be made, or if the law does not allow such a covenant to be made, it must be a covenant to retire from the trade so far as the law permits of such an undertaking. If it is to be construed in the first of those two ways (a covenant absolutely to retire altogether from the trade or business) it seems to me to be against the common law for this reason. The principle of the common law as to covenants in restraint of trade which are unlimited altogether, whether in space or time, is that such covenants are void—they cannot be enforced. That was laid down as early ago as the Year Book of 2 Hen. 5, which was followed in the reign of Elizabeth, and which is alluded to in *Ipswich Taylor's* case, 11 Rep. 54a. This is what the court says in the *Ipswich Taylor's* case, that at the common law no man can be prohibited from working in any lawful trade for these reasons, that it is according to the wish of the law that all should learn and practice lawful trades and sciences which are profitable to the Commonwealth, and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade. Then the court proceeds to consider the case in 2 Hen. 5, and they say that "for the same reason, if a husbandman is bound that he shall not sow his land, the bond is against the common law; and the statute of Elizabeth, which prohibits every person from using or exercising crafts or occupations until they have been apprentices, was enacted not with intent of preventing trade, but with the intent of encouraging education in trade. "Therefore," says the court, "it appears that without an act of Parliament none can be in any manner restrained from working in any lawful trade." That language of course must be taken with reference to the subject-matter, but still I use it as showing that broadly the law sets its face, subject to exceptions, which I shall have to consider, against restraints of trade. That is laid down in *Mitchel v. Reynolds*, a case which may be said to be the foundation of the recent decisions upon the point. Now there may be limitations which are to be found in the covenants, on the strength of which it is sought to escape from this general doctrine. There may be such limits in time, and it has also been the view of the courts that a limit in time is not indispensable in order to enable the covenant to be enforced where there is some other limit to be found which makes the covenant reasonable and necessary for the protection of the party who seeks to protect himself, and these cases I need not discuss further. Then we come to another limit which may be found, a limit in space, and as yet I think that there has been no decision that you may have a covenant unlimited in space altogether, unless in the case of special limits which form the third class of limit—the limit which is to be found in the special case, in the special character of the subject-matter which is sought to be protected. The last or third kind of limit is a kind of limit which I think James, V. C., thought he had found in the case of the *Leather Cloth Co. v. Lonsont*, though in that case also, as the lord justice has pointed out, there may also have been found a limitation in time. Now we have

been asked by Mr. Warrington, in an extremely able argument, first of all to hold that limitation in space is not necessary if you can find that protection through an unlimited area of space is reasonably necessary for the protection of the covenantee. But Mr. Warrington has not confined himself to that minor proposition; he has also gone further and asked us to consider generally whether the state of circumstances, the change in the character of the business of the world, the extension of the means of intercourse between one part of the kingdom and another, and one part of the world and another, has not shaken to its core the original doctrine that covenants unlimited altogether ought not to be enforced. It appears to me that if there is to be any change made in the principle of the common law to which I have alluded, and which has remained unassailed for centuries, it would better come from the House of Lords than from ourselves; but if there was to be an exception engrafted on the rule, or the rule was to be modified with reference to the requirements of modern society, as to which I will for the moment express no opinion, it could only be if the case in question ranged itself under one of two heads: either that the covenant in its unrestricted form was one which was a benefit to the public, in which case it might be said that that would destroy the reason for insisting on the old rule which was derived from the public policy of the kingdom; or secondly, if it was reasonably necessary for the protection of the covenantee. In the present case, it seems to me that we have got no materials upon which we can, without leaping in the dark, assume that the present covenant is a benefit to the public, for there is nothing to my mind which shows that the public would be benefited by allowing such a covenant as this in this case to be enforced, nor have we the materials for deciding that such a covenant is reasonably necessary even for the protection of the covenantee. It appears therefore to me that it is not necessary in the present case to consider or to decide whether what I have called the old doctrine of the common law, that covenants absolutely unlimited both in space and in time, ought to be modified, having regard to the altered character of the commercial intercourse of the world. We ought to leave that to be discussed on an occasion when the facts really raise the point. For the same reason, it appears to me, that we are not bound in the present instance to decide even that an absence of limit as to space may be excused or may be accepted, if it is reasonably necessary for the protection of the covenantee, because there is nothing here which shows that it was reasonably necessary for the protection of the covenantee. For that reason, without denying that I have an inclination to think that the rule of the common law is too much ingrained in our history to be changed at this moment, at all events except by the highest court in this country, I do not decide it because it seems to me the materials do not enable us to decide it. If therefore the part of the covenant which I am now discussing, which is that James Davies is to retire so far as the law allows from the trade or business in all its branches, is to be interpreted as meaning an absolute covenant, and we are asked to hold that the law will allow in such a case such a covenant to be made, I say there are no materials here to which we could attempt to apply the modification of the general principle which Mr. Warrington asks us to accept, of the old rule of the common law. But then if we are to read on the other hand this branch of the covenant as something short of that if it only means that the covenant in restraint of trade is not to be unlimited, but that the limit is to be found by an appeal to the law, then it seems to me that the obvious answer is that that covenant is too vague for us to deal with. I think myself it would have been too



vague, even if it remained in the nature of an executory contract to execute a deed in that shape. The parties would still be asking the law to do for them what they had not made up their minds about themselves. In fact they would be asking the law to make a contract instead of making a contract themselves. But in any view it seems to me that this covenant is too vague. It is said that this is a covenant that Davies will retire so far as the law allows, and that we are to ask the law what is to be the restraint imposed upon the generality of the covenant. The law is absolutely incapable of answering a question so put. It is perfectly true that in many contracts where you want a measure to be applied to a particular subject-matter, you leave the measure to be supplied by reason. There is many a contract, for example, which instead of fixing the particular time for payment, provides that the time is to be fixed by what is reasonable in the trade or in the business. In those cases you introduce the consideration of what measure reason will apply, because the measure which reason will apply tends toward certainty, and therefore enables you to make up for the absence of distinction on the part of the contract by reference to a standard which the parties had in their minds, though they did not express it on paper, viz., the standard of reason. But in the present case, what we are in search of is some definition which would limit what otherwise is a pure negative. In such a case as that you cannot invoke reason to put a limit upon a mere negative. You cannot get a measure out of it at all, and whatever reason says about it, you remain still in want of the definition which is necessary to make the covenant a restricted one. The most obvious proof of the truth of that proposition is to recall to one's mind this, that supposing the law will allow certain restrictions, there may be twenty different restrictions, all of which might serve the purpose of the parties, all of which would be absolutely inconsistent with each other, all of which the law would allow. How are we to know which of those particular restrictions the parties intended to impose? They leave it absolutely uncertain, and for the best of all reasons, because they had not made up their own minds. Therefore to ask us to apply reason at this particular point is to ask us to condescend upon some one of the twenty possible alternatives, although the parties themselves could not make up their minds which one they would take. A contract to do nothing that is unreasonable contains in itself no limitation, because there may be a hundred different reasonable causes, all of which are inconsistent with one another. The law of England allows a man to contract for his labor, or allows him to place himself in the service of a master; but it does not allow him to attach to his contract of service any servile incidents—any elements of servitude as distinguished from service. What sort of position would a contracting party place the court in who made this sort of contract for himself, "I will undertake to serve you in every possible way which the law does not consider repugnant to the doctrine that servile incidents are not to be imposed upon a party." That is too vague. It gives you no sort of measure of service. In the same way contracts in restraint of marriage are void except in certain specified cases, where for instance, a definite period is imposed for the sake of the health of one of the parties. How could a man contract that he would never marry, subject always to such limitations as the law imposed? It would leave the contract absolutely vague. You would not know what he meant. For the same reason, if you read this contract in the secondary sense as an attempt to make a contract in partial restraint of trade, the answer is, we do not know what the parties mean. On that ground it seems to me that that part of the

contract cannot be enforced. Then we come, lastly, to the third branch of the covenant, that James Davies is "not to trade, act or deal in any way so as to either directly or indirectly affect"—whom? Edward Davies and Edward Albert Davies. I doubt myself if that contract is not in restraint of trade—if it is not an absolutely unrestricted covenant in restraint of trade in one view put upon it; and if so, I think it is bad, for the same reason, as I said before, with regard to the earlier branch of the covenant. But to read it in a less offensive or less rigid way, suppose it means, "not to trade, act or deal in any way so as to affect Edward Davies and the plaintiff Edward Albert Davies in their business," it is a covenant that seems to me to be personal to E. Davies and E. A. Davies, and cannot be assigned. It is perfectly true that there is a class of covenants in restraint of trade which would affect established businesses which can be assigned. For instance, a covenant not to carry on business in a particular street, or in a particular town, may pass by assignment to the assignee of the business; but if the contract, in its nature on its true construction, is a personal one, then it cannot be assigned. The rule of law is plain; you cannot assign the benefit of covenants which are purely personal. I think this is a purely personal covenant, and it cannot therefore be assigned, and cannot be enforced by the present plaintiffs. On these grounds, it seems to me, with regret, that one must differ from Kekewich, J. As I said before, as far as I am concerned, I leave undiscussed and unsettled the great question as to how far modern changes in commerce affect the old doctrine of the common law.

FRY, L. J. In this case we are called upon to enforce, by way of injunction, and by assessment of damages, a covenant contained in an executed contract. We have not before us an agreement which is intended to be afterward developed into a deed, but we have a solemn and formal deed executed between the parties which contains this covenant. We are told, and I have no doubt with perfect truth, that the history of it is this: That the formal covenant which we have to construe was part of an earlier executory and informal contract, and that the parties to it, not being able to develop that contract satisfactorily between themselves, inserted in the formal instrument the very words which they had used in the informal one. That does not enable us to construe the covenant in any manner other than as a formal and an executed contract. Now the covenant consists of three parts. It is, first, that James Davies is to retire wholly and absolutely from the partnership; with regard to that no question arises. Secondly, James Davies is to retire (for thus I read it), so far as the law allows, from the trade or business thereof (that is, of the partnership) in all its branches. And thirdly, James Davies is not to trade, act or deal in any way so as to either directly or indirectly affect Edward Davies and E. A. Davies. I deal first with the second branch of that covenant—that James Davies will, so far as the law allows, retire from the trade and business of the partnership in all its branches. I think that covenant is too vague to be enforced. I think the object of the contracting parties was to leave the law to make the contract between them. I think that it is the function of courts of law to interpret contracts—to say whether a contract is or is not reasonable, to say whether it is or is not void; but it is not the duty of the courts to make contracts between parties. Whether those words would be capable of development if the court had directed an instrument to be executed to carry them into effect is a point upon which I need not express any decided opinion. I entertain the greatest doubt whether the court could

possibly be called upon to interpret such words. The reason why I come to the conclusion I have stated is this: That whatever else may be in doubt about contracts in restraint of trade, this is plain and undisputed, that no contract in restraint of trade which is unreasonable, which is larger than is necessary to protect the interests of contracting parties, is good. Now it appears to me that there may be a hundred forms of contract, each of which might be reasonable, and might therefore be good, but that the law cannot select which of those hundred is to be the contract between the parties. Let me assume for one moment (as is probably the case) that it is necessary in order to make this contract reasonable that there should be some limit in space. Is Wales to be left out, or the eastern counties, or the southern counties, or the northern counties? No human being can tell. That is a matter which ought to have been settled between the contracting parties. So again if a limit of time be necessary in order to make the contract reasonable, the court cannot lay down what length of time is requisite. When the parties to the contract have settled all those matters between themselves, then the court can attend to the suggestions of those who say that looking at all the particulars of the contract, the contract is or is not unreasonable. I repeat that the substance of this document seems to me to throw upon the court the making of the contract between the parties. For that reason I think it is too vague to be enforced. I have come to the conclusion which I have stated without reference to the larger question, which has been so much debated in the course of this argument, but which, in my judgment, does not require adjudication from us on the present occasion. Therefore I shall not express any decided opinion upon it. I think however that it is not unreasonable that I should add that the inclination of my mind is still in the direction in which it was when I decided the case of *Roussillon v. Roussillon*. I think that the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all times. It would be strange, and I think it would be unreasonable, if a contract which might now be for the public benefit were held to be void, because in the reign of Henry V or in the reign of Elizabeth that contract was contrary to public policy. It is impossible to look at the history of the law, and not to see that contracts which at one time were deemed—and I dare say justly deemed—to be contrary to public policy, at another time are deemed to be consistent with public policy and for the public benefit. A forcible illustration of that fact is furnished by the very case which is the foundation of this branch of the law, the case in 2 Hen. 5, which excited the indignation of Hull, J., in a manner which has made his name immortal in the books. As has been pointed out by Lord St. Leonards, the general principle that a contract in restraint of trade which is unreasonable is void, is still the law, but the particular conclusion at which the judge arrived—that that particular contract was against public policy—is entirely at variance with modern decisions. What Lord St. Leonards said in *Egerton v. Earl Brownlow* was this: "Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself upon grounds of public policy to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint created in that way with a particular object is now perfectly legal. Without any exclamation of the judge, and without any danger of prison, any subject of this

realm may sue upon such a condition as Hull, J., was so very indignant at in that particular case." The same observation applies to the case of *Michel v. Reynolds* with more or less force, because although that case is certainly perfectly sound as regards its great principle, viz., that contracts in restraint of trade which are unnecessarily large are void, yet there can be no doubt that that decision has been more or less affected by the course of the law since. In that case it was considered that the adequacy of the consideration was a matter to be investigated by the court. The courts have since repudiated their capacity to investigate that point. The law as laid down in that case created a presumption of invalidity as against the contract. That burden of proof has since been shifted as soon as it has been shown that the contract has been entered into for the protection of the interests of one of the contracting parties, and therefore I repeat, although that case in its broad features is still undoubtedly the law, the law has grown since that case. I may be wrong, but it appears to me that the ground on which in that case it was said that the condition must be partial in point of space was clearly expressed by the learned judge when he said: "It can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime." The judge who decided that case seems therefore to have thought that a total restraint could never be necessary for the protection of the parties. If he was wrong in that assumption it would be a matter for future inquiry how far the limit which he created or imposed on that ground is or is not binding on the courts at the present day. I should not have made these observations had it not been that my learned brethren have thought it desirable to express their views without giving any decision upon this point. [COTTON, L. J. I meant to decide the question.] I desire not to decide it, but to say that I think the inquiry is still one which is open and worthy of great consideration whenever it shall come up for decision before the courts. What I mean to indicate is this, that I am not convinced that there is any other rule of limitation except that the contract shall not be unreasonably large. If it be more than reasonably large, then it tends to a monopoly without any corresponding good to the parties. If on the other hand it is not larger than is reasonable, it still seems to me that it would be remarkable that something else should be imposed on the contract, so that the contract would be required to be not only reasonable, but something more. I rather incline to think that every reasonable contract ought to be enforced. Then leaving those observations, which after all are only by the way in my decision, I come to the last branch of the contract, which is that James Davies is not to trade, act or deal in any way so as to either directly or indirectly affect Edward Davies and E. A. Davies. In order to construe those words we must have regard to the position of things between the contracting parties. James Davies was a son by the first marriage of Edward Davies. Edward Davies was carrying on the business with his younger son Edward Albert Davies. The assignment of the good-will had (as was pointed out by Mr. Warmington) an implied contract for quiet enjoyment of the good-will. We have therefore, before we arrive at this covenant, a covenant for the quiet enjoyment of the good-will, a covenant to retire from the business, a covenant to retire from every branch of the same business which the partnership carried on. Now the covenant for quiet enjoyment has not been sued upon. Therefore we have not to consider it except for the purpose of construction, but I am bound to give to this last covenant some real meaning in addition to all the previous covenants. I think therefore

that it is something more than retiring from the business of the partnership and not carrying on any branches of the same business. I think, that popularly speaking, it means this—that as long as the father and the half-brother are connected together, James Davies will not in any way annoy or interfere with them, but I think that is a contract not relating to business only, but relating to the two Davises so long as they have any common interest. I think it is therefore one which does not pass with the business, and which cannot be broken after the death of Edward Davies. But further than that, I desire to say that the contract appears to me to be couched in such vague terms and doubtful words that I think it can be enforced neither at law nor in equity. Mr. Warmington, who undoubtedly felt the difficulty in the way, asked us to separate the words "directly" and "indirectly," and to hold, if the covenant could not be enforced with regard to conduct having an indirect effect on the Davises, that it might with regard to a direct effect. But that construction is not open in this case, because those words, "either directly or indirectly" are only an amplification or explanation of the affirmative words, "in any way." Therefore we have a contract not to trade in any way to affect the two Davises, not to act in any way to affect them, and not to deal in any way to affect them. I think that no such vague and general covenant which is not, even in terms, confined to affecting them injuriously could be enforced. For these reasons I am unable to concur in the conclusion arrived at by Kekewich, J., and I think that this action ought to have been dismissed with costs, and must now be dismissed with costs here and in the court below.

COTTON, L. J. As Fry, L. J., misunderstood me, I think I had better state (what I thought I had done) that my first ground for deciding that the previous clause of this covenant is bad, is that it is in restraint of trade generally, which in my opinion the law holds to be bad. The law does not allow that, and therefore it is not covered by that expression, "so far as the law allows."

#### CONSTITUTIONAL LAW — DUE PROCESS — CONFINEMENT FOR DRUNKENNESS.

SUPREME COURT OF WISCONSIN, FEB. 23, 1888.

##### STATE V. RYAN.

A statute providing that "any person charged \* \* \* with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of a court of record for trial; \* \* \* and if convicted \* \* \* shall be sentenced to confinement in any inebriate or insane asylum in this State; \* \* \* provided that some relative or friend \* \* \* shall execute a bond conditioned that he will pay for the support of such inebriate \* \* \* during his confinement," is in violation of the Constitution of the United States, amend. art. 14, § 1, which declares that no State shall "deprive any person of \* \* \* liberty, \* \* \* without due process of law," "deny to any person within its jurisdiction the equal protection of the laws."

ORIGINAL proceeding by *certiorari*.

*Austin, Runkel & Austin*, for relator.

*Jenkins, Winkler & Smith*, for respondent.

CASSIDAY, J. The relator's right to a discharge depends upon the validity of chapter 194, Laws 1887, under which he was arrested, tried, convicted and sentenced to confinement for the period of two years. This act is certainly anomalous. It is entitled "An

act relating to inebriates and habitual drunkards." The language of the act however leaves it somewhat doubtful whether it should be regarded as penal or paternal. If it is to be regarded as penal, then its validity would seem to turn upon widely different considerations than though it were paternal; and if it is to be regarded as paternal, then its validity would seem to turn upon widely different considerations than if it were penal. It reads: "Any person who shall be charged upon the complaint of another with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of a court of record for trial in the same manner that offenders may be arrested and brought to trial before a justice of the peace; and if he shall be convicted of being an inebriate, habitual or common drunkard, he shall be sentenced to imprisonment or confinement in any inebriate or insane asylum in this State, for a period not exceeding two years, nor less than three months: provided however that before such sentence some relative or friend of such inebriate, habitual or common drunkard shall execute a bond in the sum of \$1,000, with sufficient surety, to be approved by such judge, to the State of Wisconsin, conditioned that he will pay for the support and treatment of such inebriate, habitual or common drunkard during his imprisonment and confinement."

1. Is it penal? and if so, is it a valid enactment? The words "charged," "arrested," "for trial," as "offenders," "convicted" and "sentenced to imprisonment or confinement" "for a period" to be definitely fixed, would seem to indicate an intention to make it a criminal offense to be "an inebriate, habitual or common drunkard," under any and all circumstances. The police powers of the State are certainly not only sweeping but potential when legitimately exercised. According to the more recent utterances of the Supreme Court of the United States, even the late amendments to the Federal Constitution were not "designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." *Barbier v. Connolly*, 113 U. S. 31, per Field, J. This language was expressly sanctioned by Mr. Justice Harlan, speaking for the court, in the very recent case of *Mugler v. State*, 123 U. S. 663. In a recent work on the Limitations of Police Power, it is in effect asserted that there can be no lawful punishment of mere drunkenness, so long as it is concealed in strict privacy, without any exposure to or interference with the public or any individual. Tied. Lim. Police Power, 302. In other words, that strictly private and concealed vice of the individual cannot be lawfully made a public offense. The language of the act in question would certainly admit of such conviction without such exposure of publicity. But we are not called upon to determine whether the act is invalid for that reason, unless we should conclude that the act must be regarded as a penal statute—a question which will presently be determined. If to be "an inebriate, habitual or common drunkard" was intended to be made a criminal offense by the act, then it should have provided for or recognized the right of a "public trial by an impartial jury of the county or district wherein the offense" should be "committed; which county or district" should "have been previously ascertained by law." Section 7, art. 1, Const. Wis. The right to such "public trial" thus secured is manifestly a trial by jury in a court of law, having jurisdiction by virtue of law. The fact that no such trial is given, and no such jurisdiction is conferred or recognized in the act in question constrains us to believe that it never

was designed, and if it was, that it cannot be regarded as a valid penal statute. The act in substance provides that any person so charged "shall be arrested and brought before a judge of a court of record for trial," and if convicted and the requisite bond given, "he shall be sentenced," etc. We understand this to mean any judge of any court of record in the State, even at chambers. True this relator was so brought before the "judge of the municipal court of the city and county of Milwaukee, being a court of record within said county." This is recited in the commitment. So it is recited therein that the complaint so charging the relator, was "addressed to" said judge (naming and describing him) and that "upon said complaint, the said relator was arrested and brought before the said judge (again naming and describing him) "for trial," and that "a trial of such charge" was "duly had before the said judge and a jury, as demanded by the said relator; and that "upon such trial the said relator was convicted of being an inebriate, habitual and common drunkard;" and that upon the bond being given, "the said judge (again naming and describing him) "did, upon such conviction, \* \* \* sentence the said relator "to confinement \* \* \* for the period of two years," etc. There is nothing in the commitment from which it can be inferred that such municipal court took or assumed to take jurisdiction of the matter so charged, nor that such trial was in or by said court. On the contrary it appears throughout the commitment that the judge of said municipal court acted as such judge and only by reason of the authority supposed to be given to him as "a judge of a court of record" by virtue of said act. The same language applies with equal force to a judge of a County Court or a Circuit Court, or even of this court. And yet we apprehend that no one would claim that the Legislature had power to authorize a member of this court to take original jurisdiction in the trial of a criminal offense. Nor could the Legislature lawfully authorize the trial of such criminal offense before and by a judge at chambers. And yet the act gave to the judge of the municipal court, sitting merely as "a judge of a court of record," no other or greater powers than are therein given to any judge of any other court of record, and hence, at most, not exceeding such powers as may be lawfully exercised by any judge of a court of record at chambers. If the Legislature could lawfully authorize the trial of criminal offenses by and before such judge at chambers, then it could effectually leave the person so charged and convicted without any remedy by writ of error, which is only authorized to review final judgments in actions triable by jury as a matter of right. *Crocker v. State*, 60 Wis. 553. But the Constitution provides that in such actions "writs of error shall never be prohibited by law." Id.; section 21, art. 1, Const. Wis. We must therefore conclude that the act was not designed to be a penal statute, and that if it is one in fact, it must to that extent be regarded as inoperative.

2. Is the act in question paternal; and if so, is it a valid enactment? Upon the argument it seemed to be conceded on both sides that the act was designed wholly for the benefit and good of such unfortunate persons as might be liable to such charge. In fact the learned counsel in behalf of such detention likened the act to the early statute of New York, which gave to the Court of Chancery custody and control of the person as well as the estate of an habitual drunkard. *In re Lynch*, 5 Paige, 120. It was there said that such powers of the Court of Chancery were by such statute "put precisely upon the same ground as its powers over the persons and estates of idiots and lunatics." Id. In that case the person in custody had been "found to be incapable of conducting his own affairs by reason of

habitual drunkenness." The chancellor said: "Whenever the court is satisfied she has so far reformed that there is no danger of a relapse, the committee will be discharged and her estate will be restored to her." It was thereupon ordered in conformity to the "decision, subject however to be modified by the vice-chancellor from time to time," as he might judge expedient, etc. Our general statute provides in effect that "when any person, by excessive drinking, shall be unable to attend to business, or shall be lost to self-control, and shall thereby greatly endanger his health, life or property, or shall be an unsafe person to remain at large, or shall by gaming, idleness or debauchery of any kind so spend, waste or lessen his estate as to endanger his own or his family's support, or expose the town to charge or expense for such support," and the proper verified petition setting forth the facts and circumstances of the case be presented to and filed with the County Court; and if after due notice and "a full hearing, it shall appear to the court proper under this section, such court shall appoint a guardian of his person and estate with the powers and duties hereinafter specified. The County Court shall have power to authorize or direct the guardian of any such person named in this section to commit such person to any inebriate asylum \* \* \* for a term not exceeding two years. Such person may be discharged at any time by order of the same court." Section 3978, Rev. Stat. A similar statute is in force in the city of New York, providing also for such discharge whenever the cause for such detention is removed. Knapp's Law relating to the P. I. I. & Habitual Drunkards, pp. 100-102. These statutes all go upon the theory of personal disability or want of self-control, which exposes the victim or others to danger or his estate to loss. These conditions create the necessity of intervention by the State through its authorized agency, as the needed physician—the Good Samaritan—the temporary guardian. The purpose of such guardianship is humane, beneficent and paternal, but the lawful right to its continuance is limited to the period of such disability or want of self-control. Since the only right of such confinement springs from the necessities resulting from such conditions, the removal of the conditions, and hence the necessities, when judicially ascertained, terminates the right. Tied. Lim. Police Powers, 114, 116, § 46, and cases there cited. But the act in question goes upon an entirely different theory. According to it "any person \* \* \* being an inebriate, habitual or common drunkard" may be convicted thereof, and if "some relative or friend" gives the requisite bond, he must "be sentenced to imprisonment or confinement" for a period to be definitely fixed by the judge within certain limits. Such conviction is not made dependent upon his inability to attend to business, nor to any want of self-control, nor upon his being dangerous to himself or others, but solely upon his "being an inebriate, habitual or common drunkard." Just what would make a person such is not very clearly defined. Manifestly it was intended that the drunkenness should be repeated to the extent of becoming habitual, but just how frequently it should occur, or the extent of the delirium or stupefaction is left as a matter of fact to be determined by those who might differ widely in regard to it. Such habit might exist, and yet the victim be kind and generous-hearted, fully capable of attending to his business, gradually increasing his estate, tenderly providing for the wants of any dependent upon him and without at all endangering the personal safety of himself or others. Such may be the condition of this relator for aught that appears in this record. True his condition may be so deplorable as to require confinement under the general statute mentioned or even such as to properly call for punish-

ment. But as we have seen, such is not the purpose of the act in question. The relator has never been convicted of any penal offense known to the law, even before a judge at chambers, much less in any court of law. The purpose of the act is not to guard merely during disability or want of self-control, or danger of personal safety, but to imprison for a fixed period, without the commission of any penal offense or any trial in a court of law, merely by reason of the existence of the condition named, and to satisfy the act and the "relative or friend" who kindly furnishes the requisite bond. Besides the act contemplates no restoration—no possibility of reformation within the time thus arbitrarily fixed. Not having been convicted of any offense known to the law, it would seem that he is beyond the reach of executive clemency. Section 6, art. 5, Const. Wis. From what has been said it appears that the relator stands before the court innocent of any offense known to the law and yet committed "to imprisonment or confinement" for the period of two years, upon a commitment issued by a judge at chambers and without any authorized process from any court of law. If the Legislature may thus authorize imprisonment for two years without the commission of any offense made punishable by law, then it may do so for ten or twenty years. It is the question of power merely with which we are concerned. While the State should take compassionate charge of any who are dangerous to themselves or others, it is equally bound to protect the personal rights and liberties of every harmless and law-abiding citizen capable of taking care of himself, his family and his property, however weak and unfortunate he may be in other respects. So sacred are certain rights of the citizen that they are especially guarded by our National Constitution; which among other things declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1, art. 14, amend. Const. U. S. In *Mugler v. Kansas*, *supra*, it is said by the court: "Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals or the public safety is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government." As indicated, the act in question does not proceed upon the theory of protecting the public health, nor the public morals, nor the public safety, nor the personal safety of the victim, nor as a punishment for crime. On the contrary it proceeds upon the sole theory that the victim may be arrested, brought before a judge of a court of record at chambers, and if found by him to be an "inebriate, habitual or common drunkard," he may, without the existence of any other fact or condition, and without any trial in any court of law, imprison him for two years without any provision for his release.

We are forced to the conclusion that the relator has been deprived of his liberty without due process of law, and denied the equal protection of the law. *Yick Wo v. Hopkins*, 118 U. S. 356; 6 Sup. Ct. Rep. 1004; *In re Ah Jow*, 29 Fed. Rep. 181; *In re Jacobs*, 98 N. Y. 98; *State v. Ray*, 63 N. H. 406; 32 Alb. Law. J. 349; *Frasce's case* (Mich.), 30 N. W. Rep. 72. Under our Constitution the relator was "entitled to a certain remedy in the law" for such injury and wrong. Section 9, art. 1. This entitled him to a discharge. The order of the court commissioner is reversed.

## NEW YORK COURT OF APPEALS ABSTRACT.

**ASSIGNMENT—OF CLAIM AGAINST STATE FOR DAMAGES—RIGHTS OF PARTIES.**—Defendant owned one-twentieth and plaintiff's assignors eight-twentieths of certain mill property, the water-power of which had been damaged by the State. Plaintiff's assignors transferred their claim for damages to defendant, and were to get eight-twentieths of the net proceeds when the damages were recovered from the State. *Held*, that the transfer was a sale for a contingent consideration to be paid in the future, and as soon as defendant recovered from the State he became liable to plaintiff for eight-twentieths of the amount, less eight-twentieths of the expense, and plaintiff's right to recover could not be defeated on the ground that the State appraisers had no jurisdiction to make an award for the eight-twentieths assigned, since, having jurisdiction of the claim presented by defendant, if the appraisers made an excessive award the error could be corrected only on appeal. April 10, 1888. *Sweet v. Merry*. Opinion by Finch, J.

**CARRIERS—OF PASSENGERS—INJURY TO PASSENGER—PRESUMPTION OF NEGLIGENCE.**—Where plaintiff, riding on defendant's railroad train, sat with his arm resting on the window-sill, but not extending without, and some part of a passing freight train struck and seriously injured the arm, a presumption of want of proper care on the part of the railroad company arises, and the company failing to explain on suit brought against them, a judgment for plaintiff will be affirmed. April 10, 1888. *Breen v. New York Cent. & H. R. R. Co.* Opinion by Danforth, J. [See note, 50 Am. Rep. 589.—Ed.]

**CONTRACT—ALTERATION AND MODIFICATION—EFFECT—COVENANTS—RUNNING WITH THE LAND.**—(1) Where there is evidence that a contract of sale, embodying a statement of the terms of a lease, had been abandoned, and an entirely different statement of such terms passed between the parties before the making of a new contract of sale and the execution of a deed, it is not error for the referee to refuse to find as a matter of law that the statement in the first contract was binding on such parties or their privies. (2) A covenant in a deed that the grantee would perform all the conditions of a certain lease already on the property and indemnify the grantor against the same will inure to the benefit of an assignee of such grantor. See *Lawrence v. Fox*, 20 N. Y. 268; *Pardee v. Treat*, 82 id. 385; *Bowen v. Beek*, 94 id. 86; *Schley v. Fryer*, 100 id. 71. March 20, 1888. *Hallenbeck v. Kindred*. Opinion by Peckham, J., Danforth, J., not voting.

**CRIMINAL LAW—TRESPASS—ENTRY UNDER CLAIM OF RIGHT—ADVICE OF COUNSEL.**—(1) The Penal Code of New York, § 467, providing that a person who intrudes upon any lot within the bounds of a city or village, without authority from the owner thereof, or occupies any structure thereon without lawful authority, is guilty of a misdemeanor, does not include entries upon such premises by persons under a *bona fide* claim of right. The statute, construed in view of the pre-existing law, was primarily intended to define what was previously known in the criminal law as a criminal trespass, as distinguished from a mere civil trespass. It may include some cases not before criminal, but this we need not consider. But to constitute a trespass on land an indelible offense, the distinguishing feature is an unlawful and criminal intent. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury. 1 Hale Proc. Crim. 509. It is not necessary to constitute the crime that the defendant does not

know that the statute prohibits his act. It is sufficient if he does the act prohibited, when the statute makes the mere act itself unlawful. But where a particular intent is an ingredient of the crime, the mere doing of the prohibited act does not constitute the crime unless accompanied with unlawful intent. The cases of larceny, receiving stolen goods or passing counterfeit money are illustrations. The same act may in one case be larceny or forgery, or a guilty receiving of stolen property, and in another wholly innocent—depending on the intent. Section 467 of the Penal Code, defining the offense of intrusion on lands, does not it is true in terms make the intent a material element of the offense. But it cannot be supposed that the Legislature intended to subject a person to criminal punishment, as when for example there being a dispute between neighbors as to the line between them, one moves his fence on to his neighbor's land, under a *bona fide* though mistaken belief that he was placing it on the true line; or where a lot-owner in a city or village, in erecting a building, encroaches innocently, although without authority, upon the street. Yet both of these cases are within the letter of the statute; but manifestly they are not within the statute, because looking at the reason of the thing—the ineffaceable distinction between innocence and crime and the antecedent law—the existence of a criminal intent as a necessary constituent of the offense must be implied. (2) When a party without authority enters into possession of a city lot, under an alleged contract of purchase which gave him no right to possession, and without having performed or offered to perform the contract on his part, it is not error to exclude evidence of the advice of counsel to show that he entered upon the premises under a *bona fide* claim of right. There was no colorable ground for any claim on the part of the defendant that he had any right or authority to enter upon the premises, arising out of the facts existing at the time. The facts were fully known to the defendant. Upon these facts there was no doubtful question of law, nor was the true conclusion to be drawn from the facts beyond the comprehension of any person of ordinary intelligence. Whatever advice may have been sought or accepted, there was a willful closing of the eyes to the truth if the defendant assumed to act upon advice that he was entitled to possession. It may have been supposed that the defendant would gain an advantage in the pending litigation if he could get into possession of the premises; but it is impossible that he could have believed that he was of right entitled to the possession. It is unnecessary to consider whether the advice of counsel, if honestly given, that the defendant was entitled to possession of the land, if accepted and acted upon in good faith, would constitute a defense. The circumstances do not permit this assumption in this respect. April 10, 1888. *People v. Stevens*. Opinion by Andrews, J.

— BRIBERY—NEW YORK PENAL CODE—CONSOLIDATION ACT—CONSTITUTIONAL LAW—JURY—EXAMINATION ON VOIR DIRE—EVIDENCE—ACCOMPLICES—CORROBORATION—WITNESS—COMPETENCY—CONFESSION PERJURER.—(1) The Penal Code of New York, § 72, defining the crime of bribery, and prescribing the punishment therefor, repealed a section of a city charter, so far as the latter was in conflict therewith. Subsequently the repealed section was re-enacted as part of the consolidation act, whose object was to consolidate the local laws of New York city, and which elsewhere provided that for the purpose of determining the effect of the two acts, the Penal Code should be deemed the later enactment. *Held*, that this provision was not unconstitutional, as not within the purview of the act, and that bribery committed by a member of the common council of

New York city was punishable under section 72 of the Penal Code. *People v. Jaehne*, 103 N. Y. 182. (2) Under the Code of Criminal Procedure, § 376, defining, as a ground for challenging a juror, the existence of a state of mind on his part which satisfies the court that he cannot try the issue without prejudice to the party challenging, it is not error to permit the prosecutor, after stating to jurors that certain persons had turned State's evidence, and it was supposed would testify that they were engaged with defendant in the transaction for which he was indicted, to ask the jurors if they were so prejudiced against such persons as to prevent them from giving their testimony its lawful weight, especially when defendant accepted such jurors. (3) After a witness had testified, without objection, that he had settled a certain suit with the plaintiff or his attorney, the question, "With whom personally did you negotiate the settlement?" is not objectionable. (4) Evidence as to acts and proceedings of the board of aldermen, in which defendant participated subsequent to the offense charged in the indictment, which tend to confirm that charge, is admissible. (5) On the trial of an alderman for bribery, where defendant has stated his reasons for voting to grant a certain franchise, a question as to his reasons for voting against a rescission of the grant was properly overruled. (6) Under the Code of Criminal Procedure, § 390, providing that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect defendant with the commission of the crime," where on the trial of an alderman for bribery, in addition to the testimony of two accomplices, there is evidence of the proceedings of the board of aldermen, in which defendant participated, which tends to prove that bribery was there committed, there is sufficient other evidence to warrant a conviction. (7) Under the Penal Code of New York, § 714, providing that no conviction for crime disqualifies a witness, one who confesses that he has previously committed perjury in regard to the same things about which he testifies, is not thereby rendered incompetent. April 10, 1888. *People v. O'Neill*. Opinion by Andrews, J.

EVIDENCE—DEPOSITIONS—EXAMINATION OF ADVERSARY—EXTENT.—Under the Code of Civil Procedure of New York, §§ 870, 872, 873, providing for taking depositions to be used in the State, a party litigant may, in the discretion of the court before whom the application is made, have a general examination of his adversary, as a witness in the cause, as well before as at the trial, the examination not being confined to an affirmative cause of action, or the affirmative defense set forth by the applicant, and an order granting an application, which is so limited because the court was of the opinion that it had no power to do otherwise, will be reversed and remitted for further consideration. April 10, 1888. *Herbage v. City of Utica*. Opinion by Danforth, J.

PARENT AND CHILD—INJURIES TO CHILD—ACTION BY PARENT—FUTURE MEDICAL SERVICES.—In an action for loss of services resulting from injuries inflicted on a minor child, a parent cannot recover for prospective medical and surgical services. It seems to be the doctrine of the law of England that the right of a parent to maintain an action for an injury to his minor child, from the tortious act of a third person, is founded exclusively upon the loss of service, and that the parent has no remedy even for expenses incurred, unless the child is old enough to be capable of rendering some act of service, and the relation of master and servant, express or implied, exists between them. *Grinnell v. Wells*, 7 Man. & G. 1041; 2 Add. Torts, § 902. But when the action is maintainable on the ground of loss of service, then both by the law of



England and of this country, the parent may claim indemnity, not only for the actual loss of service to the time of the trial, but also for any loss of service during the child's minority, which in the judgment of the jury, and according to the evidence, will be sustained in the future, and for expenses necessarily incurred by the parent in the cure and care of the child in consequence of the injury. *Cowden v. Wright*, 24 Wend. 429; *Drew v. Railroad*, 28 N. Y. 49; *Dixon v. Bell*, 1 Starkie, 287; *Schouler Dom. Rel.* 351. The English rule which denies to the parent any remedy for medical or other expenses incurred in consequence of the injury to the child, except as incident to the loss of service, ignores the paternal relation and obligation as an independent ground of recovery, although it may be manifest that the parent had sustained a pecuniary loss as the proximate result of the wrong. The court of Massachusetts, in the case of *Dennis v. Clark*, 2 Cush, 347, held a more liberal, and as it seems to us, a more reasonable and equitable doctrine, and decided that when an infant, residing with his father, receives an injury such as would give the child a right of action, the father who is put to necessary expense in the care and cure of the child, may maintain an action for indemnity, although the child was, by reason of his tender age, incapable of rendering any service. This doctrine casts upon the wrong-doer responsibility for a pecuniary loss flowing from his wrongful act, actually sustained by the parent in the discharge of his parental obligation to care for and maintain his infant children. But the jury were permitted to include, as a part of the damages in the action, the value of contingent and prospective surgical services. The right of the parent, in an action for loss of service of a child disabled by a tortious injury, to recover for prospective loss of service during the child's minority, is well settled. These damages are however of necessity to a great extent speculative or conjectural. There are many contingencies which may deprive the parent of the services of a child and even make the child a pecuniary burden to the parent, although the particular injury had not happened. The child may die from disease or other accident, or the parent may die. The prospective damages for loss of service, recoverable in such a case as this, may never in fact be sustained. But as only one action can be maintained against a wrong-doer for a single wrong, the law from necessity permits consequences not yet fully ascertained, but which are reasonably certain to happen, to be anticipated, and a jury is allowed to estimate the damages for future loss of service in the light of experience and of such evidence as can be given. The damages allowed in this case for prospective surgical expenses have still another element of uncertainty. If recoverable by the parent, it must be upon the ground of the parent's obligation to maintain the child. But not only may the parent die or the child die, thereby rendering the surgical expenses unnecessary, but the parent may become wholly unable to pay for the services if required, or the child may be treated in a hospital or at public expense, as was in fact the case in this instance, when the child's leg was amputated. There is adequate reason for permitting the parent to recover medical or other expenses actually incurred, consequent upon an injury to the child from the wrongful act of a third person. In case of an injury to a minor child, whose parents are living, there is a double right of action; an action by the child and an action by the parent. In the child's action, plainly there can be no recovery for expenses actually incurred by the parent, and so far a double recovery is prevented. But it is not so plain that the child may not recover, as part of his damages, all the proximate pecuniary consequences of his disability, including medical and other expenses, as under the evidence the

jury shall find it will be necessary in the future to incur. The denial of this right would in many cases deprive the child of the means of necessary relief. It cannot, I suppose, be doubted that the parents being dead, all the future consequences of the injury and necessary expenses flowing from the disability would be proper element to be considered by the jury in an action brought by the child, nor is there much doubt that these considerations enter into every verdict rendered in an action brought by a minor for his personal injury. There is perhaps a logical difficulty in denying the right of the parent to recover the damages now in question, but the same difficulty attends a denial of the child's right. It appears by the record that the child has brought an action and has recovered her damages. In the absence of controlling authority, we are of opinion that in an action by a parent, founded on loss of service of a child, only expenses actually incurred by the parent for medicine or medical attendance, or which are immediately necessary to be incurred, are recoverable as incident to the main cause of action, and that future, prospective, contingent expenses of this kind are recoverable only in an action by the child. The parent in an indirect way is benefited by a recovery by the child, and this rule will be most likely to accomplish justice and prevent a double recovery in such cases. The obligation of parents to maintain and provide for their children has its most effectual sanction in the natural affections. The law at best can but imperfectly enforce it. It does not undertake to do so directly until children have become, or are likely to become, a public charge. The law of necessities is so limited and guarded that the wants of children can only be supplied under this rule in exceptional cases. The legal obligation of maintenance and support resting on the mother is especially imperfect. In all cases it necessarily can be enforced only in cases of the pecuniary ability of the parent, and in case of the mother the child's means are first chargeable with his support. *Furman v. Van Sise*, 56 N. Y. 435. A recovery in the child's action for a personal injury, for prospective medical services, where the fund recovered is usually preserved through a guardian or in other ways, will be most likely to secure such services when needed. April 10, 1888. *Cumming v. Brooklyn City R. Co.* Opinion by Andrews, J.

**PARTNERSHIP—ACTION AGAINST SPECIAL PARTNER—CREDITOR'S BILL—JURY TRIAL—JUDGMENT—RES ADJUDICATA.**—(1) A complaint alleging that plaintiff recovered a judgment against a general partnership, upon which execution was issued and returned unsatisfied, and that defendant, a special partner, fraudulently withdrew the assets contributed by him, together with alleged profits, although demanding a judgment against defendant as a general partner to the amount of money wrongfully withdrawn by him, states an equitable cause of action in the nature of a creditor's bill, and not an action to recover a money judgment only, which under the Code of Civil Procedure of New York, § 968, would entitle the parties to a jury trial. (2) A judgment for defendant in an action at law to recover a partnership debt from the defendant as a general partner, based on the claim that defendant failed to contribute his capital in cash, and that he fraudulently withdrew the assets from the firm, is not a bar to a creditor's bill by the same plaintiff for an accounting by defendant as a special partner for the assets withdrawn by him, the causes of action not being identical, and it not appearing from the record or extrinsic evidence that the question of the improper withdrawal of assets was involved and determined therein in defendant's favor. There are some cases in which a former judgment is a bar to the maintenance of another action, even if the second is



not identical with the first cause of action. Such for example is the case where the second action is brought against a physician for malpractice. A former judgment in favor of the physician, in an action commenced by him to recover for his services in such case, operates as a bar to the maintenance of the second action, because the recovery for his services in an action brought by him for that purpose necessarily adjudicated the question of reasonable skill in his favor. *Gates v. Preston*, 41 N. Y. 113. In such a case it is said the former judgment is a perfect bar to a second and different cause of action, and is conclusive upon the question of skill, although it was not in reality litigated in the former suit, for the proof of the fact that the patient was treated with reasonable skill is part of the plaintiff's case, and which he must prove to entitle him to a recovery; and hence even if not litigated in the sense of not being contradicted by other proof, the matter is forever set at rest by the judgment; and so it is an instance of a judgment being conclusive upon a matter of fact which perhaps was not, though it might have been, litigated. *Dunham v. Bower*, 77 N. Y. 76, 79. See also *Malloney v. Horan*, 49 id. 111; *Collins v. Bennett*, 46 id. 490. The case in 49 N. Y. says a judgment is final and conclusive upon all matters which might have been litigated and decided in the action, as to matters which might have been used as a defense in that action, and such as, if again considered, would involve an inquiry into the merits of the former judgment. To such extent a prior judgment is, as a plea, a bar to the maintenance of another cause of action, which necessarily involves the questions already litigated, or which might have been litigated, in the former action. The defendant claims here that no judgment in his favor in the Superior Court action could have been recovered upon the evidence in that case, unless the fact were found that he was not a general partner; and that as there was evidence on that trial upon the question of an improper withdrawal of assets from the firm by the defendant while it was insolvent, which evidence, if true, would have shown such a violation of the limited partnership statute as would have made him liable as a general partner, it follows that this judgment in his favor must now necessarily show there was no such improper withdrawal of assets by him from an insolvent firm. He thus claims that even if this second action is not for the same identical cause as was the first, it is yet based, among others, upon an alleged fact (the withdrawal of assets) which was involved in the other action; and he says that the judgment in such action conclusively shows a decision of that question in his favor. It is true that a valid judgment upon a question directly involved in a suit is conclusive evidence as to that question in any other suit (although for a different cause of action) between the same parties; but it must appear, either by the record in that suit or by extrinsic evidence, that the precise question was raised and determined in the former suit; and this burden rests of course with the party who endeavors to make use of the judgment as conclusive evidence upon that point. If there be uncertainty as to whether or not the question was passed upon, the judgment is not conclusive as evidence. See *Stowell v. Chamberlain*, 60 N. Y. 272; *Russell v. Place*, 94 U. S. 606; *Cromwell v. County of Sac*, id. 351. Thus in the *Stowell* case it was held that in a second action between the same parties, brought for a different cause, though in regard to the same transaction, in order to make the former judgment available, either in bar or as evidence, where such judgment was recovered in an action for the wrongful conversion of property (the second action being brought in *assumpsit*), it was necessary to show that the question of plaintiff's title was passed upon in the first action.

The judgment may have passed upon the fact that defendant had not had possession of the property, and on that ground was not guilty of conversion. So in order to obtain the benefit of a prior adjudication of a fact, it is entirely reasonable to exact from the party asking its benefit clear proof that such adjudication has been made. The cases in the Supreme Court of the United States above cited are further illustrations of the principle, which is firmly based upon authority and good sense. April 10, 1888. *Bell v. Merrifield*. Opinion by Peckham, J.

**RAILROAD COMPANIES—NEGLIGENCE AT CROSSING—CONTRIBUTORY NEGLIGENCE.**—Where plaintiff approached and attempted to cross a railroad track at the rate of about ten miles an hour, while a strong wind was blowing, and snow was falling fast, knowing that trains frequently passed there, and that it was a place of danger and was injured by a collision with a fast express train, there being nothing to conceal the approach of the train except the storm, a nonsuit in an action against the railroad company for such injuries, on the ground of contributory negligence, was properly granted, it being the duty of plaintiff to establish his own freedom from such negligence. March 20, 1888. *Powell v. New York Cent. & H. R. R. Co.* Opinion per Curiam; Danforth and Andrews, JJ. dissent.

**—IN STREET—INJURY TO PASSENGER—NEGLIGENCE.**—In an action against a street-car company for damages, where the car was going at an unusual rate of speed in a large city, and the shaft of a truck wagon suddenly broke through the panel of the car, striking plaintiff from her seat and severely injuring her, a nonsuit on the ground of no evidence of negligence on the part of the car driver should not be granted. April 10, 1888. *Hill v. Ninth Ave. R. Co.* Opinion by Finch, J.

**STATE AND STATE OFFICERS—CLAIMS AGAINST STATE—LIMITATIONS—REVIVAL BY LEGISLATURE.**—Plaintiff presented his claim for damages against the State, to the canal appraisers, who had power to hear and determine such claim, and they disallowed it. Subsequently, by act of Legislature of 1883, the offices of canal appraisers were abolished and the board of claims, established with power to determine all private claims against the State presented within certain limitations of time, and all claims against the State pending before the canal appraisers were transferred to the board of claims. In 1886 an act was passed exempting plaintiff's claim from the limitations in the act creating the board of claims, and giving that board jurisdiction to rehear, audit and determine said claim. Held, that plaintiff's claim, being barred by the lapse of more than six years from the time the canal appraisers disallowed it, under the Constitution of New York, art. 7, § 14, forbidding the payment by the State of any claim which as between the citizens of the State would be barred by the lapse of time, was not revived by the act of 1886. April 10, 1888. *McDougall v. State*. Opinion by Ruger, C. J.

**TAXATION—REDEMPTION—NOTICE TO OCCUPANT—PROVINCE OF JURY—BOUNTY TAX—SALE FOR NON-PAYMENT—CONSTITUTIONALITY.**—(1) Where defendants assert that plaintiff's title to land is invalid, because claiming under a tax sale, he did not give notice to redeem to a third party, who was an occupant of the premises at the time specified by statute for the giving of such notice, the question whether such third party was an occupant of the premises at that time is properly submitted to the jury; it being conceded that he resided upon an adjoining lot, and the evidence tending to show that he had abandoned the lot in question prior to the tax sale. (2) Under an act of the

Legislature relating to taxation for bounties, which provides that all provisions of law, existing at the passage of the act, for the collection of taxes, shall apply to the taxes therein provided for, payment of unpaid bounty taxes may be enforced by a return of the delinquent property to the comptroller and a sale thereof, the same as other taxes are enforced. (3) The Constitution of New York, art. 7, § 13, providing that every law imposing a tax shall state the object to which it is to be applied, refers only to a general tax upon all the property in the State, and is not applicable to the Laws of New York, 1863, chap. 15, authorizing the citizens of towns to impose a tax for bounties. *In re McPherson*, 104 N. Y. 306. April 10, 1888. *Jones v. Chamberlain*. Opinion by Danforth, J.

**TELEGRAPH COMPANIES — UNREPEATED MESSAGE — NOTICE OF STIPULATION — MUTILATED BLANK.** — (1) Where plaintiff has been familiar for several years with defendant's telegraph blanks, containing a notice and stipulation wherein it is agreed between the sender and the company that it shall not be liable for the non-delivery of unrepeatd messages, whether happening by the negligence of its servants or otherwise, he cannot recover for damages sustained by the non-delivery of a message, where it appears that he had not ordered the message repeated, and there is no evidence in the case to show that the non-delivery was due to the misconduct of the defendant or its servants. That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other States of the Union and in England. *McAndrew v. Telegraph Co.*, 33 Eng. Law & Eq. 180; *Telegraph Co. v. Carew*, 15 Mich. 526; *Ellis v. Telegraph Co.*, 13 Allen, 226; *Redpath v. Telegraph Co.*, 112 Mass. 71; *Grinnell v. Telegraph Co.*, 113 id. 299; *Clement v. Telegraph Co.*, 137 id. 463; *Schwartz v. Telegraph Co.*, 18 Hun, 157; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Breese v. Telegraph Co.*, 48 id. 132; *Kirkland v. Dismore*, 62 id. 171; *Young v. Telegraph Co.*, 65 id. 163. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this State and generally elsewhere been upheld as reasonable. The plaintiff must be held to have assented to this stipulation. He was familiar with the defendant's blanks, having used them extensively for several years, and he had frequently read the words at the bottom of them: "Read the notice and agreement at the top." Therefore, although he may not have known what the precise terms of the stipulations contained in the blank were, yet he knew that some stipulations were therein contained, and he must be held by the use of the blank and its delivery to the defendant to have assented to them. The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was not shown that the failure was due to the willful misconduct of the defendant or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure

would have been detected and the loss averted. The case is therefore brought within the letter and purpose of the stipulation. (2) The party cannot protect himself from the operation of such agreements by showing that a portion of the agreement was torn from the blank on which he wrote his message. (3) A mutilated telegraph blank, showing that the sender of a message should order the same repeated, and for this one-half the regular rate is charged in addition, and also showing the agreement between the sender and the company that it shall not be liable for the non-delivery of an unrepeatd message, contains sufficient language to put a party writing a message on such a blank upon inquiry of what the full agreement is in a complete blank, and he will be held as under a perfect blank. (4) Plaintiff, in an action for damages for the non-delivery of a telegram, testified that he could not remember whether or not the blank upon which he wrote the message was torn. A witness for defendant testified that he saw the message several times after its delivery to defendant's operator, and as he remembered it was not torn. *Held*, not sufficient evidence to justify the jury in finding that the blank was torn at the time of writing the message. April 10, 1888. *Kiley v. Western Union Tel. Co.* Opinion by Earl, J., Danforth, J., dissenting.

#### UNITED STATES SUPREME COURT ABSTRACT.

**ARBITRATION AND AWARD — IMPEACHMENT OF AWARD — BIAS OF ARBITRATOR.** — Action was brought by a railroad company to set aside a judgment rendered upon the award of arbitrators in favor of the railroad contractors. It appeared that one of the arbitrators was in the employ of the chief engineer at the time the contracts were made, and continued therein for some time, but left before the completion of the work. In accordance with a private arrangement with one who was interested in the contracts, he received a share in the profits, but in no other way was he interested in the contracts or in the work. *Held*, insufficient cause to set aside the judgment. January 16, 1888. *Union R. Co. v. Dull*. Opinion by Harlan, J.

**JURISDICTION — OF FEDERAL COURTS — "SUITS AT LAW" — EMINENT DOMAIN PROCEEDINGS.** — A proceeding under the Code of Civil Procedure of Colorado to ascertain the compensation for land taken for public use, is a suit at law within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction on Federal courts. *Kohl v. United States*, 91 U. S. 367; *Boon Co. v. Patterson*, 98 id. 403; *Removal cases*, 115 id. 1; *Gaines v. Fuentes*, 92 id. 20. The precise question involved here was passed upon and satisfactorily dealt with by the circuit judge in the Circuit Court for the District of Colorado in *Railway Co. v. Jones*, 29 Fed. Rep. 193, and by the Circuit Court for the Western District of Michigan, by the District Judge Brown, in *Railroad Co. v. Copper Co.*, 25 Fed. Rep. 515. January 16, 1888. *Searl v. School-Dist. No. 2, in Lake Co., Colorado*. Opinion by Matthews, J.

**LACHES — FAILURE TO ENFORCE TITLE.** — Plaintiff's father made an oral gift to him of a lot of land, and plaintiff entered into possession and began improvement. Plaintiff also purchased a tax deed of the premises, but did not have the deed recorded. Afterward a part of the lot was sold, under execution, for plaintiff's debts and bought by the defendant. Plaintiff filed a bill to enjoin the sale, alleging that he had an equitable interest only by virtue of the verbal gift.

This action was not prosecuted. Ten years afterward the father gave plaintiff a deed of the lot, and twelve years after the sale plaintiff brought action to set aside the sale. *Held*, that the plaintiff having held the legal title to the lot under his tax deed at the time of the sale, he was guilty of gross laches in sleeping on his rights for twelve years, and is not entitled to any relief in equity. January 9, 1888. *Richards v. Mackall*. Opinion by Harlan, J.

**MUNICIPAL CORPORATION — EMINENT DOMAIN — DAMAGE TO PRIVATE PROPERTY.**—A lot in the city of Chicago had a frontage of sixty feet on Lumber street, 150 feet on Eighteenth street, and 300 feet on the south branch of the Chicago river. The property had been used as a coal-yard. A viaduct constructed by the city on Eighteenth street, under power conferred by its charter and special ordinances, was so built that access to the yard from Eighteenth street was practically cut off, and the use of Lumber street seriously impaired as a way of approach and exit. In addition the property was often flooded by water from the approaches on each side of it to a neighboring bridge. *Held*, that the lot was "damaged," within the meaning of the Illinois Constitution of 1870, providing that "private property shall not be taken or damaged for public use without just compensation." (2) *Held*, that the diminution, if any, in the selling or renting value of the property, was the true measure of damages, and that no recovery could be had for the flooding or for the improvements put on the lot for the special purposes for which it was rented, unless the flooding affected that value, and unless the damages to the lot were such as to destroy its use as a coal-yard. March 19, 1888. *City of Chicago v. Taylor*. Opinion by Harlan, J.

**SALE — UPON CONDITION — CONTRACT — REVOCATION — LACHES.**—(1) A., who was the president of a street-railway company, and who held about 800 shares of its stock, agreed with B., who owned 1,200 shares, that the stock should be pooled, each party's interest in the pool to be joint and equal and A. to pay in money to equalize the difference. The object was to buy up stock and thus control the road. The right was reserved to each party upon death of the other to buy in the interest of his estate on certain terms. A. paid no money, and about three years later B. reported that he then had 1,571 shares and that A. had 812 shares. To make their interests equal, B. transferred to A. 379½ shares and took from him his note for the amount of their value, giving him a receipt, which set out that the note had passed, and that it was given for the purchase-money of the 379½ shares then held by B., "and to be delivered upon payment of the note." *Held*, that the receipt revoked the original contract and amounted to a sale upon condition that if the note was not paid when due all interest of A. in the 379½ shares should come to an end. (2) The receipt was assigned September 16, 1882, to M., who in January, 1883, offered to pay B.'s note, and demanded the stock, and being refused, filed a bill for specific performance. In the meantime A., who was president of the road, became indebted to it, and parted with his stock in the spring of 1878. B. then assumed control and managed the property so well that the stock appreciated very much in value. *Held*, that the bill for specific performance was barred by laches. March 19, 1888. *Davison v. Davis*. Opinion by Bradley, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**BAILMENT — WHAT CONSTITUTES — DELIVERING WHEAT TO MILLS.**—Plaintiffs delivered wheat at a mill, and according to the custom and arrangement of the

mill, the wheat all went into a common mass with other wheat. Receipts were given by the miller showing it was received for the use of plaintiffs. Afterward the sheriff levied on a lot of flour and bran in the mill, by virtue of an execution against the miller. Plaintiffs claimed it as theirs, and on an interpleader issue between them and the attaching creditors, after being fully instructed as to what constituted a sale, and what a bailment, in such cases, the jury found for plaintiffs. *Held*, that the finding for plaintiffs necessarily implied a finding that the transaction was a bailment, and not a sale, which was a question of fact for the jury. The fundamental distinction between a bailment and a sale is that in the former the subject of the contract, although in an altered form, is to be restored to the owner, while in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it. In the one case the title is not changed; in the other it is—the parties standing in the relation of debtor and creditor. Thus in *Norton v. Woodruff*, 2 N. Y. 153, a miller agreed to take certain wheat, and to give one barrel of superfine flour for every four 36-60 bushels thereof, the flour to be delivered at a fixed time, or as much sooner as he could make it. As the miller's contract was satisfied by a delivery of flour from any wheat, the transaction was held to be a sale. But in *Malloy v. Willis*, 4 N. Y. 76, wheat was delivered under a contract "to be manufactured into flour," and one barrel of the flour was to be delivered for every four 15-60 bushels of wheat. This transaction was by the same court held to be a bailment. If a party having charge of the property of others so confounded it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it. Where however the owners consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract of bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole mass of course has no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product. *Chase v. Washburn*, 1 Ohio St. 244; *Hutchinson v. Com.* 32 Penn. St. 472. It makes no difference that the bailee had in like manner contributed to the mass of his own wheat, for although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock without a breach of the bailment, which will subject him, not only to a civil suit, but also to a criminal prosecution. *Hutchinson v. Com.*, 82 Penn. St. 472. But where, as in *Chase v. Washburn*, *supra*, the understanding of the parties was that the person receiving the grain might take from it, or from the flour, at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale, and not a bailment. To the same effect are *Schindler v. Westover*, 99 Ind. 395; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Id. 558, and *Johnston v. Browne*, 37 Iowa, 200. In *Lyon v. Lenon*, 7 N. E. Rep. 311, the distinction is thus stated: "If the dealer has the right at his pleasure either to ship and sell the same, on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only

when the bailor retains the right from the beginning to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property, as stipulated. The distinction is, can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale." This distinction is drawn of course with reference to cases where grain is deposited in a mass, as in grain elevators, etc. There are cases in which the doctrine of bailment has been carried much beyond the rule recognized in the cases we have cited. See *Sexton v. Graham*, 53 Iowa, 181, and *Nelson v. Brown*, id. 555. We think however the rule recognized in *Chase v. Washburn, supra*, and *Lyon v. Lenon, supra*, is a safe one, and is more in accord with the well-settled principles of the law relating to bailment. Penn. Sup. Ct., Jan. 3, 1888. *Bretz v. Diehle*. Opinion by Clark, J.

**BANKS — PAYMENT OF FORGED CHECK — LIABILITY.** A stranger presented to the bank of O. a check purporting to be drawn by one C. on the bank of A. for \$385. The cashier of the bank of O. compared the signature of the purported drawer with his genuine signature in a book kept by such cashier, and paid the check without requiring proof as to the identity of the person presenting the same, or making inquiries in regard to him. The check was sent to a bank in Lincoln, and there credited to the bank at O., and by the Lincoln bank sent to the bank at A. on which it was drawn, and was paid by such bank. Several days afterward it was discovered that the check was a forgery, and notice was thereupon given to the bank at Lincoln and also at O. Held, that the bank at O. was liable for the amount received by it on the check. The case of *Ellis v. Trust Co.*, 4 Ohio St. 626, is similar, in many respects, to that under consideration. It is said, p. 632: "To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground, by putting the drawer alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and especially if the failure to detect the forgery and consequent loss can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and cannot, with a good conscience, retain it. To allow him to do so would be to permit him to take advantage of his own wrong, and to pervert a rule designed for his protection against the negligence of the drawee into one for doing injustice to him." See also *Goddard v. Bank*, 4 N. Y. 147; *Bank v. Bank*, 3 Id. 230; *Bank v. Bank*, 1 Hill, 287. In the last case the indorsement of the payee was forged and the money paid by the drawee was recovered back, although the forgery was not discovered for two months after payment, and the remedy against the other indorsers was lost. In *Bank v. Allen*, 59 Mo. 311, a bank had paid to a stranger a check drawn upon another bank and collected the amount from the latter. At the time of the payment neither bank was aware of the forgery. The next day after the payment, the bank on which the check was drawn ascertained the forgery, and on that

day or the succeeding one notified the first bank of that fact; it was held that the notice was given in a reasonable time, and that the money could be recovered back. In that case the money had been drawn on a check for the sum of \$20, payable to a stranger who before presenting it to the bank had altered it by substituting \$328.68 instead of \$20, and also by changing the name of the payee, the signature of the check being genuine. In *Espy v. Bank*, 18 Wall. 604, a check was drawn by Stall & Meyer on the defendant for \$28.50 in favor of Mrs. Hart. This was raised by substituting \$3,920 for 28.50, and the name of Espy, Heidelberg & Co. for that of Mrs. Hart as payee. The check thus altered was presented to the bank, and paid by it through the clearinghouse. The court held if this were all the case there would be no doubt of the right to recover. E., H. & Co. however had sent the check to the bank before paying the same, and were informed that it was good; a question which does not arise in this case. After a careful examination of the authorities, we have no doubt that a party who pays a forged check does so at his peril; and if by means of his indorsement and use of the same he thereby obtains money from another, he is liable for the amount thus received. The Capitol National Bank and also the State Bank of Alma had the right to assume that an instrument sent forth with an indorsement of the plaintiff's on which they received value was genuine. Neb. Sup. Ct., Jan. 5, 1888. *First Nat. Bank of Orleans v. State Bank of Alma*. Opinion by Maxwell, J.

**CONTRACT — PUBLIC POLICY — SALE OF BOHEMIAN OATS.** — A promissory note for the payment of \$125, being one-half of the purchase price of twenty-five bushels of Bohemian oats, which are worth but little more than ordinary oats, made in consideration of the delivery of the oats, and an agreement on the part of the payee to sell for the maker, within a stated time, a certain number of bushels at \$10 per bushel, for the sale of which he was to receive a commission, is void, on the ground of public policy and cannot be enforced, though a part of the consideration has been received. The court cannot shut its eyes to the fact that this is only one of the thousands of similar contracts made within this State within the last few years, and that the unwary, unsuspecting and too credulous farmers have been made the victims of sharpers and swindlers, who by their seductive acts have worked upon the natural love of gain which most men possess, and thus reaped a rich harvest from those whom the law should protect. The very scheme itself bears evidence upon its face that it is a fraud and a snare, and yet so cunningly devised that in the hands of a sharp, shrewd and designing man, hundreds of the unwary have been defrauded; and the courts should set their seal of condemnation upon it and pronounce it, as it is, a contract void on the ground of public policy. It is upon its face a gambling contract. Mr. Greenwood, in his work on Public Policy, says: "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law or public policy in relation to the administration of the law. The strength of every contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at public expense; the courts will never therefore recognize any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare." Walker, J., in *Hotzger v. Cleveland* (Marion Superior Court, Indiana), 3 Ind. Law Mag. 42, 50, speaking upon this ques-

tion, says: "We may take it as well settled that in the law of contracts the first business of the courts is to look to the welfare of the public; and if the enforcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, even though it might result beneficially to the party who made and violated the agreement." Mr. Story says: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. This rule may however be safely laid down that wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void, as being against public policy." Story Conf. Law, § 546. Some of the courts, speaking upon this subject, have said that the immediate representatives of the people in Legislature assembled would seem to be the fairest exponent of what public policy requires as being most familiar with the habits and fashions of the day, and with the actual consideration of commerce and trade, their consequent wants and weaknesses. That legislation is least objectionable, because it operates prospectively as a guide in future negotiations, and does not, like a judgment of a court, annul a contract already concluded. Such contracts in this State have already had the seal of condemnation stamped upon them by the legislative branch of the State government. The argument that holding such contracts void on the ground of public policy annuls a contract already concluded has no force. If the contract is at war with the established interests of society, and is in conflict with the morals of the time, the fact that individuals may suffer can in no manner affect the question, as the interests of individuals must in many cases be subservient to public welfare. It is essentially a gambling contract, and one impossible to be performed. These oats were worth no more than any other oats, for any useful purpose, and Griffith knew that these oats, at any time up to October 21, 1886, could not be sold legitimately for more than any other oats, and that they could not be sold for \$10 per bushel in any legitimate and lawful transaction; that the only way in which they could be so sold was by the perpetration of another and similar fraud upon some other unsuspecting victim to his arts and wiles. The contract is one that Gargett could not have enforced had Griffith failed to call for and sell the oats. In such cases the courts must leave the parties where it finds them. If either party has however been defrauded, he may have his action for the fraud, but could not enforce the contract. It is said however that Gargett received twenty-five bushels of oats, and ought not to be permitted to complain, as there is not a total failure of consideration. But the trouble is, the whole contract is tainted and avoided by the part of the consideration which is illegal. If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. 1 Pars. Cont. 457; Snyder v. Willey, 33 Mich. 486. Had the note gone into the hands of a *bona fide* holder—one who purchased for value before maturity, and without notice of the consideration for which it was given—the principles which we have laid down would not apply. It is not intended to run counter to the rules of the law-merchant governing negotiable instruments, but we have taken the note and bond together as forming the

contract between the parties; and construing them together, as though written upon the same piece of paper, and as between the original parties and those purchasing with notice, we hold such contracts void. Mich. Sup. Ct., Feb. 2, 1888. *McNamara v. Gargett*. Opinion by Long, J.

### NEW BOOKS AND NEW EDITIONS.

#### PATTERSON'S FEDERAL RESTRAINTS ON STATE ACTION.

*The United States and the States under the Constitution.* By Christopher Stuart Patterson. Philadelphia: T. & J. W. Johnson, 1888. Pp. xxxi, 200.

An intelligent monograph on the relation of the States to the United States and to each other; the implied powers; taxation; the regulation of commerce; the impairment of the obligation of contracts; *ex post facto* laws and bills of attainder; the prohibition of State bills of credit; fugitives from justice; the judicial powers; rights of person and of property; the Federal Supremacy and the reserved rights of the State, illustrated by a classification and analysis of the Supreme Court decisions.

#### SPEER'S REMOVAL OF CAUSES.

An excellent and convenient manual by Judge Speer on the Act of March 3, 1887, with forms, and an ingenious "tabular compendium showing the essential elements of jurisdiction by removal." Published by Little, Brown & Co., of Boston.

### NOTES.

A singular case of *idem sonans* is *Stewart v. State*. Indiana Supreme Court, March 1, 1888, which holds that forgery may be predicated of an order reading, "please let this boy have a soot of cloth."

The *London Law Times* says "that in the new edition of his work on partnership, Lord Justice Lindley laments that this branch of the law should not be put into shape and codified by legislative authority, hinting too that the draft of a bill to consolidate and amend the law of partnership may be found in the appendix to Mr. Frederick Pollock's 'Digest of the Law of Partnership,' and observing that Mr. Pollock's remarks on this subject deserve the serious attention of the Legislature. That they obtain the attention of Parliament is shown by the excellent bill to consolidate the law of partnership, which has been prepared and brought in by Colonel Hill, Sir Bernhard Samuelson, Sir George Elliott, Sir Charles Palmer, Mr. Whitley, Sir Albert Rollit and Mr. Seale Hayne. The bill would repeal Boville's Act (28 and 29 Vict., chap. 86), and re-enact its substance. It would contain the whole law of partnership, the modicum of statutory law and the much larger quantity of 'judgemade' law, in the small compass of sixty-four clauses filling some fifteen pages. It is worth while to notice the definition of partnership with which the bill opens: 'Partnership is the relation which subsists between persons who have agreed to carry on business and share profits in some way in common.' This approaches very nearly to the definition given in the Civil Code of New York: 'Partnership is the association of two or more persons for the purpose of carrying on business together and sharing the profits between them.'"

# The Albany Law Journal.

ALBANY, JUNE 2, 1888.

## CURRENT TOPICS.

THE most interesting part of the "Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association," at least to us, is the account of the action on the "Code of Ethics." We regret that the present record does not show the first rule, for it seems that it refers to the proper course of conduct of attorneys toward judges, as one of the debaters spoke of it as a rule that "a lawyer shall not call a judge an ass, and that he shall treat him with deference and respect." But quite a breeze of discussion arose over rule three, which is as follows: "Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial, personal and official relations between bench and bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable." One gentleman said, "the favorite of the judge is the most detestable animal that ever got out of the woods." The rule was adopted. Still more debate arose over rule 5, which is as follows: "The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence—knowingly misquoting the language of a decision or text-book—knowingly misstating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel—*offering evidence which it is known the court must reject as illegal, to get it before the jury under guise of arguing its admissibility*, and all kindred practices—are deceits and evasions unworthy of attorneys. Purposely concealing or withholding in the opening argument positions intended finally to be relied on, in order that opposite counsel may not discuss them is unprofessional. Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them. In the argument of demurrers, admission of evidence and other questions of law, counsel should carefully refrain from 'side-bar' remarks and sparring discourse to influence the jury or bystanders. Personal colloquies between counsel tend to delay, and promote unseemly wrangling, and ought to be discouraged." One gentleman moved to strike out the words which we have italicised, but they were retained, and the rule was adopted. Rule 14, as pro-

posed, read as follows: "An attorney must decline in a civil cause to conduct a prosecution when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong; but once entering the cause he is bound to avail himself of all lawful advantages in favor of his client, and cannot, without the consent of the client, afterward abandon the cause." "Must" was changed to "may," and all after "wrong" was struck out. There are fifty-six rules in all, and they are to be printed and circulated. We hope to see a copy of this etiquette book. The report contains also an interesting address by the president, Mr. Henry C. Tompkins, on the statutory changes of the year; a paper by Mr. Horace Stringfellow, Jr., on the "Constitutionality of the Inter-State Commerce Law;" a paper by Mr. A. C. Hargrove, on "Legal Education and Admission to the Bar," which erroneously states the present requirements in this State as having been adopted September 1, 1887—they have been in force ten years; and Judge Dillon's admirable address on "A Century of American Law."—Since writing the foregoing we discover that the "Code of Ethics" is annexed to the report. Rule 7 is commendable: "It is not wise, or respectful to the court, for attorneys to display temper because of an adverse ruling." Rule 26 advises against "a rough tongue." Rule 29 enacts that "personalities should be avoided." Rule 51 says that "contingent fees may be contracted for, but they lead to many abuses, and certain compensation is to be preferred." On the whole this code is very excellent, and if our brethren in Alabama would live up to it they would be entirely irreproachable. We shall publish it in full soon.

The commencement exercises of the Albany Law School last week attracted a brilliant audience, and were of unusual interest. The subjects chosen for the graduating orations were of modern and practical moment, such as the "Elective Franchise," "Restrictions upon Immigration and International Law," and were treated with discretion and force, and without the usual sophomorical gush and shallowness. The address to the class by the Hon. Roger A. Pryor of New York (formerly of Virginia) was a scholarly and elegantly written discourse, although somewhat in the old-style vein of elaborate rhetoric and ultra-classicism, and was delivered with the vivacity and earnestness of the typical southern orator. We have a feeling of respect for Mr. Pryor, because he has had the magnanimity to forget his mistakes and to submit to defeat gracefully, and the true courage to "accept the situation" in a manly and philosophical manner, not to spend his time whining over a bad, lost cause, but to come among his late foes, his present friends, and to cast in his lot with them in the struggle for existence. We are glad that such a course has met with the success it deserves. We have a warm admiration for his unusual acquirements in scholarship, for his high ideal of what goes to true success

as a lawyer, and for his evident sincerity in urging his views upon young lawyers. His views are eminently practical and practicable. His remarks on the decay of forensic eloquence in modern times were especially interesting. He thinks justly that eloquence, as the art of persuasion, is not extinguished but simply modified in form. His suggestion that the presence of the stenographer and reporter in court has much to answer for in this regard struck us with force. On the other hand, it is equally true that the modern extemporaneous orator owes much to the corrections of the stenographer and reporter in writing out his notes—as much, probably, as the wrinkled sitter to the photographer owes to the artisan who “finishes up” the negative. For our own part, we are glad that the reign of the glib disclaimer is over, that the days of spouting, buncombe, blattering and hifalutin are over, that men are no longer so much disposed, as in simple, barbaric times, to hear through their mouths, nor to allow designing orators to put an enemy in their ears to steal away their brains. The modern man does a good deal of thinking for himself, and is a little on his guard against hired advocates; and much of this is due to the enlightening influence of the modern press. Perhaps however the influence of oratory in getting verdicts has been overrated, for the greatest verdict-getters have carefully eschewed declamatory and rhetorical flights—witness Scarlet. We shall publish Mr. Pryor's address in full next week.

The advisability of employing stenographers in court is still a mooted question among the judges. The English judges, or at least some of them, are strongly opposed to it, and so are some of our own. Within a few days one of the most learned and excellent of our Supreme Court judges has spoken to us in terms of strong hostility to their employment, urging that taking into account the increased voluminousness of the testimony and the expense of printing it on appeal, their employment is not beneficial. We cannot agree with him. If courts should revert to the old practice of relying on the judges' minutes, the trial of causes would proceed much more slowly, especially as counsel would then rightly insist on keeping their own minutes. The stenographer has accomplished one very desirable thing: he has prevented the possibility of a judge's prejudicing a party's appeal by a wrong report of the proceedings on the trial when he is called on to settle the case. Every old lawyer has a tale to tell of how some judge at some time, by design or mistake, so settled a case as to defeat his client's rights on appeal. With a stenographer there can be scarcely any doubt as to what is said on a trial. There is no doubt that cases on appeal are more voluminous than they were under the old system, but that is the fault of the lawyers or judges, or both, and not that of the system. We have very seldom seen a case on appeal that conformed to the rule requiring that only so much evidence shall be

set forth as is necessary to point the exceptions. The difficulty is that most lawyers are too timid or uncertain as to what they really need, and the judges have not independence enough to enforce the rule. The same fault appears in reporting, where the reporters set forth unnecessary testimony and prolix statements of the facts. There are comparatively few men who know what to leave out. We believe that the true way to take testimony is by question and answer, and this is only practicable under the stenographic system. No two men will take it alike in the narrative form, and sometimes an important shade of meaning is missed.

#### NOTES OF CASES.

**I**N *Bucher v. Cheshire Railroad Co.*, United States Supreme Court, March 19, 1888, it was held that in an action for personal injuries received by plaintiff while traveling on defendant's railroad in the State of Massachusetts on Sunday, the adjudications of the Supreme Court of that State holding that no recovery can be had for injuries received while traveling in violation of the Massachusetts statutes, are binding upon this court as the local law, although its own views may not accord with such ruling. The court, by Miller, J., said: “If the proposition, as established by the repeated decisions of the highest court of that State, were one which we ourselves believed to be a sound one, there would be no difficulty in agreeing with that court, and consequently affirming the ruling of the circuit judge in the present case. But without entering into the argument of that subject we are bound to say that we do not feel satisfied that upon any general principles of law by which the courts that have adopted the common-law system are governed, that this is a true exposition of that law. On the contrary, in the case of *Railroad Co. v. Tow-Boat Co.*, 28 How. 209, this court had under consideration the same question. It arose in regard to the effect of a statute of Maryland forbidding persons ‘to work or do any bodily labor, or willingly suffer any of their servants to do any manner of labor on the Lord's day, works of charity or necessity excepted,’ and prescribing a penalty for a breach thereof. It was held by this court that where a vessel was prosecuting her voyage on Sunday, and was injured by piles negligently left in the river, this statute making traveling on Sunday an offense and punishing it by a penalty, constituted no defense to an action for damages by the vessel. A number of cases were cited sustaining that view of the subject, and the court, through Mr. Justice Grier, used this language: ‘We do not feel justified therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libelants by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for the breach of the statute.’ In that



case however there had been no decision of the courts of Maryland holding that a violation of the Sabbath would constitute a defense to the action against the company which had left the piles in the river. In this view of the matter it is not unworthy of consideration that shortly after the injury in the present case was inflicted the general court of Massachusetts passed a statute, to which we have already referred, declaring that traveling on the Lord's day should not 'constitute a defense to an action against a common carrier of passengers for any tort or injury suffered by a person so traveling.' The question then arises, how far is this court bound to follow the decisions of the Massachusetts Supreme Court on that subject? The Congress of the United States, in the act by which the Federal courts were organized, enacted that 'the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' Rev. Stat., § 721; Jud. Act, § 84; 1 U. S. Stat. at Large, 92. This statute has been often the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded 'as rules of decision in trials at common law,' is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance. The language of the statute limits its application to cases of trials at common law. There is therefore nothing in the section which requires it to be applied to proceedings in equity or in admiralty; nor is it applicable to criminal offenses against the United States (see *United States v. Reid*, 12 How. 361), or where the Constitution, treaties or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the laws of the several States shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law. It has been held by this court that the decisions of the highest court of the State in regard to the validity or meaning of the Constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In *Leffingwell v. Warren*, 2 Black, 599, this court said, in regard to the statutes of limitations of a State: 'The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.' In the case of *Luther v. Borden*, 7 How. 40, Chief Justice Taney said: 'The point then raised here has already been decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State, and the well-settled rule in this court is that the courts of the United States adopt and follow the

decisions of the State courts in questions which concern merely the Constitution and laws of the State.' See also *Post v. Supervisors*, 105 U. S. 667. It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts. The principle also applies to the rules of evidence. In *Ex parte Fisk*, 113 U. S. 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts.' See also, *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 66. There are undoubtedly exceptions to the principle that the decisions of the State courts, as to what are the laws of that State, are in all cases binding upon the Federal courts. The case of *Swift v. Tyson*, 16 Pet. 1, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the State court, it was not bound to follow the latter. There is therefore a large field of jurisprudence left in which the question of how far the decisions of State courts constitute the law of those States is an embarrassing one. There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs and common law. *Wheaton v. Peters*, 8 Pet. 591; *Pennsylvania v. Bridge Co.*, 13 How. 518. When therefore in an ordinary trial in an action at law we speak of the common law we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the State courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises. It may be said generally that wherever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess v. Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State." Field and Harlan, JJ., dissented.

In *Wallis v. Wood*, Texas Supreme Court, Feb. 7, 1888, it was held that a partnership may not be proved by general reputation. The court said: "In *Brown v. Crandall*, 11 Conn. 93, such evidence was held to be incompetent, even in connection with other facts, and the court say: 'To receive such evidence would be a departure from principle, and a precedent dangerous in practice. A person of doubtful credit might cause a report to be circulated that another was in partnership with him for the very purpose of maintaining his credit. His creditors also might aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts.' In New York it was held that the evidence was admissible independently, and not in corroboration of other evidence (*Whitney v. Sterling*, 14 Johns. 215, and *Gowan v. Jackson*, 20 id. 178, 179); but in the later case of *Halliday v. McDougall*, 20 Wend. 88, it is said that the decisions in the preceding cases must be understood to rest upon the fact that the evidence was admitted without objection. Justice Cowen overrules former decisions, and expresses opinions and uses arguments against the competency of the evidence for any purpose. He quotes approvingly the reasoning in *Brown v. Crandall*, *supra*, and adds 'that independent of sinister misrepresentations, there is scarcely a question upon which common reputation is more fallible. A contract of partnership is in its nature incapable of being defined by laymen, and whether an apparent partnership be really so or a contract of some other character, is often a most embarrassing legal question with the ablest lawyer.' He says the rules of evidence reject such testimony in relation to ordinary contracts, and concludes that there is no 'necessity for a resort to such proof in the one case more than in the other.' In New Hampshire reputation was held inadmissible. *Bank v. Moore*, 18 N. H. 102, 103; the court following *Halliday v. McDougall* and *Brown v. Crandall*, *supra*. See also later case, *Smith v. Griffith*, 3 Hill, 336. In Ohio the Supreme Court denied the right to offer the evidence unless the party had, by word or deed, held himself out to the world as a partner. *Inglebright v. Hammond*, 19 Ohio St. 343. So in Vermont the same rule prevails. *Hicks v. Cram*, 17 Vt. 449; *Carlton v. Woolen Mill*, 27 id. 498. In Georgia it is held reputation alone is not sufficient to establish a partnership. *Tumlin v. Goldsmith*, 40 Ga. 224. In California the evidence is held inadmissible except in corroboration, and to show knowledge on the part of plaintiff. Thus we see that the decisions are by no means uniform. The weight of authority is however opposed to the admissibility of the evidence. We believe both principle and reason are also opposed to it. No other contract can be established by reputation. As to third persons dealing with a partnership, sufficient concessions have been made for their protection by allowing proof of admissions of the person sought to be charged; his acts holding himself out to the world or to third persons as a partner; public acts of the firm; their bill and

letter-heads sent out to customers, advertisements, shop-sign, etc.; and all acts and declarations authorized by him that would inform a stranger or the public that the partnership existed. The facts that form public opinion, or that create common reputation, to which the person is committed, are more trustworthy and more satisfactory than mere proof of reputation so formed. Proof of the facts themselves is more consistent with the rules of evidence. A contrary doctrine would allow reputation, based on mere hearsay, to prove the fact, when the law would exclude the hearsay itself. We think a rule admitting the evidence would be too loose and unsafe, and should not be adopted for any purpose, either alone or in connection with other testimony, to establish a disputed partnership."

#### CAN THE JUDICIARY DETERMINE WHETHER A STATUTE EXISTS?

##### I.

LEGISLATURES are not exempt from corruption. Acts are approved which were never passed as approved. Professional bribers, sometimes unable to drive their filthy bargains in the halls of legislation, intercept and alter bills on their way from the houses to the governor. Constitutional requirements in the enacting of statutes are willfully or inadvertently disregarded. For these and various other reasons there are statutes enrolled and published in every State which have no legal existence. Must they nevertheless be regarded and obeyed as valid laws? Or may their validity be investigated by the judiciary and their nullity decreed? How far can the courts go in their investigation, if at all? What evidence can they consider? Under what circumstances will judgment be written against the existence of a statute? These and kindred questions are of vast importance, not perhaps to the every-day practitioner, but to the people; and so much confusion reigns where harmony alone should prevail that no apology is needed for an exhaustive review of the subject.

In England the general acts are enrolled by the clerk of Parliament and filed in the Court of Chancery. This enrollment constitutes the original act; it is the record beyond which no inquiry can be made. As to private bills, the original as passed and approved, and which remains with the clerk of Parliament, is the original record.

In *King v. Arundel*, Hob. 249 (110), the doctrine that the journal cannot be resorted to, to impeach the original act, is based on the fact that the journal was not required, by any law or any provision of the British Constitution, written or unwritten, to be kept by either house: "But now suppose that the journals were in every way full and perfect, yet it hath no power to satisfy, destroy or weaken the act, which being a record, must be tried by itself, *teste me ipso*. Now journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity, neither have they always been. They are like dockets of prothonotaries or the particular to the king's patent \* \* \* The journal is of good use for the observation of the generality and materiality of proceeding and deliberations as to the three readings of any bill, the intercourses between the two houses, and the like; but when the act is passed the journal is expired. And in this journal there appears but one reading of the bill in the upper house when it passed, which is unlikely. But if the record of the act itself

carry its death's wound in itself, then it is true that the parchment—no, nor the great seal either to the original act or to the exemplification of it—will not serve, as in the 4 Hen. VII, 18, where the act was by the king with the consent of the lords (omitting the commons), and was judged therefore void." Blackstone's language is to the same effect: "The trial therefore of this issue—*nul tiel record*—is merely by the record, for as Sir Edward Coke observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury or otherwise, *but only by itself*." 3 Bl. Com. 331.

There is no reasonable doubt that these extracts state the common-law rule, and that in the absence of some provision in the Constitution of a State or the organic land of a Territory, requiring the Legislature to keep journals of its proceedings, no resort can be had to the journals actually kept for the purpose of overthrowing the record of the act. But in this country it is doubtful if a State or Territory can be found in which the power superior to the Legislature has not ordained that journals of legislative proceedings shall be kept, and it is the opinion of the writer that the sound rule, and the one that has the support of the weight of the adjudications, that in such a case the journal may be resorted to for the purpose of ascertaining whether the law as enrolled ever passed, and whether it was constitutionally passed. If the journals on their face show that the act was never in fact passed, or that the Constitution or fundamental law was violated as to its mandatory provisions in the manner in which the statute was enacted, then it is void. If the journals are silent, their silence will not defeat the law unless they are expressly required to speak. Back of the journals no inquiry can be made. What are the cases that hold, or seem to hold the contrary?

First let us consider *Sherman v. Story*, 30 Cal. 253; S. C., 89 Am. Dec. 93. The Constitution of California at the time the act in question was passed, provided that "each house shall keep a journal of its own proceedings and publish the same; and the yeas and nays of the members of either house on any question shall at the desire of any three members present, be entered on the journal." The question whether an act could be destroyed by the journals was not involved in this case. This is apparent from the language of the court: "There is nothing upon the face of the act as enrolled and now remaining of record in the office of the secretary of State, nor is there any thing in the journal showing that it is not enrolled and approved in precisely the same form as that in which it passed both houses." The ground on which the existence of the statute was attacked was that the act enrolled and filed with the secretary of State never in fact passed either house, because the act was altered by the enrolling clerk of the Senate after it had been voted upon, and before it was approved by the governor. The statement in the opinion of the facts and of the question before the court show this beyond controversy: "To impeach the validity of the act, the defendant introduced in evidence the bill as it was transmitted from the Senate to the Assembly; the amendments said to have been proposed by the committee of the Assembly on military affairs, as they appear on the tags annexed to the Senate bill; also oral testimony for the purpose of showing that the said amendments as they appear on said tags are the amendments proposed by said committee and rejected; and that said rejected amendments were incorporated into the enrolled bill by the enrolling clerk of the Senate, and thereby, although in fact not adopted by either house, became a part of the act as it now appears. In other

words, it is claimed to be competent to show by the *kind of evidence indicated*, that the act now appearing of record in the office of the secretary of State, duly authenticated by the certificates of the secretary of the Senate and clerk of the Assembly, the signatures of the president of the Senate and speaker of the Assembly, never did pass either house, and is therefore not a valid law."

The attempt in this case then was to destroy the record, not by the journal, but by other evidence, in which oral testimony played an important and absolutely necessary part. No lengthy opinion was required to answer so absurd a proposition as this: that the existence of a law could depend on the testimony of members of the Legislature, and that as the court might find the fact to be, in case of a difference between the witnesses as to the facts, the court could pronounce the statute valid or void. What was said in this case touching the force of journals to overthrow the record of a statute was *obiter*, for there was no conflict between the *record* and the *journals*. But the court went beyond the demands of the case, and *did* declare that in spite of the constitutional provision to which reference has been made, the journal could in no way affect the enrolled act which imported absolute verity. The language of the court on this point is: "There is nothing in the Constitution then that requires or authorizes us to avoid, correct or in any way modify by aid of the journals the acts of the Legislature properly enrolled, authenticated and deposited with the secretary of State as records, and we know of no provision of the statute imparting to the journals any greater dignity than that which pertains to the journals of Parliament." But the force of this dictum is much broken by what follows: "Much less is there any authority for resorting to the *bill* as originally introduced with the *loose tags* appended, containing proposed amendments, and the memoranda of the action indorsed, or to *parol evidence* for the purpose of impeaching the record. But for the purpose of showing the character of evidence we should find, admit for the present that it is competent to go behind the journals as well as the enrolled act and look at the bills."

*Pacific Railroad v. Governor*, 23 Mo. 353; S. C., 66 Am. Dec. 673, will be found to be in harmony with the rule which has been stated to be the better one, for it appears from the opinion that the Constitution of Missouri did not require the Legislature to keep journals, and the case was therefore like the English decisions, where the journals are held to be memorandum books kept by the houses for their own convenience, and not under the requirement of a superior law. The court said: "The Constitution does not expressly require a journal to be kept, though it evidently contemplates that there would be one." But what conclusively takes this case out of the list of authorities against resorting to journals to impeach the record of a statute is the fact that the provision of the Constitution alleged to have been violated in the passing of the act (and which violation it was claimed the journals would show) was held by the court to be not *mandatory*, but merely *directory*, and therefore the failure of the Legislature to observe and obey it did not affect the statute, but only rendered the members of the Legislature guilty as law-breakers in the forum of public opinion, and in the sanctuaries of their own consciences. The court said: "When an act is directed to be done in a particular way, the direction may be merely directory—that is, it is not of the essence of the act, but the act may stand in law, notwithstanding the direction was not strictly observed. This is a familiar principle. Those exercising the powers of the several departments are sworn to support the Constitution; yet if they violate their

duty, the exigencies of government require that their acts must be upheld. This is not true of all violations of the Constitution, but is particularly applicable to violations of the class of those which are urged against the validity of the law under consideration. \* \* \* The provisions of the Constitution alleged to have been violated in the reconsideration of the bill were designed to be directory."

*State v. Swift*, 10 Nev. 176; 8 C., 21 Am. Rep. 721, is not an express authority on the point that the journal cannot be looked to with a view to ascertain whether a statute has any existence. In this case the court was asked to go beyond the journals to destroy the statute, and it was necessary to go beyond them, for on their face they did not show what was claimed to be fatal to the statute, namely, that it was not passed as approved by the governor. The court says: "If this court, for the purpose of informing itself of the existence of a public statute or testing its validity, is at liberty to look beyond the statute roll, solemnly attested in accordance with the provisions of the Constitution, and is bound to give controlling force to the entries in the legislative journals, then in this case it does clearly appear from an examination of those journals that Assembly bill No. 138, entitled as this act is entitled, was finally passed in the terms in which it was introduced, after the rejection of an amendment proposed and originally adopted in the Senate. But as the journals do not purport to contain the language, or even the substance of either the bill or the amendment—only referring to it by its number and title—they cannot by themselves, as a matter of course, impeach the enrolled act, for the two are completely and easily reconciled by supposing that the bill was originally drawn in the terms of the enrolled act. We are accordingly asked by the relator to go a step further, and look at a paper now in the office of the secretary of State purporting to be the original bill as introduced into the Assembly—the bill, it is said, to which the journals refer, and which, by a comparison with the journals and statute roll, shows that section 2, as approved by the governor and enrolled, was never passed by the Legislature. If we are at liberty to institute this examination and comparison, and if credit is to be given to the journals and this loose paper in preference to the statute roll, then the conclusion of relator seems to follow." Here then the journals did not destroy the act. There was a link to be supplied outside the journals, and the court very properly held that the inquiry could not be made. It is true that the court squarely expresses its opinion that under a Constitution providing that the houses of the Legislature should keep journals of their proceedings, the enrolled act is conclusive, and cannot be overthrown by reference to the journals; but this was not necessary for the decision of the case, and at the end of the opinion the court somewhat weakened the force of its remarks as an authoritative expression of the law in that State by the following language: "But even if we admitted the correctness of the decision in *Spangler v. Jacoby* upon the Constitutional grounds upon which it is placed, it would not help the relator in this case, for it is there only held that the journals can be resorted to, because for certain purposes they are made by the Constitution a record of as much sanctity as the enrolled laws. Here a reference to the journals alone shows no discrepancy between the enrolled act and the act passed. To discover the alleged discrepancy we must look further to a loose paper possessing no characteristic of a record."

In *People v. Comm'rs of Highways*, 54 N. Y. 276; 8 C., 13 Am. Rep. 581, what was said was obiter. No resort to the journals was urged. The law was void on its face, and the court held that an admission of the binding force and validity of the statute by a

party to an action will not preclude a decision by the court in his favor holding the statute void. The court however did say, that on the question whether an act has received the requisite vote "the printed volume is presumptively correct, and the original act is conclusive."

A review of the New York authorities will not be attempted. They are not satisfactory, and the Court of Appeals of that State has recently held emphatically that the invalidity of a statute could be shown by an examination of the journals. *People v. Petrea*, 92 N. Y. 128. The cases in that State in which the question was discussed are *People v. Purdy*, 2 Hill, 35; *De Bow v. People*, 1 Denio, 14; *Warner v. Beers*, 23 Wend. 131; *Purdy v. Hill*, 4 Hill, 394; *Hunt v. Van Alstyne*, 25 Wend. 606; *People v. Supervisors*, 8 N. Y. 317-327; *People v. Devlin*, 33 id. 260. The language of the court in this last case is certainly strong to the effect that the record will stand in spite of what appears in the journals. Both judges who wrote opinions in the case held however that if the journals could be examined, still the law was valid, as there was nothing on them to destroy the statute.

In *People v. Burt*, 43 Cal. 560, the court was asked to refer to the journals, but not for the purpose of showing that the act was never passed, and therefore this case decides nothing on the point, although the court refused to examine the journals.

In Indiana the court seems to have settled the question against the right to affect the record by the journals by so many reiterations of that doctrine that a reference to the cases and a short extract from the opinion in the last one will suffice. *Evans v. Browne*, 30 Ind. 514; *Bender v. State*, 53 id. 264; *Board of Comm'rs v. Burford*, 98 id. 383; *Stout v. County of Grant* (Ind.), 8 N. E. Rep. 223. In this last case the court says: "It is likewise true that the certificates of the speaker of the House of Representatives and of the president of the Senate respectively, that an act has passed both houses of the General Assembly, are conclusive upon the courts, and hence cannot be impeached by the production of facts inconsistent with the truth of such certificates."

In *Mayor, etc., v. Harwood*, 32 Md. 471; 8 C., 3 Am. Rep. 161, the offer was to show by evidence other than that afforded by the journals that the enrolled act never passed as enrolled, but that through mistake on the part of the engrossing clerk a portion of the original act as passed was omitted. This offer was of course refused. This case therefore decides nothing on the point. But in *Fouke v. Fleming*, 13 Md. 362, the court seems to have held that the journals cannot be looked to, the court saying: "Seeing that the engrossed bill and the published copy of the law corresponded we do not feel authorized to assume they are erroneous and decide the law to be according to the evidence of the proceedings of the Legislature as furnished by the journals of the two houses."

The question was not decided in *Müller v. State*, 3 Ohio St. 476, for the reason that there was nothing on the face of the journal to show that the act was void, and the court said that every presumption would be indulged in support of an act, and that as certain things which it was claimed had not been done in the passage of the act, were not specifically required to be entered upon the journals, the silence of the journals raised no presumption that they had not been done. This we shall see is unquestionably sound.

In *Louisiana State Lottery v. Richoux*, 23 La. Ann. 748; 8 C., 8 Am. Rep. 602, no attempt was made to assail the act by the record contained in the journals.

But in New Jersey the conclusive character of the enrolled act is authoritatively settled. *Pangborn v. Young*, 32 N. J. Law, 29. This case was approved in *Freeholders of Passaic v. Stevenson*, 46 id. 173, although

the court held—three members dissenting—that under the amendment to the Constitution the court might look to the record which that amendment had required to be made, in order to ascertain whether the provisions of that amendment had been complied with. The statute was held void because of a failure to give the notice required by the amendment. The same article provided what should be evidence of the giving of the notice, and how that evidence should be preserved. As was said by Dixon, J., in his dissenting opinion in this case, the same arguments that lie at the foundation of *Pangborn v. Young* apply with equal force to support the act in question, and it is difficult to see how the later case can be regarded as consistent in principle with the former. (See his remarks at pages 190, 191.)

*Pangborn v. Young* is undoubtedly the strongest and best reasoned case in this country on the side of the question it supports. Particular reference will therefore be made by it hereafter.

North Carolina is in harmony with New Jersey. *Bordnux v. Groom*, 64 N. C. 244.

Mississippi leans the same way. *Green v. Weller*, 32 Miss. 650. But the court was divided.

Connecticut may perhaps be considered as on the same side of the question. *Eld v. Gorham*, 20 Conn. 7.

On the other hand the cases which hold that under a Constitution requiring journals to be kept, the enrolled act may be overthrown by the journals are numerous. The case of *People v. Petre*, 92 N. Y. 128, has already been referred to. The Constitution of that State prohibited the passage of a local or private bill in certain cases, unless the act was one that had been reported by the commissioners appointed by law to revise the statutes. The act in question was within the condemnation of the statute unless the act was so reported. The court held that it would be presumed that it had been so reported, but that the journals showing the contrary, the statute was void, and it was ruled that the journals should have been received in evidence, and the court seems to have taken judicial notice of them, as the act was declared void by the Court of Appeals. Of course it was proper to take judicial notice of them.

In *State v. Francis*, 26 Kans. 724, the journals showed that four supernumeraries, who had no seat in the House and no right to vote therein, had all voted for the act in question, and that without their votes the bill was not legally passed. The court took judicial notice of the fact that there were only 125 members lawfully entitled to seats in the House; and the journals showing that the requisite number of those entitled to seats had not voted for the bill it was adjudged to be void as having never passed.

In *State v. McClelland*, 18 Neb. 236; S. C., 53 Am. Rep. 814; S. C., 36 N. W. Rep. 77, the journals showed that the bill passed by the two houses was not the one approved by the governor, and the court was called upon to decide whether the enrolled act was conclusive. The conclusion of the court was that the journals could be looked to, and that as it appeared from them that the statute in question had never passed the Legislature, it was void. The court said: "The journals of each House were evidently intended to furnish the public and the courts with the means of ascertaining what was actually done in each branch of the Legislature. They are to be treated as authentic records of the proceedings, and the court may resort to them where the validity of an act is questioned upon the ground of the failure of the Legislature to observe a matter of substance in its passage, for the purpose of ascertaining whether the constitutional provisions have been substantially complied with or not. The certificate of the presiding officers is merely *prima facie* evidence that an act has been duly passed, and

will be overthrown if it appears from the journals that it was not. The necessity for such a provision is apparent, as this is the second act passed at the last session of the Legislature which has been before this court where the provisions of the original act were changed and others inserted apparently without the knowledge of the members. \* \* \* It follows that the act is of no force and effect." This case was approved by the same court in *State v. Poole*, 29 N. W. Rep. 246.

The case of *Fouke v. Fleming*, 13 Md. 492, seems to be overruled by *Legg v. Mayor*, 42 id. 220, where the court say: "While the presumption arising from the proper forms of authentication of a statute is very strong that the statute was regularly and constitutionally enacted by the Legislature, the authorities maintain that such presumption may be overcome by competent evidence, and the statute may be shown to have never been constitutionally enacted, and this court has so decided at the present term in the case of *Berry v. Balt. & Drum Point Railroad*, 41 Md. 445. A valid statute can only be passed in the manner prescribed in the Constitution; and where the provisions of that instrument in regard to the manner of enacting laws are wholly disregarded in respect to a particular act, it would seem to be a necessary conclusion that the act, though having the forms of authenticity, must be declared to be a nullity, otherwise the express mandatory provisions of the Constitution would be of no avail or force whatever."

But in *Berry v. Balt., etc., Railroad* (see same case in 20 Am. Rep. 69) the court did not decide upon the journal alone, but examined the engrossed bill, and from this evidence came to the conclusion that the bill which passed the two houses was not the same bill that appeared enrolled and filed. This case therefore goes beyond the conservative and sound authorities in the investigation of the existence of a statute. But the court expressly held that parol evidence would not be received. It inclined to the view that the journal by itself would not in any case be sufficient to overthrow the record of the statute, but what was said on this point was of course *obiter*, as the journal, unaided by other evidence, did not make out the invalidity of the statute. The court said: "But while the authorities just cited maintain that it is the right and duty of the court to go behind the authentication of the statute and to receive evidence such as that furnished by the engrossed bill with the indorsements thereon and the journals of the proceedings of the two houses of the Legislature upon the question of the constitutional enactment of what purports to be a statute, they all seem to concur in maintaining that no statute having the proper forms of authentication can be impeached or questioned upon mere parol evidence. Nor do we decide in this case that the journals of the two houses, though required by the Constitution to be kept as records of their proceedings, would be evidence *per se* upon which the validity of a statute having the required authentication would be successfully questioned as to the manner of its enactment."

In Minnesota it is settled that the record of the act may be destroyed by the journals. In *State v. City of Hastings*, 24 Minn. 78, the court say: "In *Supervisors of Ramsey County v. Heenan*, 2 Minn. 281 (330), it was held that upon inquiry whether an alleged statute had been passed in accordance with the requirements of the Constitution 'the court may inspect the original bills on file with the secretary of State and have recourse to the journals of the houses of the Legislature to ascertain whether or not the law has received all the constitutional sanctions to its validity.'"

In New Hampshire the same doctrine is most emphatically established. In *Opinions of Justices*, 52 N. H. 622, the Supreme Judicial Court of that State, in response to a resolution of the Legislature, rendered

the following opinion on the point: "When an act is found lodged in the office of the secretary of State with other public acts passed at the same session, signed by the speaker of the House of Representatives and the president of the Senate, and approved and signed by the governor and published by authority as one of the public statutes, that constitutes *prima facie* evidence that said act received the assent of the two branches of the Legislature and approval of the governor in the manner required by the Constitution to make it a valid statute of this State, but that the journals of each branch of the Legislature are to be considered and treated as authentic records of the proceedings, and that they may be resorted to in such cases to ascertain whether the two houses in fact concurred in the passage of any specified act; and that if it appears by the journal that they did not thus concur, the *prima facie* evidence derived from the examination of the act itself will be overcome, and the act will be held to be invalid and of no effect as a law." This is an approval of a former opinion by the justices reported in 35 N. H. 579.

In South Carolina the court has held not only that the journals are competent evidence to show that a statute was never constitutionally passed, but also that the original bill may be examined. *State v. Platt*, 2 S. C. 150; S. C., 16 Am. Rep. 647. The reasoning of the court in this case, in so far as it relates to the right to test the act by the journals, is most vigorous and unanswerable: "When several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them shall be admitted as conclusive proof of the performance of the others, is to say in effect that that alone is really requisite. If it should be admitted that the great seal possessed by law, at the adoption of the Constitution, the attributes ascribed to it in respect of affording final and conclusive evidence of the facts certified under it, still there would be wanting evidence (to be sought for in the Constitution alone) that such force was intended to be given to it in its bearing in weakening the safeguards of the Constitution. Assuming the question to be whether the act had passed the houses by the due number of readings—of which fact the Constitution provided appropriate evidence, namely, the journals of the proceedings of the House—it is not to be presumed that it was intended that the act of affixing the great seal, an act performed apart from the legislative body, in an executive office, should furnish higher evidence of the proceedings of that body than its own journals."

In Alabama it has been clearly settled that an act must stand or fall by the record made by the journals. *Moody v. State*, 48 Ala. 115; S. C., 17 Am. Rep. 28. See also *Jones v. Hutchinson*, 43 Ala. 721; *Walker v. Griffith*, 60 id. 367; *Moog v. Randolph*, 77 id. 597. This is the law in Florida. *State of Florida v. Brown*, 20 Fla. 407; in Arkansas, *State v. Crawford*, 35 Ark. 237; *Chicot County v. Davies*, 40 id. 200; *Smithee v. Campbell*, 41 id. 471; in Illinois, *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571; *People v. Sturme*, 35 Ill. 121; S. C., 85 Am. Dec. 348; *Ryan v. Lynch*, 68 Ill. 160; *Miller v. Goodwin*, 70 id. 659; *People v. Lowenthal*, 93 id. 191-214; in Kansas, *Division of Howard County*, 15 Kans. 194; *Commissioners v. Higginbotham*, 17 id. 62, and *State v. Francis*, already cited. In addition to the Nebraska case already cited sustaining this view, see also *Taylor v. Wilson*, 17 Neb. 88. Michigan inclines to this view, if indeed it cannot be said that the law is thus settled in that State. *Green v. Graves*, 1 Doug. (Mich.) 351; *People v. Mahanney*, 13 Mich. 481; *Litchport v. East Saginaw*, 22 id. 104; *Attorney-General v. Rice* (Mich.), 31 N. W. Rep. 208. Although the language of Thurman, J., in *Miller v.*

*State*, 3 Ohio St. 475, has been cited to the contrary, it would seem that Ohio has adopted the more rational rule that the journal is not closed by the great seal to judicial inspection. *Fordyce v. Godman*, 20 Ohio, 801; *State v. Smith* (Ohio), 7 N. E. Rep. 447. In this last case the court say: "There are numerous cases in the decisions of the different States to the effect that the journals of a Legislature may be noticed by courts on the question whether a bill became a statute or not. But as before stated, none are to be found in which the courts have for any purpose affecting the validity of a statute gone beyond such permanent memorials of its enactment." Colorado is in the same good company. In *re Roberts*, 5 Colo. 525. Iowa is still in doubt on the subject. The cases of *Clara v. State*, 5 Iowa, 509, and *Duncombe v. Prindle*, 12 id. 1, have been cited as holding in accordance with the English rule that the record of the act is final. That they do not so hold is apparent from a most casual reading of the cases, and that court has so decided in a recent case. *Koehler v. Hill*, 14 N. W. Rep. 738. Referring to these cases the court say: "All that was determined in relation to the question under consideration in the two last-named cases was that where there is a conflict between the printed act or statute and the enrolled act, filed in the office of the secretary of State, the latter is the ultimate proof of the true expression of the legislative will. Whether the journals were competent evidence or their effect was not considered in either case."

The court in this case seems to have leaned toward excluding the journals, saying on this point: "The leading and better reasoned of the cases which hold the enrolled bill is a verity, and that the journals cannot be considered in determining the question whether such bill was constitutionally passed by the General Assembly or what the contents of the bill were, are." (Citing New York, California, New Jersey, Missouri and Indiana.)

But the court does not express any opinion on the subject. On the contrary, it specially refrains from doing so. "As we have said, the appellant contends the enrolled joint resolution is a verity, and that we cannot look into the journals for the purpose of ascertaining whether or not it was ever agreed to by the respective bodies composing the Eighteenth General Assembly, and that the great weight of authority is in favor of this position. The citations may indicate, to say the least, that this is a debatable question." The court here inclines to the other opinion.

Texas appears to hold that under a general provision in the Constitution requiring the houses to keep journals of their proceedings, the journals cannot be used to impeach legislation. This is practically the effect of the cases of *Blessing v. City of Galveston*, 42 Tex. 641, and *Usener v. State*, 8 Tex. App. 177. These cases were subsequently distinguished by a recent decision of the Texas Court of Appeals, *Hunt v. State*, 3 S. W. Rep. 233, and they were practically affirmed. The distinction there made brings us to a very important question, but one on which the authorities are in commendable accord. In *Hunt v. State* it appeared that the Texas Constitution required the presiding officer of each house to sign all bills in the presence of the house, and that the fact of such signing should be entered upon the journals. No such entry appeared on the journals as to the act in question, and the court held that the provision of the Constitution was mandatory, and not having been complied with, the statute was a nullity. The court made a distinction between a general provision that journals should be kept and all proceedings entered therein, and a provision requiring particular facts to be entered therein, and impliedly held that in the former case resort could not be had to the journals to destroy the statute. The

court said: "In neither the *Blessing* nor the *Usener* case is the distinction between a constitutional provision which expressly requires an entry of a fact concerning the passage of a statute to be entered upon the journals and a provision which contains no such express requirement discussed or noticed. In regard to the latter character of provision, these decisions are unquestionably correct, but with respect to provisions of the former character, we cannot agree to the apparently unqualified, unlimited rule therein announced; nor do we believe that either of the courts delivering these opinions would have so held had the precise question now before us been called to their attention or so presented as to demand thorough investigation. We are unwilling to adhere to and affirm the broad language of those opinions, although they are not only good authority themselves, but are supported by the decisions of other courts of high authority." Texas then may be said to be opposed to looking at the journals under a Constitution which merely provides that the houses shall keep journals of their proceedings, and if any particular fact is required to be spread upon the journal, it is only as to that fact that the journal will be examined. All the cases agree that if a certain thing is required specifically to be entered on the journal, the silence of the journal will be fatal to the statute. The cases on this point will be referred to hereafter. It was on this ground that the cases of *State v. Smith*, 7 N. E. Rep. 447; *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571; *Hunt v. State*, 3 S.W. Rep. 233; *State v. Buckley*, 54 Ala. 599, were decided. Strictly speaking therefore, none of these decisions can be held to establish authoritatively the rule that in all cases the journals can be referred to. But in Alabama and Illinois the courts have expressly gone thus far. (See Alabama cases already cited and *People v. Starne*, 35 Ill. 121; S. C., 85 Am. Dec. 348.) In these cases the statutes in question were not adjudged void because the journal did not show on its face some fact specifically required to be shown on the journal, but for the reason that the journals established affirmatively that some constitutional provision had not been complied with. California ruled in the same way in the earlier history of the State, *Fowler v. Pierce*, 2 Cal. 165; and though the court overruled this case in *Sherman v. Story*, yet the question, as we have seen, was not necessarily involved. But in *Well v. Kerfield*, 54 Cal. 111, we find that the pendulum has swung back. The court in this case expressly held that a failure to read a bill at length on three separate days, in accordance with the requirements of the Constitution, was fatal to the act. How did the court learn that the Constitution had not been complied with in this regard if it did not resort to the journal or some other source of information independent of the record to the statute? The court certainly held that the record of the act was not conclusive. This record did not show that violation of the Constitution. The pendulum seems to have oscillated farther to the right than to the left. It had new momentum imparted to it coming back. The court did not even trouble itself about examining the journals, but acted on the admissions of a party against all authority. The case states that "the proceedings of the Assembly with reference to the bill referred to in the opinion are set out at length in the petition, and from this it appears that the bill was not read at length on its first and second reading." This statute was not declared void because the journals were silent as to something particularly required to be entered upon them. It therefore overrules *Sherman v. Story*. The United States Supreme Court appears to have gone still farther than those cases which hold the journal may be examined. In *Gardner v. Barney*, 6 Wall. 499, the court merely decided that the day when

the president approved a bill could be shown by any information available, there being no date to the approval and the law requiring none. But the court used language that would warrant resort to the journal or even to other sources of information to ascertain whether a statute had any legal existence. "We are of opinion therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." This language was cited with approval by the same court in *South Ottawa v. Perkins*, 94 U. S. 280, and the court added: "Of course any particular State may by its Constitution and laws prescribe what shall be conclusive evidence of the existence or non-existence of a statute." The implication from these words is that until such prescription has been made, that court does not deem itself concluded by the record of the statute. See also *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667.

In Pennsylvania the decisions are not in clear shape. *Spear v. Plank Road Co.*, 22 Penn. St. 376, has been cited to sustain the position that the journals cannot be looked to. But see *Southwark Bank v. Commonwealth*, 26 Penn. St. 446, which leans the other way.

In Oregon the court appears to have assumed that it could examine the journals of the houses to ascertain whether the bill ever passed as it appears of record. *State v. Wright*, 12 Pac. Rep. 708. The court examined the journals and came to the conclusion that there was grave doubt whether the bill ever passed, but the court did not consider it necessary to decide the question. It did however practically hold that the journal could be inspected and that it might be used to impeach a statute. After reviewing the journals at considerable length, so far as this particular act was concerned, the court said: "It may therefore be well questioned whether this bill ever became a law."

GUY C. H. CORLIES.

GRAND FORKS, DAKOTA.

## NEGLIGENCE—DEATH—ACTION—REMEDY.

NEW JERSEY SUPREME COURT, FEB. 27, 1888.

GROSSO V. DELAWARE, L. & W. R. CO.

In the absence of an express statute no action lies for an injury caused by the death of a human being.

THE opinion states the case. The defendant had judgment below on demurrer.

Mr. Trimble, for plaintiff in error.

Bedle, Muirheid & McGee, for defendant in error.

MAGIE, J. The declaration demurred to charged the defendant company with the immediate killing of plaintiff's wife by the negligence of its employees. It sought to recover damages for the loss of her society and assistance in plaintiff's domestic affairs, and for money laid out by him in burying her. The case thus presented does not come within the provisions of the statute of March 3, 1848 (Revision, 294), or any other statute. It is of novel impression in this State, and the demurrer raises the question, whether apart from the authority conferred by statute, an action will lie to recover damages for the killing of a human being. In the very ingenious argument submitted in behalf of the plaintiff in error, it seems to be admitted that



the current of English authority indicates that such an action could not be brought at common law. In 1607 it was held that the husband could not recover for the injury he sustained by the death of his wife occasioned by the battery of defendant. *Higgins v. Butcher*, Yel. 89. In deciding the case, Taunfield, J., expressed this opinion: "If a man beat the servant of S. so that he dies of that battery, the master shall not have an action for the battery and loss of service, because the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master before, and his action is thereby lost." No trace of a case involving the right to recover for the loss of services occasioned by the killing of a wife or servant can be found thereafter until 1808. Then in an action tried before Lord Ellenborough, a husband sought to recover damages for injuries inflicted on his wife by the negligent overturning of a stage-coach, and which eventually produced her death. That eminent judge directed the jury to limit the damages to those the husband had suffered during the life of the wife, giving as the reason, that "in a civil court the death of a human being cannot be complained of as an injury." *Baker v. Bolton*, 1 Camp. 493.

No further opportunity to adjudicate upon the question seems to have been afforded until 1872, when an action by a father for loss of the services of a daughter and servant, occasioned by her death, caused by the negligence of a servant of the defendant, came before the Court of Exchequer on demurrer to pleas, one of which set up that the death of the daughter was the immediate and instantaneous result of the negligence. The validity of that plea was sustained as affording a complete answer to the father's claim. *Osborn v. Gillett*, L. R., 8 Exch. 88. This course of decision cannot perhaps be said to have been promulgated without some protest. Thus the learned reporter of *Baker v. Bolton* appends to the report this query: "If the wife be killed on the spot, is this to be considered *damnum absque injuria*?"

In *Osborn v. Gillett* the result was reached by the concurrence of Kelly, C. B., and Pigott, B., against the vigorous dissent of the then Baron Bramwell. Notwithstanding such evidences of some doubt, the fact that the common law has been construed in England from the earliest times to reject an action for loss of services occasioned by the death of the servant appears, not only from these adjudged cases, but also from the absence of precedents for such actions (the opportunity for which must have frequently occurred), and of any doctrine of text-writers or commentators to the contrary. There also appears a parliamentary declaration of what was the common-law rule, which seems to me must be decisive. It occurs in a recital of the preamble of Lord Campbell's act of 9 & 10 Vict., chap. 93 (1846), which declares that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person." There is nothing to justify any restriction of this general expression of what the common law was, because the act then proceeds to give an action in favor, among others, of a husband for the death of his wife, and of a parent for the death of his child, although such death had been caused under circumstances which would amount in law to felony.

Counsel therefore properly admitting this rule to have existed at common law, strenuously contend that it has never been and ought not to be adopted here. His argument is that this doctrine depended upon the notion that every homicide was felony, and occasioned the forfeiture of the felon's goods; and since his property was to go to the crown, and his body to the gallows, an action for a private injury was

useless and absurd; but that in this country, where the law of forfeiture has never been adopted, the rule is inapplicable under the maxim, *cessante ratione, cessat ipsa lex*. But it is obvious that the reason counsel assigns for the rule is not that afforded by the cases.

In *Higgins v. Butcher* it is said, not that the private action is useless, but that the private wrong is merged or drowned in the public wrong.

In *Baker v. Bolton* the case was not necessarily one of felony, and Lord Ellenborough's ruling opposed a barrier to any civil action for a death, however caused.

In *Osborn v. Gillett* there was nothing to show the killing to have been felonious, and all the judges treat the case as not involving a felony. So the recital of Lord Campbell's act declared that no action lay against any person who by his wrongful (not necessarily felonious) acts had caused the death of another. The rule having been applied to cases not felonious, we cannot accept the reason attributed by counsel as the ground of the rule. Many reasons have been suggested for the rule. It has been said that it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation (*Worley v. Railroad Co.*, 1 Haury, 481), that upon the principle which would allow an action to those who have been deprived of the services of deceased, an action would lie in favor of those entitled to the protection or interested in the life of deceased, as dependents or even creditors (*Insurance Co. v. Railroad Co.*, 25 Conn. 205), that there is a national and universal repugnance among enlightened nations to setting a price on human life (*Hyatt v. Adams*, 16 Mich. 180), and which is perhaps as satisfactory as any, that the right to such services as are under discussion ceases at the instant of death, so that the husband or master is deprived of no service to which he can be said to have a right. Wood Mast. & Serv., § 223; Shear. & R. Neg., § 290. What may have been the real reason for the establishment of this rule of the common law we may not be able to discover; but if so, I do not apprehend we can apply the maxim *cessante ratione*. In that case the rule must be held to be one (to use the apt illustration of Mr. Bishop) originally created for some legal reason which in the mutation of things has crumbled away, leaving the rule so crystallized as to be immovable except by legislative power. 1 Bish. Crim. Law, § 337. It is in this sense I think that the rule has been accepted as law in this country. While several of our text-books criticize it, all seem to admit it to have been a rule of the common law generally adopted here. Reeve Dom. Rel. 377; Schouler Dom. Rel. 110; Shear. & R. Neg., § 290; Wood Mast. & Serv., § 223; 1 Thomp. Neg. note, 1272; Hil. Torts, 87.

There are two early cases in this country in which the common-law rule was not applied. The first was *Smith v. Weaver*, Tayl. (N. C.) 42, in which an action for damages for the killing of a slave was allowed. The report is obscure, and it is obvious that some considerations growing out of the peculiar relations of master and slave may have afforded ground for the decision. The other case is that of *Ford v. Monroe*, 20 Wend. 210, where a father was permitted to recover for the loss of the services of his son, killed by the defendant. But the point was evidently not raised by counsel, and passed *sub silentio*. The case moreover, as well as the later case of *Lynch v. Davis*, 12 How. Pr. 323, was clearly overruled by the Court of Appeals in the case below cited. I have not found any other cases giving the least countenance to the contention of plaintiff in error until one of recent date, hereafter referred to. On the contrary, we have the common-law rule forbidding an action for damages occasioned by the death of a human being, except in cases where a statute gives a remedy by action, acknowledged in

Massachusetts (*Skinner v. Railroad Corp.*, 1 Cush. 475); in Kentucky (*Eden v. Railroad Co.*, 14 B. Monr. 165); in New York (*Green v. Railroad Co.*, 28 Barb. 9; \*41 N. Y. 294); in Michigan (*Hyatt v. Adams*, 16 Mich. 180); in Indiana (*Long v. Morrison*, 14 Ind. 595; *Railroad Co. v. Keeley*, 23 id. 133); in Connecticut (*Insurance Co. v. Railroad Co.*, 25 Conn. 272); in the Supreme Court of the United States (*Insurance Co. v. Brame*, 95 U. S. 754); in California (*Kramer v. Railroad Co.*, 25 Cal. 434); in Maine (*Nickerson v. Harri-man*, 38 Me. 277); in Pennsylvania (*Railroad Co. v. Adams*, 55 Penn. St. 499); and in Georgia (*Railroad Co. v. Lacey*, 49 Ga. 106). The case of recent date above referred to is *Sullivan v. Railroad Co.*, 3 Dill. 334. The action was by a parent for the loss of the services of his son, claimed to have been killed by the negligence of the defendant. It was admitted that there was no existing statute upon which the action could rest. After a review of the English cases, Dillon, J., reached the conclusion that the plaintiff might recover. The decision indicates the opinion of that able judge to be that the common law, as administered here, does not prohibit such actions. But I have found no other Federal court following the case, and the Supreme Court of the United States in *Insurance Co. v. Brame*, *supra*, declares the proposition that by the common law no civil action lay for an injury which results in death to be one not open to question.

Lord Campbell's act, as we have seen, gave an action in favor of a husband and parent, as well as of a wife and child, for an injury occasioned by death. In the earliest period the common law had given to the widow and to the heir an action against the slayer of the husband and ancestor. Such actions, known as appeals of death, had fallen into disuse, and after the celebrated case of *Ashford v. Thornton*, 1 Barn. & Ald. 405, which exhibited to comparatively modern times two relics of ancient law, viz., pleadings *ore tenus* and wager of battle, were abolished by statute. As I have interpreted the common law, thenceforth an injury occasioned by death was absolutely without redress. Parliament thereupon, by Lord Campbell's act, provided for redress for such injuries, etc. It gave an action in favor of the widow and of the children of the deceased. It also gave an action in favor of the husband and the parent. When the Legislature of New Jersey passed the "Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," approved March 3, 1848, the lines of Lord Campbell's act were not followed. An action was thereby given in favor of the widow, but not in favor of the husband; and the action was not limited to the children, but extended for the benefit of the next of kin. The omission of the husband does not however, in my judgment, indicate a legislative declaration that he already had a right of action. As we have seen, no recognition of any such right has been discovered. The omission may rather be assumed to indicate a legislative intent to provide redress for those who, in general, had been dependent upon the deceased, and who for that reason might be presumed to be peculiarly injured by his death.

The conclusion I have reached is that the rule of the common law was that no action would lie to recover damages for the killing of a human being; that the rule has become so solidified that whatever its original reason was, and however such reason may have ceased to exist, it cannot be judicially disregarded or annulled, but if injurious, its further modification must be sought from legislative action. This result excludes the whole action disclosed in the declaration.

The demurrer was therefore properly sustained, and the judgment below should be affirmed.

## NEW YORK COURT OF APPEALS ABSTRACT.

**APPEAL — DECISION — PARTIAL AFFIRMANCE.**—Under the Code of Civil Procedure of New York, § 1317, providing that on appeal the court "may reverse or affirm, wholly or partly, or may modify the judgment, \* \* \* and may \* \* \* grant a new trial or hearing," on appeal from a judgment for a gross sum of money against a single defendant a new trial can be granted only as to the whole action, and the court cannot sustain a part of the judgment and order a new trial as to the residue. *Story v. Railroad Co.*, 6 N. Y. 85; *Wolstenholme v. Manufacturing Co.*, 64 id. 272. This section (1317) embodies and takes the place of sections 13, 330, Code Proc., and it in no way enlarges the powers or jurisdiction of appellate courts. The two authorities above referred to must therefore control our decision in this case. A new trial in a common-law action against a single defendant can be granted only as to the whole action, and so far the common-law rule is still in force. If however in such a case there is error affecting only part of the judgment, and the record be in such condition that by a reversal in part, or by a modification thereof, the error can be eliminated, and the judgment can thus be made right without a new trial, the Code confers power upon appellate courts to make the correction or modification. So too where there are several defendants, and there is error affecting only one, who has a separate defense, the judgment as to him may be reversed and a new trial ordered, leaving final judgment to stand as to the others. *Frank v. Insurance Co.*, 102 N. Y. 266. April 10, 1888. *Goodsell v. Western Union Tel. Co.* Opinion by Earl, J.

**ARBITRATION AND AWARD — CONCLUSIVENESS — PARTY-WALLS.**—One who has agreed to submit to arbitrators the value of a party-wall is bound by the award and cannot afterward deny his liability to pay one-half the value as fixed by the arbitrators. April 10, 1888. *Bedell v. Kennedy*. Opinion by Finch, J.

**FRAUD — FRAUDULENT CONVEYANCE — PENDING SUIT — CONSIDERATION.**—Defendant, pending a foreclosure suit in which judgment for a deficiency might be rendered against her, conveyed to her brother-in-law lands conveyed to her through him by her husband, and he conveyed them back to her in trust for her daughter. Defendant alleged that at the time of her conveyance she was ignorant of the foreclosure suit, and it was not established that the transfer was voluntary and without consideration. *Held*, that there was no legal inference of fraudulent intent, and a finding for defendant should not be disturbed. April 10, 1888. *Jackson v. Badger*. Opinion by Finch, J.

**MUNICIPAL CORPORATIONS — DEFECTIVE STREETS — EXPLOSION OF GAS.**—In an action against a city for injuries caused by an explosion at a man-hole in a street, it appeared that steam-heating pipes had been laid so near gas-pipes that they had leaked, and a consequent accumulation of gas becoming ignited had probably caused the explosion. The steam-pipe enterprise was an entirely new one, but was properly authorized by charter and city ordinance. There was no positive proof of a lack of care in conducting the work or locating the pipes, or that such explosion could be anticipated. *Held*, that no negligence on the part of the city had been shown. Where the defect is known, rendering the street unsafe and dangerous, the municipality is bound to be prompt and vigilant in remedying it. It is at all times bound to exercise due care that the streets are safe and free from dangerous defects, and that they shall not become unsafe or dangerous. To this extent its duty is absolute. The language of the

cases expressing the measure of duty resting upon municipal corporations in respect to their streets, sewers, etc., has not always been carefully guarded; but the doctrine has been frequently reiterated in this court that there is no absolute guaranty of undertaking on the part of a municipal corporation that its streets or other constructions shall at all times and under all circumstances be in a safe and proper condition, and that its obligation and duty extend only to the exercise of reasonable care and vigilance. *McCarthy v. Syracuse*, 46 N. Y. 194; *Smith v. Mayor, etc.*, 66 id. 256; *Ring v. Cohoes*, 77 id. 83; *Hubbell v. Yonkers*, 104 id. 434. There must be willful misconduct or culpable neglect to create liability. Under such circumstances, the omission of the city to make a regulation prescribing the manner in which the steam-pipes should be laid furnishes no evidence of negligence. The experience furnished by the accident led to the changes in the forms of coverings for the man-holes, and to the substitution of a different method of joining the sections of the steam-pipes, which thereafter apparently prevented the occurrence of similar accidents. But so far as appears, all the precautions which at the time seemed to be necessary were taken to make the work safe and secure. April 10, 1888. *Hunt v. City of New York*. Opinion by Andrews, J.

**PARTIES — DEED OF TRUST — PARTITION — SALE — ESTOPPEL TO QUESTION VALIDITY.**—(1) A deed imposing certain trusts upon the grantee of the property conveyed, provided that he might absolutely sell, lease or mortgage so much of the estate or any part thereof as might be necessary to defray the expenses of the same, and to invest the proceeds received and pay over the income to the grantor, and upon the latter's death, to transfer both principal and interest and the whole of the residue to his surviving children. *Held*, that as the deed did not command an absolute sale of the whole of the real estate, after the death of the grantor, the residue of the real estate, if any, vested in his children; and they should be made parties to a judgment for a partition and sale of the land, in order to give a purchaser at the sale a clear title. (2) After a judgment and sale of land in partition proceedings, the alleged heirs to the property admitted, in a sealed instrument, the validity of a claim against the estate, and consented that it should be paid out of the funds arising from such sale. It did not appear that the instrument was based upon any consideration or was ever acted upon. *Held*, that this was not such a recognition of the validity of the sale as will estop them from denying it. (3) A person made a party to partition proceedings, but who has no interest in the land sold, and is not a necessary party to the proceedings, will not be estopped from denying the validity of the sale. April 10, 1888. *Miller v. Wright*. Opinion by Earl, J.

**CORPORATIONS — STOCK — ACTION TO DETERMINE OWNERSHIP — CONTRACT — PUBLIC POLICY — EQUITY — JURISDICTION — ACCOUNTING — CONTRIBUTION — DEFENSES — FRAUD — RIGHT TO JURY TRIAL.** (1) A corporation is not a necessary party to a suit between its stockholders as to the ownership of stock. (2) Persons purchasing property with their own money, but intending to turn it over to a railroad company with which they are connected, are the real parties in interest in an action to establish their rights as against an associate in the purchase who refuses to surrender the possession of certain shares of the stock of the corporation owning the property. (3) An agreement to organize a corporation, and that one of the persons furnishing the capital shall subscribe for the whole stock intended to be taken by the associates is not illegal. (4) An action to establish the rights of persons who have advanced money and incurred lia-

bilities in reliance upon an agreement of others to contribute equally to such advances and share such liabilities, is one for the cognizance of a court of equity. (5) The fact that a mortgage was given by a corporation to secure an advance made by a member thereof upon its formation is no defense for his associates when called on to reimburse him according to their agreement. (6) The repayment by a third party of the amount expended by one who advanced funds under an agreement that his associates should contribute to the advance affords no defense to an action for contribution unless such was the intention of the parties. (7) The trial by a referee of the question of an overcharge of the cost of property purchased by defendant with the funds of his associates does not necessarily involve a question of fraud entitling defendant to a jury trial, as his liability results from his failure to expend the moneys intrusted to him by his associates in the purchase of such property. April 10, 1888. *King v. Barnes*. Opinion by Ruger, C. J.

**PATENTS FOR INVENTIONS — TRANSFER — PROMISSORY NOTES — CONSTITUTIONAL LAW.**—A State law providing that when the consideration for a promissory note shall consist of the right to a patent invention, the words "given for a patent-right" shall be written or printed on the face of such note, which shall be subject to the same defenses in any purchaser's hands as in the hands of the original owner, and making it a misdemeanor to take or sell a note without those words inserted therein, with knowledge that the consideration was a patent-right, is not unconstitutional as being in restraint of a patentee's right of sale of his invention. This question has been considered by the highest courts in the States of Pennsylvania and Ohio, under statutes substantially like the statute in this State, and in the opinions delivered the constitutionality of the legislation was maintained. *Tod v. Wick*, 36 Ohio St. 370; *Haskell v. Jones*, 86 Penn. Stat. 173. The plaintiff however, in opposition to this view, cites several cases: *Ex parte Robinson*, 2 Biss. 309; *Woolen v. Banker*, 17 Alb. Law J. 72; *U. S. Cir. Ct.*, S. D. Ohio, Swayne, J.; *In re Lake*, U. S. Cir. Ct., N. D. Ohio, Matthews, J.; *Cranston v. Smith*, 37 Mich. 309; *Wilch v. Phelps*, 14 Neb. 134; *State v. Lockwood*, 43 Wis. 403. The leading case, *Ex parte Robinson*, arose under a statute of Indiana making it unlawful for a person to sell or offer to sell any patent-right within this State without first filing an authenticated copy of the letters-patent with the clerk of the court, and at the same time making an affidavit before the clerk that the letters-patent were genuine and had not been revoked or annulled, and that he had full authority to sell, etc. It was held by Mr. Justice Davis, sitting at circuit, that the law then in question was unconstitutional and void, as an infringement upon the right of sale secured to a patentee by the letters-patent. The other cases mentioned are founded mainly upon the authority of *Ex parte Robinson*. It will be observed that even if that case was well decided, it would not necessarily determine a case arising under our statute, which does not undertake to impose conditions upon the right to sell a patented invention, but simply prescribes that if a negotiable instrument is taken upon such sale the words "given for a patent-right" shall be inserted, and subjects the note to defenses existing against its original holder, notwithstanding its transfer. The Supreme Court of the United States in a recent case (*Patterson v. State*, 97 U. S. 501) had occasion to pass upon the validity of a statute of Kentucky which prohibited the sale in that State of illuminating oils not bearing a prescribed test. The plaintiff was the patentee of an oil, which if the statute was valid, could not be sold at all in Kentucky, as it could not be made

so as to conform it to the statute standard. It was claimed that the law was an invasion of the right secured to the patentee by his patent to sell his invention. The opinion of Mr. Justice Harlan in the case, upholding the statute, in which the court concurred, is an able and satisfactory exposition of the doctrine that the patent laws do not interfere with the power of a State to pass laws for the protection and security of its citizens in their persons and property, or in respect to matters of internal polity, although such laws may incidentally affect the profitable use or sale by a patentee of his invention. The Supreme Court of Indiana, after the decision in *Patterson v. State*, affirmed the constitutionality of the Indiana statute, reversing its previous decisions to the contrary, founded upon *Ex parte Robinson*. *Breckbill v. Randall*, 102 Ind. 528; *New v. Walker*, 106 Ind. 306. Under this state of the authorities we feel at liberty to declare our concurrence in the views expressed by the courts of Ohio and Pennsylvania upon the general question. The right of a discoverer to sell his invention is not derived from his patent. This right would exist although no patent laws had been enacted. What he obtains by his patent is the right to exclude others from selling or using his invention for the period specified; the right to sell or use which would, except for the protection of the patent laws, be open to all the world. The statute of New York now in question in no way interferes with this exclusive right. A State law directly infringing this law would unquestionably be void. The law of Congress and the State law are not in conflict. The object of one is to secure to the inventor an exclusive right to use or sell his invention, and the object of the other is to protect against fraud in sales. The State law operates upon the thing taken for the right sold when that is a negotiable instrument by requiring the consideration to be plainly expressed, and thus subjecting the instrument when transferred to the same defenses in the hands of the transferee as in the hands of the original holder. The statute does not make the note illegal, although the statutory words are omitted; nor does it take from a *bona fide* transferee for value before maturity, without notice of the consideration, the protection accorded to commercial paper by the law-merchant. This is the view taken in the case first cited, and is we think the true construction of the statute. It is impossible to say even that the statute operates to the disadvantage of the patentee. It may restrict the currency of the paper taken on sales of patent-rights, but on the other hand it may facilitate sales by inducing confidence on the part of purchasers that they will be protected in case of fraud or other defense. April 10, 1888. *Herdic v. Roessler*. Opinion by Andrews, J.

**STATUTE OF LIMITATIONS—CONVERSION—RUNNING OF THE STATUTE—BY AGENT—WHAT CONSTITUTES—RATIFICATION—PLEADING AND PROOF.**—(1) Under the Code of Civil Procedure of New York, § 410, providing that the time within which an action must be commenced shall be computed, where the right grows out of the receipt or detention of money by a person acting in a fiduciary capacity from the time when the person having the right to make the demand had actual knowledge of the facts upon which that right depends, where plaintiff, in an action for the conversion of funds in the hands of defendant for investment, relied entirely upon defendant and received interest money from him on a pretended investment for a long time, and it appeared that defendant never invested the money, but used it for his own purposes, the statute begins to run from the time plaintiff discovered the true state of facts and demanded a return of the money. (2) Where money is placed in the hands of an agent for investment upon

good bond and mortgage, and he retains such money in his own possession, and causes his wife to assign to plaintiff a bond not representing an investment of money, but obtained as a part of the consideration expressed on a trade of real estate by her and secured by a mortgage on property already fully incumbered, the agent is liable for conversion. (3) The bond was secured by a second mortgage on a lot covered by a first mortgage to its full value; the second mortgage included about twenty feet of land not covered by the first mortgage; plaintiff, in ignorance of her rights, accepted from defendant a deed to such twenty feet; in a very short time after being advised what her rights were, she returned such deed and claimed the money. *Held*, that the acceptance of the deed was not a ratification of defendant's acts. (4) Where a complaint in an action for the conversion of money fails to aver a demand by plaintiff of such money, but is not demurred to, evidence of such demand is competent in absence of objection. April 10, 1888. *King v. MacKellar*. Opinion by Gray, J.

**TAXATION—TAX TITLES—CANCELLATION—REFUNDING PURCHASE-MONEY.**—Laws of New York, 1855, chap. 427, § 85, provides that when, after the conveyance has been made, a tax sale is found to have been invalid, the comptroller shall cancel the sale and refund the purchase-money to the purchaser or his assigns. *Held*, that where a purchaser has conveyed away the property by mortgage and warranty deed before sale was canceled, his grantee alone is entitled to the purchase-money. April 10, 1888. *People ex rel. v. Chapin*. Opinion by Andrews, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**CONSTITUTIONAL LAW—LEGISLATIVE POWERS—TAXATION—PUBLIC IMPROVEMENTS.**—After an assessment for improving a street was partly paid, it was declared void for want of any provision for notice and hearing, and the unpaid portion was cancelled. Subsequently the Legislature directed an assessment of the amount so cancelled, with interest, upon the lands upon which the former assessment was not paid, and provided for an apportionment, with notice and hearing thereof. *Held*, valid. The power to tax belongs exclusively to the legislative branch of the government. *United States v. New Orleans*, 98 U. S. 381, 392; *Meriwether v. Garrett*, 102 id. 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall: "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the Legislature is not to the courts, but to the people, by whom its members are elected." *Bank v. Fenuo*, 8 Wall. 533, 548; *McCulloch v. Maryland*, 4 Wheat. 316, 428; *Bank v. Billings*, 4 Pet. 514, 568. See also *Kirtland v. Hockhies*, 100 U. S. 491, 497. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a State court cannot inquire. *Kelly v. Pittsburgh*, 104 U. S. 78, 80. The Legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard v. Presbury*, 14 Wall. 676; *Davidson v. New Orleans*, 96 U. S. 97; *Mobile Co. v. Kimball*, 102 id. 691, 708, 704; *Hagar v. Reclamation Dist.*, 111 id. 701.

If the Legislature provides for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans and Hagar v. Reclamation Dist.*, above cited. In *Davidson v. New Orleans* it was held that if the work was one which the State had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the fourteenth amendment to the Constitution upon which this court could review the decision of the State court. 95 U. S. 100, 106. In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited, and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the Legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction. April 2, 1888. *Spencer v. Merchant*. Opinion by Gray, J.; Matthews and Harlan, JJ., dissenting.

**EVIDENCE—ANCIENT DOCUMENT—USE FOR COMPARISON OF HANDWRITING.**—Where a paper, dated in 1828, properly authenticated, from the public archives of Coahuila, purporting to be signed in person by an applicant for concession of land by the government, is properly in evidence for other purposes, the jury may, if they believe from all the evidence that the paper is genuine, and as old as its date imports, treat the signature as genuine, and use it as a standard of comparison in determining the genuineness of an alleged signature. It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or admitted to be his, will not be allowed from such knowledge to testify to that person's handwriting, unless the witness be an expert, and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had. 1 Greenl. Ev., § 578. It is also the result of the weight of authority that papers cannot be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose. *Id.*, §§ 579, 581. But where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting

of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison. *Griffith v. Williams*, 1 Crompt. & J. 48; *Doe v. Newton*, 5 Adol. & E. 514; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Miles v. Loomis*, 75 id. 288; *Medway v. United States*, 6 Ct. Cl. 421; *McAllister v. McAllister*, 7 B. Monr. 289; 1 Phil. Ev. (4th Am. ed.) 615; 1 Greenl. Ev., § 578. The history of this rule is well stated in *Medway v. United States*, *quæ supra*. In *Griffith v. Williams* it was stated by the court that "where two documents are in evidence it is competent for the court or jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence." In *Doe v. Newton* Lord Denman said: "There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied, to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can under circumstances which cannot be helped." The other judges expressed substantially the same view. "The true rule on this subject," said Justice Johnson, in *Van Wyck v. McIntosh*, 14 N. Y. 439, 442, "is that laid down in *Doe v. Newton*, that where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other instruments or signatures cannot be introduced for that purpose." See American note to *Griffith v. Williams*, 1 Crompt. & J. (Phil. ed.) 47. This rule is not contravened by the decisions of the Supreme Court of Texas or of this court. The leading case in Texas on comparison of handwriting is *Hanley v. Gandy*, 28 Tex. 211, which only decides that other papers, not connected with the cause, cannot be introduced for the mere purpose of instituting a comparison of handwriting. No case decides that a signature to be proven cannot be compared by the jury with other papers or signatures of the party, properly in evidence in the cause. *Strother v. Lucas*, 6 Pet. 763, the leading case in this court, relates to the competency of a witness to testify as to the genuineness of a signature without having any knowledge of the party's handwriting; and the court held that such evidence was not admissible. The case of *Moore v. United States*, 91 U. S. 270, affirms the rule in question in cases where the paper used as a standard of comparison is admitted to be in the handwriting of the party, or where he is estopped from denying it to be so. It does not disaffirm the rule as applied to cases where the standard is clearly proved to be in such handwriting. In that case the paper referred to as the standard of comparison was the claimant's power of attorney given to his attorney in fact, by virtue of which the latter presented his case to the Court of Claims. It was held that he was estopped from denying that the signature to the power was in his handwriting. The present case is quite similar to that. April 2, 1888. *Williams v. Conger*. Opinion by Bradley, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

CARRIERS — PERSON ON TRAIN BY INVITATION OF BAGGAGE MASTER — CARRIERS NOT LIABLE FOR INJURY

**RIES.**—(1) It is not within the scope of the employment of a baggage master connected with a railway train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter and ride on a coach of such train. Permission given under such circumstances cannot create the relation of carrier and passenger between the company and the person thus riding on such cars. (2) The company is not liable to such persons for injuries which they may receive, unless for negligence or tortious acts on the part of the company. The baggage master has no duty or authority with the train, whether running or at the depot; and his permission to the girls to ride on that train cannot bind or affect the rights or obligations of the company. *Pierce Railroads, 277; Snyder v. Railroad Co., 60 Mo. 413; Gillet v. Railroad Co., 55 id. 315; Hanson v. Railway Co., 38 La. Ann. 111. La. Sup. Ct., Jan. 9, 1888. Reary v. Louisville, N. O. & T. Ry. Co. Opinion by Roché, J.*

**CONTRACT—ASSUMPSIT—INABILITY TO PERFORM—RECOVERY FOR LABOR DONE.**—Plaintiff having contracted to furnish certain machinery and appliances for a hotel, and having nearly completed his contract, was rendered unable to do so by reason of defendant's delay in doing some carpenter work which under the contract he was obliged to do. Before any thing further was done, the hotel was destroyed by fire, and performance of the contract rendered impossible. *Held*, that plaintiff could recover upon general *assumpsit* for his labor and materials furnished under the contract, although the completion of the work had been further delayed by the consent of both parties, and without the immediate fault of either. The destruction of the building without the fault of either party absolved both parties from the obligation of the contract and rendered further performance of it by the plaintiff impossible; it worked a virtual dissolution of the contract. It is hardly necessary to cite authorities or to adduce arguments to sustain the proposition, that if the plaintiff had furnished labor and materials under an entire contract, which it had not fully performed at the time the contract was dissolved, and if such non-performance was owing to the fault of the defendant, the plaintiff can maintain an action for the labor and materials. *Rawson v. Clark, 70 Ill. 656, and Garretty v. Brazell, 34 Iowa, 100, are in point.* There is no question that the fault of the defendant prevented the completion of the plaintiff's work at some time before the fire, and it must be taken to have been the cause of the incompleteness of the work at the time of the fire, unless some fault of the plaintiff intervened as a contributing cause. The plaintiff could not be in fault unless he was under obligation to perform the contract, and had an opportunity to complete the work. If the breach of contract by the defendant was such as to give the plaintiff a right to rescind the contract, and he exercised that right, he would be under no obligation to further perform the contract, and could not be in fault in not doing so. If the circumstances were such that he could not, or if he did not, rescind the contract, but continued under its obligation, the fact would remain that he would have fully performed the contract but for the fault of the defendant; and that fault would remain the cause of the non-performance until the plaintiff should be in fault. The plaintiff could be in no fault in not completing the work until it had notice that the defendant had finished the frame. Although the frame was in fact ready two months before the hotel was burned, the plaintiff had no notice of it. It had no reason to suppose that the defendant had rendered it possible to finish the work; and we need not consider what would have been the effect of notice before that time from the defendant that he had performed the condi-

tion precedent, with a request to the plaintiff to complete the work. The plaintiff was not in fault in not insisting upon a speedy performance of the contract by the defendant, and in agreeing to a postponement. The defendant had already broken his contract, and prevented the plaintiff from completing its part, and obliged it to suspend its work; and it could not perform the little that remained until the defendant had performed his part. At what time that should be done was immaterial. It might be more desirable and convenient for both parties that it should not be done until the building was finished, so that the machine could be put in use. The defendant's work was a condition precedent to the plaintiff's; and if they mutually agreed that both should be postponed for a time, their relations were not changed, nor the fact altered that the failure of the defendant to furnish his work prevented the plaintiff from performing his contract. Without deciding that, if there had been no fault in either party, the destruction of the building before the plaintiff had fully performed its contract would give it a right to recover for what it had furnished under it (see *Lord v. Wheeler, 1 Gray, 283; Cleary v. Sohler, 120 Mass. 210; Wells v. Colman, 107 id. 514; Applebee v. Percy, L. R., 9 C. P. 657*), we decide that as the plaintiff had been prevented from performing its contract by the fault of the defendant, and without the default of the plaintiff, the contract remained unperformed at the time it was dissolved by the burning of the building. The plaintiff can recover for the labor and materials furnished under the contract, although the completion of the work had been further delayed by the consent of both parties and without the immediate fault of either. *Mass. Sup. Jud. Ct., Jan. 10, 1888. Gilbert & Barker Manfg. Co. v. Butler. Opinion by W. Allen, J.*

**DAMAGES—PROSPECTIVE—HOW RECOVERABLE.**—A lot-owner injured by a change in the grade of a street or alley, cannot split his cause of action so as to maintain successive suits, but may recover in one action present, past and prospective damages. Damages to land arising from one permanent wrong, committed under color of legal right, cannot be collected in shreds and patches as each new loss arises, but must be recovered in a single action. It is not the damages alone that constitute the cause of action, for a cause of action is composed of both injury and damages. If there is a single injury, and there can be only a single injury, where the thing that causes it is permanent, there can be only one action; for a single injury cannot be dissected into many parts, and thus made to yield a progeny of actions, limited only by the possibility that a time may come when no new inconvenience or loss can be suffered. It is not because a wrong-doer persists in doing wrong that one action must cover all damages, but because the permanency of the work done under color of legal authority makes one indivisible injury. Where the thing done is permanent, the injury is not repeated; and where there is no repetition of an injury there cannot be successive actions. In *City v. Voegler, 103 Ind. 314*, we exhibited the difference between a thing constituting a nuisance and abatable as such, and a thing wrongfully done under color of authority, which cannot be regarded as a nuisance. We do not care to repeat what was there said, nor to enlarge upon it, further than to say that the grade of a street cannot be abated as a nuisance, and therefore cannot be regarded as governed by the rules which prevail in cases where the wrong constitutes a nuisance. It is true that there are some plausible objections to the rule that prospective damages may be recovered, but as Dr. Johnson long since said, there are objections to all propositions; so the question is not whether there are objec-

tions, but whether the reasons in favor of a proposition outweigh those against it. One who should undertake to find a rule against which no plausible objection could be urged, would find his quest as fruitless as that of the knight of La Mancha. In favor of the rule we sanction are these reasons: If successive actions are allowed, one injury may be made to constitute many causes of action. If successive actions are permitted, the rule forbidding the splitting of demands is violated. If many actions may be maintained a recovery in one may embrace what has been recovered in former actions. If many actions are allowed, the public welfare and convenience is disturbed. The principle we here assert is by no means a novel one in this court. *City v. Hudnut*, 13 N. E. Rep. 686 (this term); *Railway Co. v. Eberle*, 110 Ind. 542; *City v. Voegler*, *supra*; *Burrow v. Railroad Co.*, 107 Ind. 432, 439; *Railroad Co. v. Stockton*, 43 id. 328; *Plank-Road Co. v. Railroad Co.*, 13 id. 90. In the case of *Copper Co. v. Mining Co.*, 57 Mich. 82, and 58 Am. Rep. 333, Judge Cooley, as the representative of the court, discussed this question with the ability and learning to be expected of so great a lawyer, and affirmed what we here affirm—that where injuries to real property are caused by an act of a permanent character, done under color of legal right, only one action can be maintained. In the more recent case of *Railroad Co. v. Loeb*, 118 Ill. 203, and 64 Am. Rep. 241, the question was very fully considered, and a like conclusion reached. The general principle was thus stated in *Railroad Co. v. Combs*, 10 Bush, 393; 19 Am. Rep. 67. “The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of.” In *Railroad Co. v. Andrews*, 26 Kans. 711, this principle was asserted, and applied to the obstruction of an alley. We do not however deem it necessary to further refer to the authorities, for in *City v. Voegler*, *supra*, we collected and reviewed very many of the cases upon the subject, so that there is no necessity for again discussing them. Many authorities will be found in Mr. Starr’s able article on Prospective Damages, to which we refer without further comment. 26 Am. Law Reg. 231-245. Ind. Sup. Ct., Jan. 18, 1888. *City of Lafayette v. Nagle*. Opinion by Elliott, J.

**EVIDENCE — REDIRECT EXAMINATION — REASONS FOR BELIEF.**—In a divorce suit for adultery and cruelty, where plaintiff claimed to have had just cause for separating from defendant, the latter testified on cross-examination that he supposed plaintiff left him because she loved another man more than him. On redirect examination he was asked what reasons he had for such belief. *Held*, proper redirect examination, although recrimination was not pleaded. Greenleaf says: “To ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further and to introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness.” 1 Greenl. Ev., § 467. Taylor, in his work on Evidence, § 1474, says the witness may be re-examined, not only with respect to his motive, but also his provocation which induced the expression used on cross-examination. Let us look at the few illustrations which the books present. On a trial of the defendant for incest with his niece, the woman was not examined as a witness by the State, but the defendant examined her as a witness in his behalf. On being asked if defendant had ever had sexual intercourse with her, she answered he

had not. On the cross-examination, counsel for the prosecution presented her with the affidavit which she had made by which proceedings in bastardy had been instituted, and in answer to his question she stated that she had signed the affidavit. On re-examination by defendant’s counsel, she was asked if the signing of the affidavit was voluntary on her part. The question was objected to as not a re-examination, and the objection sustained, and on appeal this was held to be error. *Yeoman v. State*, 31 N. W. Rep. 669. In *Kendall v. City of Albion*, 34 N. W. Rep. 833, the plaintiff testified, without objection, that his services were worth in his business \$200 per month. On cross-examination he said, I can get more than that; I can get \$2,500 for my time outside of my business. On re-direct examination he said he meant he could get that sum for superintending other people’s business. *Held*, that the defendant could not object to this testimony, as it was merely explanatory of evidence introduced by himself. In *Blumenthal v. Bloomingdale*, 100 N. Y. 558, the question arose upon an action at law for breach of a contract in a lease. The court of last resort said: “The defendant, upon cross-examination of Elkin Blumenthal, a witness for the plaintiff, drew out of him the fact that on one occasion he sought to negotiate with defendant a sale of plaintiff’s crockery business, which negotiation failed. The purpose of this evidence, or the inference which the defendant sought to draw from it, is not very apparent. It was new matter, not at all growing out of the direct examination. It was possible to infer from it that plaintiff’s business was unsatisfactory, and so without profit as to make a sale desirable, and that independently of any interference by defendant, since nothing of the kind was alleged in the negotiation. Upon the re-direct examination of the witness, he was allowed to testify, under objection and exception, that plaintiff, when he requested him to attempt the negotiations, stated as a reason for his desire to sell, that defendants had obstructed him, and he could not compete with them. The alleged reason for the offer of sale actually given to the selected agent was a part of the *res gestæ* of the particular transaction made by the defendants themselves the subject of inquiry. If they were entitled to part of it, plaintiff might prove the whole to prevent or rebut any adverse or damaging inferences. The answer too, as the general term suggests, beyond bringing out the true character and purpose of the attempted negotiation, tended to prove nothing more than what the plaintiff had already stated as a witness.” In *Bank v. Young*, 36 Iowa, 44, a witness for the plaintiff said he saw the defendant sign the note in question. On cross-examination, he said the matter had once been talked over by the bank officers, and the loan to Young had been refused. On re-examination he was asked to state the reasons for such assertion respecting the talk with the bank officers, and upon objection the question was overruled. On appeal this was held to be erroneous. In *Rex v. George*, 9 Car. & P. 193, on trial of A. for an attempt to discharge loaded arms at B., B. (with a view to discredit his evidence), was cross-examined as to whether he had not used violent language toward his father, which he admitted he had. *Held*, that on re-examination B. might be asked as to how his father had acted toward him before he used the language that he had been cross-examined about. In *Railroad v. Doughty*, 22 N. J. Law, 500, a witness was asked on cross-examination whether the plaintiff at any time had told him how his property was injured by the railroad, and was answered in the affirmative without more. On re-examination he was asked what the plaintiff said to him on that point, to which objection was made; but the question was allowed to be answered. The Supreme Court held that this



was not error. The opinion of Abbott, C. J., in Queen's case, 2 Brod. & B. 284, seems to make quite plain the fair scope and limit of a re-examination. He shows that when a conversation is alluded to on cross-examination which is material to the issue, the re-examination may be extended to the whole of such conversation on that material point, but nothing beyond. He also says it is right "to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." For further illustrations see *Rex v. Beazley*, 4 Car. & P. 220; *Rex v. Simmonds*, 1 id. 84; *Rex v. Bodle*, 6 id. 186. N. J. Ct. Chan., Jan. 26, 1888. *Pullen v. Pullen*. Opinion by Bird, V. C.

**LANDLORD AND TENANT—DANGEROUS PREMISES—LIABILITY OF LANDLORD.**—The owner of a building is not liable for injuries caused by the fall of snow into the adjoining highway from the roof, where the whole building is let to a tenant, and it does not appear that the latter might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precaution have prevented the accident, there being no covenant on either side to repair, but the landlord reserving the right to enter the premises to repair the same, or to ascertain if they were properly used, etc. The only difference between this case and *Leonard v. Storer*, 115 Mass. 83, is that there the tenant had agreed to make all needful repairs, while in the case at bar there was no contract on either side, but the landlord reserved the right to enter the premises to repair the same, or to ascertain if the same were properly used, etc. This difference cannot affect the result, because the damage was not caused in either case by a want of repairs, but by the original character of the structure, and therefore the presence or absence of a covenant to repair has nothing to do with the question, and because the landlord's reservation of a right to enter, in the lease before us, did not include the control of the roof, which the landlord was held to have had in *Kirby v. Market Ass'n*, 14 Gray, 249; *Shipley v. Fifty Associates*, 101 Mass. 251, 254; 106 id. 194, 200. See *Larue v. Hotel Co.*, 116 id. 67. See also *Lowell v. Spaulding*, 4 Cush. 377; *Payne v. Rogers*, 2 H. Bl. 350. It may be that the tenant had a right to put a guard upon the roof in *Leonard v. Storer*, but if so, his right was independent of his covenant to repair, and the tenant had the same right in the present case. *Boston v. Worthington*, 10 Gray, 496, 506. See *Swords v. Edgar*, 59 N. Y. 28, 36; *Coupland v. Hardingham*, 3 Camp. 398. On the other hand if the landlord had the right to put up a guard, in the present case, during the tenancy, it is not clear that he did not have it also in the other. In either case of course a guard might have been put up before the lease was made. The decision in *Leonard v. Storer* was on the ground that "it does not appear that [the tenant] might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precautions have prevented the accident." The same is true here. There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the danger was attributable in part to the concurrent or subsequently intervening misconduct of a third person. *Elmer v. Locke*, 135 Mass. 575, 576; *Lane v. Atlantic Works*, 111 id. 136; *Walker v. Canon*, 107 id. 555; *Newman v. Zachary*, Aleyn, 3; *Scott v. Shepard*, 2 W. Bl. 892; 3 Wills. 403; *Dixon v. Bell*, 5 Maule

& S. 198; *Clark v. Chambers*, 3 Q. B. Div. 327; *Winsmore v. Greenbank*, Willes, 577 (see 21 Am. Law Rev. 765, 769); *Lynch v. Knight*, 9 H. L. Cas. 577, 590, 600; *Lumley v. Gye*, 2 El. & Bl. 216. See 1 Hale P. C. 428; *Riding v. Smith*, 1 Exch. Div. 91, 94. But the general tendency has been to look no further back than the last wrong-doer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act. See for example *Lane v. Atlantic Works*, 111 Mass. 141; *Hastings v. Stetson*, 126 id. 329; *Clarke v. Morgan*, 38 L. T. Rep. (N. S.) 354; *Carter v. Towne*, 103 Mass. 507. In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, this court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease. *E. g.*, *Jackman v. Arlington Mills*, 137 Mass. 277; *Harris v. James*, 45 Law J. Q. B. 545. It is true, that if the nuisance exists when the premises are let, the landlord can be held, although the tenant may be liable also to the person injured, for the landlord is taken to have contemplated the premises remaining in the condition in which he let them. *Delay v. Savage*, 145 Mass. 38, 41; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Swords v. Edgar*, 59 N. Y. 28, 34; *Joyce v. Martin* (R. I.), Index A. A. 35; 10 Atl. 620 (July 16, 1887). But courts have differed when the nuisance existing at the time of the lease was due to want of repairs, and the tenant had covenanted to make repairs (*Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinell v. Kamer*, L. R., 10 C. P. 668; *Swords v. Edgar*, *ubi supra*), and the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage. *Mollen v. Morrill*, 126 Mass. 545; *Rich v. Baisterfield*, 4 C. B. 783; *Gandy v. Jubber*, 5 Best & S. 78, 90; 9 id. 15, 16; *Nelson v. Brewery Co.*, 2 C. P. Div. 311; *Edwards v. Railroad Co.*, 98 N. Y. 245. In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant managing the premises in his occupation in such a way as to prevent their being a nuisance. *Stewart v. Putnam*, 127 Mass. 403, 406; *Lowell v. Spaulding*, 4 Cush. 377; *Russell v. Shenton*, 3 Q. B. Div. 449; 1 Chit. Pl. (7th ed.) 94. The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof, or took other steps to prevent it. But so far as appears, the tenant could have done so by using reasonable care. If he could, it was his duty to do so, and the landlord was not liable, for the reasons which we have stated. Mass. Sup. Jud. Ct., Jan. 9, 1888. *Clifford v. Atlantic Cotton Mills*. Opinion by Holmes, J.

**MASTER AND SERVANT—WHEN SERVANT ENGAGED IN MASTER'S EMPLOYMENT.**—(1) Plaintiff was a wiper in defendant's roundhouse. In going to his work, he and others employed in the roundhouse were accustomed to use a certain path across the yards. While going along this path within the yard, on his way to the roundhouse to go to work, plaintiff was injured while crossing the track between some cars that had been left apart for that purpose. Held, that plaintiff was, at the time of the injury, in the employment of

defendant. As to what may be the law when an employee of a railway company is not actually employed, or at any intervals of actual labor, or going to or from his labor his own way, and independently of the company, or under other circumstances, is immaterial to this case. The authorities may be in great conflict upon that question; but we are not aware that they are in conflict upon the question presented by the facts of this case. Here we have a private pathway over the grounds of the company, granted and allowed to the plaintiff and other employees of the company who worked in the roundhouse, by usage, custom and consent for their ingress and egress to and from their work, kept open across the track of the road, and which had been worn and used by himself and others for a long time prior to the injury, and that in order to reach the roundhouse it was necessary for him to go upon said pathway and to cross the track of the company at that place. It was the means and only means of entrance and exit to and from their work furnished by the company, and the plaintiff and others had a right to its free and uninterrupted use as they always had; and it was because they were the employees of the company in the roundhouse that they had such right and privilege. It was an essential part and ingredient of the plaintiff's contract of employment and incidental to it, as much as any means and facilities for his labor in the roundhouse itself furnished by the company. The plaintiff therefore, while enjoying such privilege and facility, or while passing along that pathway, and between the opening of the cars, was an employee and servant of the company as much as while actually laboring for the company in the roundhouse, and as much within his contract of employment. On the other hand there was, by virtue of the same contract, a corresponding duty of the company to keep that passage-way open for the plaintiff, for he had a right to be there as an employee of the company working in the roundhouse. If the company violated that duty, to the plaintiff's injury, by its own act or primary negligence, its liability to respond in damages is absolute and unquestionable. Our present concern is, was he, when injured, an employee of the company? The peculiar facts of this case which make him such, appear to involve precisely the same principle of that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad company, by consent, custom or contract, and was injured by the negligence of other employees of the company. This carriage of the plaintiff was the means, facility and advantage to which he was entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment or were incidental and necessary to it. In *Gilman v. Railroad Corp.*, 10 Allen, 233, the plaintiff was a car repairer, and was being carried on the cars of the company to his home at night, a distance of about four miles, free of charge by the contract. He was injured on the way by the carelessness of a switchman of the company. It was held, not only that he was an employee of the company at the time but a co-employee of the switchman, and could not recover. In *Gillshannon v. Railroad Corp.*, 10 Cush. 228, the plaintiff was a laborer repairing the road-bed, several miles from his home, and was being carried on a gravel train to his work free and by the mere consent of the company, and was injured on his way by the carelessness of those having charge of the train. Dewey, J., says, in the opinion: "If the plaintiff was, by the contract of service, to be carried to the place of his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants.

If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his service and labor, and is equally connected with it and the relation of master and servant, and therefore furnishes no ground for maintaining this action." This expresses the exact principle of this case. The keeping open of this pathway between the cars was a permissive privilege (established by custom in this case) granted to the plaintiff, of which he availed himself, to facilitate his labor and service, and is connected with it and the relation of master and servant. In *Seaver v. Railroad Co.*, 14 Gray, 466, a carpenter employed to repair the fences, bridges, etc., of the company, was carried to his work on the train and was injured by the negligence of the engineer or of those whose duty it was to inspect the axles of the cars. It was held that he was a servant of the company and a fellow-servant of the engineer and the others and could not recover. The case of *Ryan v. Railroad Co.*, 23 Penn. St. 384, is closely in point. The plaintiff was a common laborer employed in digging and filling cars with gravel, etc. He lived about four miles distant from his principal work, and it was usual for him and his fellow-workmen to ride on a gravel train to and from their work, and while being so carried to his work he was injured by the carelessness of those in management of the train. It was held that he was a mere servant of the company with the privilege of riding, as a part of his business, in the gravel train, which was one of the instruments of his work; and that he sued in his true relation, not as a passenger but as a servant; and was injured by the carelessness of his fellow-servants and could not recover. In *Le Blanche v. Railway Co.*, L. R., 1 C. P. 280, the plaintiff was a laborer with others to assist in loading a pick-up train, and it was a part of their contract of service that they should be carried to and from their work. After his work was done for the day, he was being carried to the place of his residence, and on the way was injured by the negligence of the managers of the train; and it was held that he was still a servant and could not recover for the negligence of his fellow-servants; and the case of *Gillshannon v. Railroad Corp.*, *supra*, is cited as authority by Field, queen's counsel. The case of *Higgins v. Railroad Co.*, 36 Mo. 418, is an extreme case in favor of this principle. The plaintiff had been employed as a brakeman, but had ceased work for a considerable time, but had not been paid off. He hailed a train and took his place with other employees, and on his way he was injured. It was held that he was still an employee and that his case did not come within the statute relating to the injury of passengers. In *Railway Co. v. Salmon*, 11 Kan. 83; in *Russell v. Railroad Co.*, 17 N. Y. 134; in *McQueen v. Railway Co.*, 30 Kan. 689, and in *Vick v. Railroad Co.*, 95 N. Y. 267, the plaintiff was a laborer being carried by the company to or from his work, and was injured by the negligence of those in charge of the train; and it was held that they were fellow-servants with him, and that he could not recover. See also *Ross v. Railroad Co.*, 5 Hun, 488. There are many other similar cases, but they need not be cited, for the principle is sufficiently established. It is questionable whether any case conflicting with these cases can be found. There are cases which seem to conflict with them, but they are those in which the facts show that the plaintiff was a passenger paying fare, or from whom fare could have been exacted. But if perchance there are such cases, we think them unreasonable, and are not disposed to follow them. But again it may be said that the plaintiff was still an

employee because he was attempting to use the pathway between the cars as the only customary and convenient means of access to and exit from the round-house which the company had provided, and was under obligation to keep open and safe for him and his fellow-workmen, when he was injured. In *Brydon v. Stewart*, 2 Macq. 30, the plaintiff was a miner, and had quit work, in mutiny; and yet the master was held bound to provide his safe exit from the mine as an employee or servant. We conclude therefore that the plaintiff, when injured, was an employee and servant of the company with all the rights and liabilities implied by that relation. (2) But he was a co-employee with the trainmen and therefore cannot recover. *Wia. Sup. Ct.*, Jan. 10, 1888. *Ewald v. Chicago & N. W. Ry. Co.* Opinion by Orton, J.

— NEGLIGENCE OF VICE-PRINCIPAL.—Plaintiff, a carpenter, working on a railroad trestle, intending to descend to a lower bent, asked the foreman of his gang, who was above him on the trestle, if a certain hanging rope was made fast. On answer that it was, plaintiff swung himself off, and the rope being loose, was thrown to the ground and injured. It appeared that plaintiff's descent was without orders of the foreman, and might have been made another way; that he did not tell the foreman of his intention to descend; and that no duty rested on the foreman to see to the means of descent. *Held*, that the foreman's negligence was merely personal and not as of a vice-principal, and that plaintiff could not recover from the railroad company. The difficulty has been to determine who are fellow-servants within the meaning of the rule. Upon full consideration of the question, it has long been determined that employees engaged in a separate and distinct department were not fellow-servants. *Railroad v. Carroll*, 6 Heisk. 363. The rule, as thus qualified or limited, is too well established both upon reason and authority to be now departed from. It rests, not only upon the implied agreement to assume all the risks consequent upon the negligence of fellow-servants, but in the case of railway employees particularly it is supported by considerations of a just and true public policy. The safety of the travelling public is largely dependent upon the care and skill with which railway employees discharge their responsible and perilous duties. The fact that such fellow-servants must, as between themselves and the company, take upon themselves the results of the carelessness and negligence of a fellow-servant, tends to quicken the zeal and arouse the activities of each employee against such negligence. The public well demands that no guaranty which tends to guard the public against the negligence of guiding the powerful appliances of the modern railway shall be broken down, and we can but guard the rule, as qualified by the courts of this State, as well calculated to stimulate each servant to his utmost exertion to prevent negligence in others. While this general rule is thus well settled, it is equally well established that the mere fact that the injury was the result of the negligence of one superior in rank to the injured servant does not take the case out of the rule. *Fox v. Sanford*, 4 Sneed, 36; *Railroad v. Elliott*, 1 Cold. 611; *Railroad v. Wheelless*, 10 Lea, 741; *Railroad v. Rush*, 15 id. 151; *Railway v. Handman*, 13 id. 423. The last case referred to ably and clearly states the rule and reviews the authorities. When however the inferior is injured while executing a lawful command of his superior, or where the superior represents and stands for the master, and has a right to control the movements of the train and of all the employees, in all such cases the rule *respondet superior* applies with reference to any injury resulting from the official neg-

ligence of such superior. *Railroad v. Bowler*, 9 Heisk. 866; *Railroad v. Collins*, 1 Pickle, 227. The true distinction we think is drawn, and by it our case may be summarized by Judge Cooper, who says: "In order to charge the master, the superior servant must so far stand in the place of the master as to be charged, in the particular matter, with the performance of a duty toward the inferior servant which under the law the master owes to such servant." *Railroad v. Handman*, 13 Lea, 423. To the same effect is the rule as stated by Judge McFarland, who says: "The plaintiff must show that his injury resulted from the carelessness or want of skill of some one who in the particular matter stands in the place of the master." *Railroad v. Wheelless*, 10 Lea, 748. This rule draws or rather recognizes a clear distinction between the mere personal negligence of a superior fellow-servant and his negligence in a matter in which he stands in the place of the master who under the law owed a duty in that matter to the servant. The cases of *Fox v. Sanford* and *Railroad v. Handman* furnish illustrations of the distinction that the mere personal negligence, as distinguished from official negligence of a superior, will not be imputed to the master. Applying the law as we have stated it, we can but regard the negligence of Ligar, the foreman, whereby Lahr was injured, as coming clearly within the doctrine of the case of *Railroad v. Handman*. The absence of sufficient proof that any duty rested upon Ligar to see to the means of descent used by his fellow-workmen, and the fact that Lahr did not notify Ligar of his purpose to descend, and that the proof clearly establishes that he was acting under no immediate order from Ligar in attempting to descend, makes the case one of mere personal negligence of Ligar, for which the master is not responsible. In other words, they were fellow-servants. *Tenn. Sup. Ct.*, Feb. 4, 1888. *Louisville & N. Ry. Co. v. Lahr*. Opinion by Lurton, J.

MUNICIPAL CORPORATION—DUTY TO LIGHT STREET—DEFECTIVE STREETS—STEPS FROM SIDEWALK TO STREET CROSSING.—(1) A city is under no obligation to light its streets, and its mere neglect to do so is not a ground of liability, unless the charter expressly imposes that duty. But inasmuch as a street partially obstructed or out of repair may be reasonably safe if lighted, but dangerous if unlighted, the fact that it was or was not lighted may be material upon the question of negligence. (2) The existence of a step, properly constructed, from a sidewalk to a street crossing, is not a defect, so as to render a city liable for accidents to pedestrians. In any city, and especially in one growing rapidly, where the streets and sidewalks cannot all be put at once on a uniform grade, it may and often must happen that the manner of constructing a sidewalk must be controlled by the necessities of the situation. A step or steps from the walk to the street crossing may, on the whole, be the most suitable plan of which the case will admit. Pedestrians must expect and be on the lookout for steps when they reach a street crossing. This case is not in this respect at all like that of *Tabor v. City of St. Paul*, 30 N. W. Rep. 765. *Minn. Sup. Ct.*, Jan. 27, 1888. *Miller v. City of St. Paul*. Opinion by Mitchell, J.

NEGOTIABLE INSTRUMENTS—DRAFT—ACCEPTANCE "EXCEPTED."—The drawee of a draft wrote across the face thereof the words, "Excepted, September 18th, L. B. Maben." *Held*, a valid acceptance. In a number of cases it has been held that the word "excepted," thus written, is an acceptance. *Vanstrum v. Liljengren*, 33 N. W. Rep. 555; *Miller v. Butler*, 1 Cranch C. C. 470; 1 Dan. Neg. Inst., § 497. The evident purpose of Maben in writing the word "ex-

cepted" was to accept the draft; and parol proof of this purpose, not being inconsistent with the writing, was proper, and should have been received. Had Maben intended to refuse acceptance, it was unnecessary to put such refusal in writing, and no doubt he was well aware of this fact. The law is not a system of quirks and quibbles upon which courts may seize to defeat rights, but a system of rules and principles in which the rights of parties are protected and enforced, and it is the duty of a court to disregard mere pretexts and decide a case if possible upon the merits. Neb. Sup. Ct., Jan. 5, 1888. *Cortelyou v. Maben*. Opinion by Maxwell, J.

**REWARD—CAPTURE OF ONE PRISONER—RECOVERY PRO TANTO.**—An offer of reward made for the capture of two persons is not so acted upon by the capture of one as to entitle the captor to recover *pro tanto* upon the offer. It is urged that the proclamation offering the reward for the arrest of the two persons, if acted upon in the arrest of one, would constitute a contract that might be apportioned, and the plaintiffs under it entitled to one-half of the reward offered for the arrest of both on the arrest of one of the persons for whom the reward was offered, and so, independent of any declaration or agreement to that effect, claimed to have been made after the arrest. The promise is to pay so much money for the arrest of the two persons. This is an entire proposition, which when acted upon by any person, would constitute a contract single in its nature, and not subject to apportionment under rules recognized wherever the common law is in force. No facts are stated, such as that the plaintiffs were prevented from arresting both the persons for whom a reward was offered, by the fault or fraud of the defendant, from which the law would raise a new contract, and give a remedy on a *quantum meruit*. It would be but the ordinary case of a partial performance of an entire contract if it appeared that the act done by the plaintiffs was performed with a knowledge that the reward had been offered, which does not appear to have been true in this case. It does not become necessary to determine whether one, who without knowledge that a reward has been offered for a named person, arrests such person, is entitled to the reward. As to this there is some conflict of authority. Nor does it become necessary to determine whether the fact that the plaintiffs were peace officers would defeat their right to recover the reward if they were otherwise shown to be entitled to it. Tex. Sup. Ct., Nov. 11, 1887. *Blain v. Pacific Exp. Co.* Opinion by Stayton, J.

#### ALBANY LAW SCHOOL COMMENCEMENT.

THE exercises took place at the Leland Opera House on Thursday evening, May 24. The Hon. W. L. Learned presided. Prayer was made by the Rev. J. Wilbur Chapman. The following orations were delivered by members of the class: "Foreign Immigration," Frank Howard Edmunds, East Corinth, Me. Music by the orchestra. Oration, "International Law," Hugh T. Mathers, Sidney, Ohio. Oration, "Trust Monopolies," William F. Walker, Rutland, Vt., followed by singing by the law school quartette, composed of James G. Kirkpatrick, first tenor; Frank H. Edmunds, second tenor; Erastus U. Ely, first bass; Marvin H. Dana, second bass. The valedictory was then delivered by Erastus U. Ely of Rochester, subject, "The Elective Franchise." The address to the graduates was then delivered by the Hon. Roger A. Pryor of New York.

The following is a list of the graduates: James W. Atkinson, Waterford; Edwin C. Angle, Schenectady; Elhanan W. Bucklin, Jr., Jamestown; Albert Cole, Farmer Village; Thomas F. Connealy, Marlboro, Mass.; Michael F. Culbert, Hornellsville; Edward W. Champion, Goshen; Marvin Hill Dana, New Haven, Vt.; Henry A. Edwards, Albany; Frank Howard Edmunds, East Corinth, Me.; Erastus U. Ely, Rochester; J. Sheldon Frost, Albany; George Lovell Flanders, Albany; John J. Halligan, Troy; Allen H. Jackson, Schenectady; James G. Kirkpatrick, Canastota; A. H. Martin, Denver, Col.; Hugh T. Mathers, Sidney, Ohio; Hugh P. O'Flaherty, Albany; Berkeley Pearce, Providence, R. I.; Jackson Silbaugh, Viroqua, Wis.; J. Orin Smith, Norway Lake, Me.; Shelton L. Smith, Lexington, Ill.; Matthias J. Severance, Jr., Albany; Alonzo W. Wheeler, Schenectady; William F. Walker, Rutland, Vt.; Edward U. Wade, Albany.

#### NEW BOOKS AND NEW EDITIONS.

##### AMERICAN DIGEST.

This is the first volume of the Annual Digest published by the West Company of St. Paul. It comprises all the decisions of all courts in this country during 1887, and is a consolidation of the monthly digests published by the same company. It is a closely printed volume of above 1400 pages. The table of cases reported has references to the official volume and page in cases officially reported. The book is furnished with marginal letters for convenience in turning over the pages. We have several times commended the monthly issues, and the present consolidation seems no less excellent.

##### GENERAL DIGEST OF THE UNITED STATES.

This is the first of two volumes from the Lawyers' Co-operative Company of Rochester, embracing all cases thus far included in their series of weekly reporters and Inter-State Commerce Reports, and all others officially reported in 1887. This volume comes down to H., and has 900 pages and a full table of cases digested. The ground covered is not exactly the same as that of the West Co.'s digest. The work by Mr. Guilbert seems very well done.

##### WHARTON ON EVIDENCE.

This is a third edition, in two volumes, published by Kay and Brother of Philadelphia. One hundred and forty pages of text have been added, and forty-one hundred additional cases have been cited. It is superfluous to speak of the merits of the work, for it has become a standard authority like all the learned author's other productions. The new issue is very timely. The volumes are very handsomely printed.

##### TAYLOR ON CORPORATIONS.

This is a second edition of Mr. Henry O. Taylor's work, published only four years ago, and is issued by Kay & Brother of Philadelphia. It is brought down to date. We can only reiterate the commendation which we thought the first edition deserved. The practitioner cannot have too many works on this engrossing and all-important topic, and we warmly commend Mr. Taylor's scholarly and practical treatise.

# The Albany Law Journal.

ALBANY, JUNE 9, 1888.

## CURRENT TOPICS.

OUR Court of Appeals are about sitting down to a new calendar of twelve hundred and fifty causes. This we believe is the largest accumulation ever known in the history of the court, and is as much as the court could possibly dispatch in two years and a half. It is high time that some remedy should be found. That proposed by joint resolution of the Legislature two winters ago, namely, authorizing the governor in his discretion to constitute, from time to time, a commission from the Supreme Court judges, is entirely out of the question, as we have heretofore pointed out, because it is a mere temporary expedient, and because those judges have plenty to do in their proper station. Besides, the very name of "commission" is distasteful to the profession and the people. Various other expedients have been suggested. Among these is the further limitation of appeals. Our opposition and the hostility of the profession to this are threadbare topics. The disease cannot be advantageously cured by bleeding. It would be far better to do away with the present limitation dependent on the discretion of the Supreme Court judges to allow appeals at pleasure. Another proposed remedy is to increase the number of judges and have them sit in branches or divisions—in branches according to the character of the causes, or in divisions without regard to their character. These are liable to grave objections. The assigning of causes according to their character would narrow the minds of judges, oppress them with an unpleasant monotony, and tend to an unequal or unfair division of business at times. The sitting in divisions would be inconvenient to lawyers having engagements in both courts, and tend to conflict of decision and lack of personal harmony among the judges. The court should be one, with one chief judge. Another way suggested, and which seems to us the best at all points, is to increase the number of judges and have a constant court, the judges taking turns in sitting, and in unusually important cases sitting all together. The increase need not be large—five additional would be enough, making twelve in all. Let five be a quorum. That number is just as good as seven, perhaps better. Let them sit three weeks and then be succeeded by five others. After the plan came fully into operation two could take a short rest, this vacation being allotted to every one of the twelve in turn. The plan of two to spare would also provide against absence and sickness. A court so constituted could sit nine or ten months of the year, and keep up with the business for many years to come. It might be wise, in connection with this, to limit appeals from certain orders which are

of minor importance and consume valuable time. A great deal of time has been consumed in this court in deciding that orders were not appealable. It would be well to make this matter more definite and certain by enactment. In place of such appeals we would recommend abolishing the present limitation, which grows more and more unpopular, and has led to grave abuse and favoritism in the matter of allowing appeals in the discretion of the judges. We should suppose that the judges would be glad to be rid of that discretion, for it must be often unpleasant to exercise it, and difficult to discriminate or lay down any certain rule. One thing should be carefully avoided at all events—a too numerous court, for that always tends to lack of harmony and consistency, whether sitting as a unit or in divisions.

Mr. Bishop's address before the South Carolina Bar Association on "Common Law and Codification" has been published in a pamphlet by T. H. Flood & Co. of Chicago. We have received a copy with the author's compliments—not on the cover or title-page, but printed in an appendix. The compliments consist in intimating that we are a "blackguard," because in a notice of this address we characterized its reasoning as "extremely arrogant, extravagant, grotesque, childish and inconsequential." It is really singular how thin-skinned a free-lance always is. Mr. Bishop stigmatizes a large class of legal text-book writers as thieves and pirates, and then gets angry at us on account of the above quoted adjectives, directed only to his reasoning. If we recollect right, we made some quotations in our remarks on his address to justify our strictures. In speaking of Great Britain he says: "But the longing for laziness has of late taken possession of her. And she threatens to substitute acts of Parliament for all her common law of reason, and make it possible for sluggards and fools to practice at her bar and preside in her courts. If she does it, it requires no gift of prophecy to foresee that her encompassing seas will weep upon the dripping rocks around that little island a more mournful requiem to her entombed empire than was ever before sung over fallen greatness and glory." "The Justinian folly plunged the world into night." "An experience of about forty years, not in writing the jurist works I am calling for, but in contributing thief-food, which I trust is performing its humble part in the fattening for a slaughter," etc. "To codify the law while yet it has not had a single jurist." "In the year 1886 there was a meeting of great lawyers at Saratoga, and fortunately the best minds were in the majority. Saratoga, please note, is a place of water, hence it is certain that these best minds were not drunk." "The consequence whereof has been that many or most who in England have essayed to write what should be juridical works have drawn largely on their predecessors by piracy; and the same thing has followed in this country. And the courts, instead of frowning upon this, have smiled

upon it and petted it. There are even exceptional judges who will scarcely listen to a thing until it has been stolen at least once, and some appear to be happily satisfied only with about the seventh theft." In the preface: "We need jurists, and not pirates and thieves in legal literature." "If after this rejoicing has gone on so long that all have become drunk with happiness, it is decided to detach the writing from reason by legislative command, so as to bury the common law and the nation in one grave of glory together, the code will now be in the proper condition to watch over the grave as its phosphorescent light." We shall leave it to our readers to judge whether our adjectives were too severe. A man who can deliberately write that "the Justinian folly plunged the world into night" writes childish nonsense," and his vaticinations of woe to our country if she turns her legal traditions into statutes are laughable. Mr. Bishop's arrogance stands out in every thing he ever wrote, and his extravagance and grotesqueness in nearly every thing, and the bad habit has grown on with his years, until he writes like a man in a passion. It is a great pity he will impair his influence by such absurd tantrums. As for his fling at us, we will only say that he must at least deem us candid, for on the outside of his pamphlet his publisher quotes from this journal some words of hearty commendation of his last text-book. He evidently deems us an exception to his sweeping observation on another occasion, that no editor of a law journal would give a fair and unbiased notice of a book advertised in his columns. Thus should it ever be if he would only confine his writing to text-books. But our Bishop demands the incense due to a pope.

The abuse of the power of granting new trials for trivial causes is strongly illustrated by *Galeston, etc., Ry. Co. v. Cooper*, Texas Supreme Court, Feb. 21, 1888, where the plaintiff's counsel said to the jury, "you ought to deal severely with these bloated corporations that can run their road right through a man's house or yard," and the court did not control him, and the jury found a verdict for plaintiff for twenty thousand dollars. *Held*, that it was reasonably evident the jury were influenced by the improper language, and the court should have given a new trial. This verdict may have been excessive, although the injury necessitated amputation of a leg, but if so it should have been put on that ground. It is such childish reasons for new trials that are bringing the system into disrepute. This sort of language is not at all uncommon in the northern States, but no court ever thought of granting a new trial on account of it, and no lawyer ever thought of asking for it to our knowledge.

It is not often that courts of law are required to declare what is a "newspaper." In *Hull v. King*, Minnesota Supreme Court, April 30, 1888, it was held that a paper issued weekly, containing principally religious news, and especially reading of in-

terest to persons of a particular religious denomination, but containing a column each week devoted to the general news of the day, embracing every sort of news of interest to the general reader, is a "newspaper." The court said: "We assume that it is similar to the ordinary so-called religious papers, which while their chief object is the dissemination of religious news, and especially such as would be of interest to some particular denomination, contain also, more or less in full, the general current news of the day. As was said by this court in *Beecher v. Stephens*, 25 Minn. 146: 'Newspapers are of so many varieties that it would be next to impossible to give any brief definition which would include and describe all kinds of newspapers.' It would therefore be unsafe to attempt to give any definition of the term, except the very general one that according to the use of the business world, and in ordinary understanding, a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest. *Beecher v. Stephens, supra*; 4 Op. Attys. Gen. 10; Abb. Law Dict., tit. 'Newspaper'; *Attorney-General v. Bradbury*, 7 Exch. 103. But if a publication contains the general and current news of the day it is none the less a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind, or to the advocacy of particular principles or views. Most newspapers are devoted largely to special interests, political, religious, financial, moral, social, and the like, and each is naturally patronized mainly by those who are in accord with the views which it advocates, or who are most interested in the kind of intelligence to which it gives special prominence. But if it gives the general current news of the day it still comes within the definition of a newspaper. *Kerr v. Hitt*, 75 Ill. 51; *Hernandez v. Drake*, 81 Ill. 34; *Kellogg v. Carrioco*, 47 Mo. 157. It might be good policy on part of the Legislature to limit the publication of legal notices to such kinds of newspapers as are most likely to circulate generally among the general public in the community where published. But it has not done so. All that the statute requires is that the notice of foreclosure sale be published in a 'newspaper;' and under the facts found by the court we are of opinion that this publication is a 'newspaper' within the meaning of the statute." Our favorite exchanges are *The Independent* and *The Nation*, but we never had suspected either of being a "newspaper." This decision however settles the matter in favor of the former. Mr. Elliott F. Shepard probably has not changed the character of his journal from a newspaper by those daily texts of scripture which he puts at the head of his editorial columns. But we, alas! are not a newspaper — so *Beecher v. Stephens* says.

#### NOTES OF CASES.

**I**N *Victoria Railway Commissioners v. Coultas, Priv. Coun.*, 18 App. Cas. 222, where the gate-keeper

of a railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and although an actual collision with a train was avoided, nevertheless damages were assessed for physical and mental injuries occasioned by the fright of an impending collision, held, error. The court said: "According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their lordships think, be considered a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York (*Vandenburgh v. Truax*, 4 Denio, —) which he referred to in support of his contention was a case of a palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of *Sneesby v. Lancashire and Yorkshire Ry. Co.*, 1 Q. B. Div. 42. It is remarkable that no precedent has been cited of an action similar to the present having been maintained, or even instituted, and their lordships decline to establish such a precedent." See *ante*, 288; *Renner v. Canfield*, 36 Minn. 90.

In *Appeal of Ladies' Decorative Art Club of Philadelphia*, Pennsylvania Supreme Court, April 28, 1888, defendants occupied a house in the city of Philadelphia in a square entirely filled with dwelling-houses, and conducted a school of instruction in the arts of metal-working and wood-carving, lessons being given to large classes several times a week, both during the day and evening. Plaintiff moved with his family into the adjoining house, and in a suit to enjoin defendants from carrying on their operations he and several other witnesses testified that the noise caused by the pupils hammering on brass, etc., was such as to interfere with conversation, reading and the usual enjoyments of home; that while plaintiff's child was dangerously sick the noise penetrated the sick-room, and caused increased anxiety and fears for the safety of the child; that plaintiff was sometimes compelled to

leave his house and seek relief in the open air from headache and annoyance caused by these noises. Held, that the pounding and hammering complained of constituted a nuisance, and were properly enjoined. The court said: "The law upon this subject is well settled and very plain. Where a noisy nuisance is complained of, it is a question of degree and locality. If the noise is only slight, and the inconvenience merely fanciful, or such as would only be complained of by people of elegant and dainty modes of living, and inflicts no serious or substantial discomfort, a court of equity will not take cognizance of it. No one has a right to complain that his next-door neighbor plays upon the piano at reasonable hours, or of the cries of children in his neighbor's nursery, nor of any of the ordinary sounds which are commonly heard in dwelling-houses. On the other hand, if unusual and disturbing noises are made, and particularly if they are regularly and persistently made, and if they are of a character to affect the comfort of a man's household, or the peace and health of his family, and to destroy the comfortable enjoyment of his home, a court of equity will stretch out its strong arm to prevent the continuance of such injurious acts. In regard to such a question I may say with the master of the rolls, Sir George Jessel, in *Broder v. Saillard*, 2 Ch. Div. 692: 'If there were no authority in the question I should have felt no difficulty about it, because I take it the law is this: that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbor make such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable but necessary to be followed, and which still cannot be allowed in the proximity of dwelling-houses so as to interfere with the comfort of their inhabitants.' A man has no right to bring a noisy trade or business into a neighborhood exclusively occupied by dwelling-houses, and to create there noises which destroy the peace and comfort of the occupants of those houses. If he does so the occupants may maintain an action for damages against him, or if the evil is of a character not to be compensated by damages and requiring speedy abatement, a court of equity will without hesitation stretch out its hand and prevent the continuance of the nuisance by writ of injunction. There are numerous places in which a noisy occupation can be carried on without detriment or discomfort to other people. If such a business is brought into a neighborhood consisting exclusively of dwelling-houses, and it is carried on in such manner that great personal discomfort and continual annoyance are occasioned thereby, those who suffer the injury are entitled to equitable relief against it. This is so well settled by our own as well as by the English decisions that there is no



necessity to appeal here to the books and the cases upon the subject. But the law was so clearly defined in regard to such injuries by Lord Chancellor Selborne in the case of *Ball v. Ray*, 8 Ch. App. 471, and his opinion is so applicable to the present case that it will not be superfluous or inappropriate to repeat the language used by him in that case. 'If,' says he, 'the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. On the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbor, that is not, according to principle or authority, a reasonable use of his own property, and his neighbor showing substantial injury is entitled to protection.' This well settled doctrine has a strong application to the present case; for here the defendants, having rented a dwelling-house in the midst of a square exclusively devoted to dwelling-houses, have set up a business therein which is clearly injurious to their neighbors on either side of them, depriving them of that comfort and quiet which every man has a right, under such circumstances, to expect in his dwelling. The plaintiff had no reason to suppose, when he bought an expensive dwelling-house in a locality which was occupied exclusively by dwellings, that he and his family were to be subjected to the discomfort, not to speak of more serious consequences which are quite possible, arising from loud and continuous noises occasioned by the hammering of brass and wood." See *ante*, 346.

In *Missouri Pac. Ry. Co. v. Johnson*, Texas Supreme Court, April 27, 1888, it was held that where plaintiff and his clerk testify that one or the other of them weighed the wheat taken in at plaintiff's elevator and set down the correct weight in the "scale-book," from which tickets were torn off and given to the farmers, and from the stubs correctly transcribed the weights into the day-book, such book is admissible in evidence to prove the amount of such weights, the "scale-book" being lost. The court said: "The introduction of shop-books as original evidence of indebtedness grew out of the necessity of affording small shop-keepers and dealers who kept no clerks the means of proving their accounts. Not being allowed to testify at common law in their own cases they were permitted to introduce their books of original entries in order to establish the items of their claim, after having sworn to their correctness, and proved by the testimony of disinterested persons who had dealt with them that their books were correctly kept. As to what are books of original entry there has been some diversity of opinion among the

courts. It seems however pretty well established that the first permanent records of the transaction by the creditor are to be deemed original entries if made within a short time after the transactions themselves, although the items may have been previously entered, as a temporary assistance to the memory, upon some slate, book, paper, or other substance not intended to be preserved. In an old case this court admitted the rule generally recognized in the courts of this country, but strongly animadverted upon it as a dangerous innovation of the principles of the common law, and refused to extend it in case of a merchant's account beyond such articles as are usually sold by a merchant in course of his business. *Cole v. Dial*, 8 Tex. 347. It is usually confined to accounts for labor performed, or to goods sold by regular dealers in merchandise. Since the passage of the statute which permits parties to testify in their own cases there is less reason for the extension of the doctrine than before existed. But we are of the opinion that so much of the account from the books introduced in this case as pertained to the wheat shipped from McKinney was admissible on a different ground. The witnesses as to these transactions testified of their personal knowledge. They swore, in substance, that they weighed the wheat, or saw it weighed, and that the weights were correctly set down in the scale-book, and correctly entered in the account-book from the scale-book. Such entries as were not made by the one were made by the other, and each testified that the entries made by him were correct. We think this was legitimate evidence, tending to establish that the weights shown in the book of accounts were correct. A witness who takes a memorandum of a transaction, and copies it himself, is certainly competent to prove the copy if the original be lost. If he takes down a correct statement of the weights of small parcels of grain, and adds them up, and enters them in an account-book at the end of each day, as appears to have been done in this case, he ought to be able to say whether the entries last made are correct or not, and we do not see why he should not be permitted to testify to the fact. If he knows that the numbers were correctly set down in the original memorandum, and correctly added, and the sum or sums correctly entered in a book of accounts, the conclusion is inevitable that the last entry correctly represents the total. It may be that as a general rule, if a witness, after refreshing his memory from a contemporaneous writing, can speak from his memory, the writing is not admissible in evidence. But if the writing be an account consisting of a mass of figures, he may refer to the paper if he knows it is correct, and testify from it; and we see no reason why it should not be introduced — not as original evidence, but as showing distinctly the specific account to which he has testified. *White v. Ambler*, 8 N. Y. 170; *Insurance Co. v. Weide*, 6 Wall. 680; *Abb. Tr. Ev.* 321. Here it was proved that the accounts which were offered from the books consisted of entries made from the

scale-book at the end of each day's transaction, and that the scale-book had been lost or destroyed; and we are therefore of the opinion that the book was properly admitted as tending to prove the weights of the wheat which was shipped from McKinney."

CAN THE JUDICIARY DETERMINE  
WHETHER A STATUTE EXISTS?  
II.

The opinion of the court in *Pangborn v. Young*, 32 N. J. L. 29, will be referred to, as it contains all that has been and can be said in favor of the doctrine it enunciates. In this case the existence of the statute was attacked on the ground that the journals showed that the bill never received a majority vote. The Constitution expressly required the two houses of the Legislature to keep journals of their proceedings, and publish them from time to time. The decision is therefore an undoubted authority in favor of the conclusiveness of the enrolled act under a fundamental law providing for the preservation of legislative records in journals. The court say:

"These are all the constitutional requirements relating to those diaries, and it will be observed, that with the exception of recording the yeas and nays on certain occasions, there is no prescription in the Constitution of what they shall contain. They are not required to be attested in any way whatever, nor is it said that they shall even be read over to the house, so that their correctness may stand approved.

"From this comparison, it seems to me impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of these journals, did not design to create records which were to be paramount to all other evidence with regard to the enactment and contents of laws. At the time of the formation of the Constitution, the mode of authenticating statutes by copy enrolled in the office of the secretary of State was completely established by common usage and by the sanction of its antiquity; and it was also obvious that a copy of an act thus enrolled was in every essential particular almost identical with a roll of Parliament, which it was well known was not only admissible in evidence, but was conclusive as to the existence and provisions of the law which it embodied. Possessed of this knowledge, it is difficult to believe that the eminent jurists who as delegates helped to frame the Constitution of 1844, meant to substitute a journal which was devoid of all the ordinary marks of authenticity, considered as a means of proof in a court of law, for a record which in point of evidential efficacy had no superior. If intended as evidence for any purpose whatever in any course of judicial investigation, can any one conceive that these registers would have been left in the condition in which by the Constitution we find them? In the nature of things, they must be constructed out of loose and hasty memoranda, made in the pressure of business, and amid the distraction of a numerous assembly. There is required not a single guarantee of their accuracy or their truth: no one need vouch for them, and it is not enjoined that they should be either approved, copied or recorded. I must be admitted, I think, from these considerations that a strong presumption arises that it was not the purpose of those who framed the Constitution, in enjoining each house to keep a journal, to establish such journals as the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions in the enactment of laws." \* \* \*

"Can any one deny that if the laws of the State are

to be tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law will be shaken to its foundations? Certainly no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons, or on which great interests depend will not be found defective, even in constitutional particulars, if judged by this criterion. The misplacing of a name on a nicely-balanced vote might obviously invalidate any act. What assurance is there therefore that a critical examination of these loosely-kept registers will not reveal any fatal errors of this description? In addition to these considerations, in judging of consequences, we are to remember the danger, under the prevalence of such a doctrine, to be apprehended from the intentional corruption of evidence of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals, for it is obvious that any law can be invalidated by the interpolation of a few lines, or the obliteration of one name and the substitution of another in its stead. I cannot consent to expose the State legislation to the hazards of such probable error or facile fraud.

"The principal argument in favor of this judicial appeal from the enrolled law to the legislative journal, and which was much pressed in the discussion at the bar, was that the existence of this power was necessary to keep the Legislature from overstepping the bounds of the Constitution. The course of reasoning urged was that if the court cannot look at the facts and examine the legislative action, that department of government can at will set at defiance, in the enactment of statutes, the restraints of the organic law. This argument, however specious, is not solid. The power thus claimed for the judiciary would be entirely inefficacious, as a controlling force, over any intentional exorbitance of the law-making branch of the government. If we may be permitted, for the purpose of illustration, to suppose the Legislature to design the enactment of a law in violation of the principles of the Constitution, a judicial authority to inspect the journals of that body would interpose not the slightest barrier against such transgression; for it is obvious that there could not be the least difficulty in withholding from such journals every fact evincive of such transgression. A journal can be no check on the actions of those who keep it, when a violation of duty is intentional. It cannot therefore fail to be observed how inadequate to the correction of the supposed evil is the proposed remedy. Besides, if the journal is to be consulted, on the ground of the necessity of judicial intervention, how is it that the inquiry is to stop at that point? In law, upon ordinary rules, it is plain that a journal is not a record and is therefore open to be explained or contradicted by parol proof. And yet is it not evident that the court could not, upon the plainest grounds, enter upon such an investigation? In the case now in hand, if the offer should be made to prove by the testimony of every member of the Legislature that the journals laid before us are false, and that as a matter of fact, the enrolled law did receive, in its present form, the sanction of both houses, no person versed in jurisprudence, it is presumed, would maintain that such evidence would be competent. The court cannot try issues of fact; nor with any propriety could the existence of statutes be made dependent on the result of such investigations. With regard to matters of fact, no judicial unity of opinion could be expected, and the consequence would necessarily be that the conclusion of different courts as to the legal existence of laws from the same proofs would be often variant, and the same tribunal which to-day declared a statute

void, might to-morrow be compelled, under the effect of additional evidence, to pronounce in its favor. The notion that courts could listen upon this subject to parol proof is totally inadmissible, and it therefore unavoidably results that if the journal is to be taken into consideration at all, its effect is uncontrollable; neither its frauds can be exposed nor its errors corrected. And if this be so, and the journal is to limit the inquiry of the judicial power, how obvious the inadequacy, if not futility, of such inquiry? In my estimation the doctrine in question, if entertained, would as against legislative encroachments be useless as a guard to the Constitution, and it certainly would be attended by many evils. Its practical application would be full of embarrassment. If the courts, in order to test the validity of a statute, are to draw the comparison between the enrolled copy of an act and the entries on the legislative journal, how great, to have the effect of exploding the act, must be the discrepancy between the two? Will the omission of any provision, no matter how unimportant, have that effect? The difficulty of a satisfactory answer to these and similar interrogatories is too apparent to need comment. And again, to notice one among the many practical difficulties which suggest themselves, what is to be the extent of the application of this doctrine? If an enrolled statute of this State does not carry within itself conclusive evidence of its own authenticity, it would seem that the same principle must be extended to the statutes however authenticated, of other States. An act therefore of Virginia or California, with regard to the mode of its enactment, would be open to trial as a matter *in pais*. And indeed the doctrine, if carried to its legitimate conclusion, would seem to abolish altogether the conclusiveness even of international authentications, for if the great seal of this State, attesting the existence of a statute, is not final, it is not perceived how a greater efficacy is to be given to the seal of a foreign government.

"In addition to the foregoing observations, I cannot close this part of my examination of the question under discussion without adverting to further consideration, which to my mind appears to be entitled to very great, if not decisive, weight. I here allude to the circumstance that in the structure of the government of this State, the judicial and legislative departments are made coequal, and that it nowhere appears that the one has the right of supervision over the other. It is true, as was much pressed on the argument, that the legislative branch may willfully infringe constitutional prescriptions. But the capacity to abuse power is a defect inherent in every scheme of human government, and yet nevertheless the forces of government must be reposed in some hands. The prerogatives to make, to execute and to expound the laws must reside somewhere. Depositaries of those great national trusts must be found, though it is certain such depositaries may betray the trust thus reposed in them. In the frame of our State government the recipients and organs of this threefold power are the legislature, the executive, and the judiciary, and they are co-ordinate—in all things equal and independent; each within its sphere is the trusted agent of the public. With what propriety then is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? It is to be borne in mind that the point now touched does not relate to the capacity to pronounce a law which is admitted to have been enacted void, by reason of its unconstitutionality. That is clearly a function of the judiciary. But the proposition is, whether when the Legislature has certified to a mere matter of fact, relating to its own conduct and its own cognizance, the courts of the State are at liberty to inquire into or dispute the veracity of that certificate.

I can discover nothing in the Constitution or in the general principles of government which will justify the assumption of such superior authority. In my opinion the power to certify to the public the laws which itself has enacted, is one of the trusts of the Constitution to the Legislature of the State."

Let us review the arguments that are set forth in this opinion in support of the position that the record is final. It is said that the journals are carelessly kept, and are therefore unreliable; that the entries are made by mere clerks, and that the Constitution does not make them records or prescribe how they may be authenticated. How does it happen that courts can take judicial notice that journals are carelessly kept? It is true a clerk makes the entries, but he makes them at the time the proceedings take place in the presence of the body of which he is clerk, and while that body is in session. These entries are subsequently read to the whole body in session, and corrected till they accord with the facts. Where is the chance for error? Can any record be more reliable? It is illogical to say that the journals are kept by mere clerks. A clerk writes the proceedings upon their pages, but the houses keep them. Would it not be deemed extraordinary to object to the use of an official record as evidence, that the officer did not personally make the record, but employed clerks to make it? How many public records would be evidence under such a rule? The record is the record of the officer, for he supervises, controls and corrects it, and so the journals are the records of the houses. It is a most egregious presumption that the sovereign power in a State will employ inefficient officers to keep the very records which they are required to keep by that supreme law which is sovereign above the sovereign power.

It is a still more extraordinary assumption that the houses will not rectify mistakes as they may occur from time to time in such records, and make the journals speak the truth. These courts seem to think that the journals are kept as a clerk keeps a memorandum of sales at a country "vendue." It is much easier for the presiding officers to certify a bill that has never passed than for a clerk to enter upon the journal any fact that never occurred in the proceedings of the house. Such entry must pass in review before the entire body. It is otherwise with the certificates of the officers whose duty it is to certify that an act has duly passed. How puerile the argument that the Constitution has not declared the journals to be records! The facts that they contain a history of the proceedings of the law-making power, and are kept in the presence and under the authority and control of that power in accordance with the positive mandate of the Constitution, make the journals records of the very highest order. A Constitution does not busy itself with definitions. Why do the people require their servants in legislative assembly to set forth their proceedings in a journal, if not to provide a record from which the people and the judiciary can, by comparing the acts of the Legislature as shown by such record with the Constitution, determine whether the great fundamental law has been observed or violated. In the absence of journals there would be no means of keeping the Legislature from bidding defiance to the Constitution, as there would be no competent evidence of the most flagrant disregard of its most valuable provisions. Is it not apparent that the provision requiring journals to be kept, when found in a Constitution in connection with restrictions upon a law-enacting power and articles regulating the mode of procedure in passing statutes, was inserted in the Constitution to make efficacious those other restricting and regulating provisions in connection with which it is found in the organic law, by substituting in place of the enrolled act as final evidence

of its existence a record of the proceedings of each body to which the courts might refer for the purpose of determining whether any particular act had been in fact constitutionally passed?

But it is further said in the New Jersey case that this safeguard against corruption and mistake is inadequate; that the two houses can withhold from their journals a record of their proceedings, or may cause to be entered thereon a false record. True, but this is highly improbable, for all the members of a house would not be corrupt or inattentive to their duties; and a majority, however strong, would shrink from publishing their willful violation of the Constitution to a minority, however small, who could have their protest entered upon the journals. But assume that this check upon a disregard of the Constitution would not be perfect, is it to be argued from such a premise that such check shall have no effect at all, and the Legislature suffered to ignore all constitutional restraints upon legislation, and the presiding officers permitted to certify as having passed a bill that never in fact was passed? This reasoning would defeat all criminal legislation. No legal evidence could be found to convict Jacob Sharp, a known professional briber. The statute against bribery is therefore not thoroughly efficacious in punishing and preventing bribery. *Ergo*, the statute is not law. But there is a peculiar reason why this argument is weak. Impeaching the existence of alleged statutes by journals is the best and only practicable means that can be devised to keep the sovereign power in enacting statutes within the limits of their authority as prescribed by the organic law. To test the validity of their proceedings by any thing save the record made by themselves would destroy the dignity and independence of this department of government, and render the existence of a statute dependent upon uncertain evidence. One court might be satisfied that a bill had been constitutionally passed. The question would not be *res adjudicata* except between the same parties in the same case. Another court might come to a different conclusion on the same or different evidence. The condition of a people under such circumstances would be worse than that of the French peasantry and commonalty before the revolution had ushered in the new system of provincial division and administration, when totally different laws prevailed in different streets of the same hamlet or village. These laws, though differing in different localities, were yet certain; but under any other mode of testing the existence of an act than by the record furnished by the legislators themselves, no man would know whether the law adjudged to be in existence to-day might not be held to be a nullity to-morrow. In the place of order there would be "eternal anarchy" in the midst of which courts would like "chaos umpire sit, and by decision more embroil the fray." The record made by the Legislature itself is clearly the only evidence to which the judiciary can resort consistently with the independence of that body and the certainty of the law. The journal is that record. The Constitution has required it to be kept. It is a better record than the act itself, as that speaks of nothing save by implication of law, and it always speaks one language: "I exist." In fact the act is no record by which the validity of itself can be tried, for it invariably impels the judicial mind to one and the same conclusion. How can a court be said to decide from the enrolled act whether all necessary steps have been taken and the law constitutionally passed, the act being always conclusive on this point. As the law must be tried by the record of the body that made it, and as that record must be something more than the act itself, if the court is to decide whether the Constitution has been observed, what other standard can be

furnished better than, or even as good, as the legislative journals? Even if a better mode of preventing violations of the Constitution could be devised, it would be no argument against the existence of the one that had been devised that it was not perfect. Much more then is the argument out of place when it is considered that human ingenuity in making the validity of a statute triable by the journals, has gone to the extreme verge, and devised the best possible mode of preventing the Legislature from bidding defiance to the Constitution, without making that body dependent on the judiciary and the statute law of a people as variable and uncertain as the ever-shifting clouds. Are there to be no checks because there are or cannot be perfect checks? Must the best that can be done under the circumstances be held to have been left undone because it does not completely meet and remedy the evil? Why not in the same way argue out of the Constitution all provisions regulating the sovereign power in enacting statutes on the ground that these provisions can be evaded? If what is undoubtedly somewhat of a restraint upon violations of the Constitution is to be reasoned out of existence because it is not *always* a restraint, then let us on the same line deny the existence of every constitutional inhibition, because without the journals to show a violation of it, it is void of force.

Would not the reply be: "Till thou canst rail the seal from off the bond thou but offendst thy lungs to speak so loud."

But it is said that the Constitution does not provide how the journal shall be authenticated. It needs no authentication. It authenticates itself. It is the journal of the house, kept under the commands of the supreme law and the power itself. The logic of those Constitutions which require the houses to keep journals is obvious. In England the act was conclusive, and therefore the people saw, the common law having been adopted in this country, that all restraints upon the mode of enacting laws would be futile unless some way of proving violations of those restraints could be established. The constitutional framers saw also that the Legislature would become the mere underling of the judiciary and the laws uncertain if any evidence save the record made by the body itself could be resorted to to impeach its acts. Therefore as the best that could be done, each house was required to enter in a journal that record, to the end that the judiciary might ascertain from an inspection of it whether the statute was passed in accordance with the Constitution. They were not so short sighted as to say what the Legislature should or should not do in passing a statute, and then leave that body at liberty to disregard the people's mandates because they had not provided a record to show such disregard. Therefore they required the record to be kept, and they required it to be kept for this purpose.

The inspection of the journals and the adjudging of a statute void because they show a violation of the Constitution is not an encroachment upon the province of a co-ordinate branch of the government, and does not affect the independence of that body, as claimed in the New Jersey case. If such violation of the Constitution appears on the face of the enrolled act, all the cases agree that the courts must hold the act void. The journals are as much the records of the two houses as the act. The courts simply bring these records to the test of the Constitution, the same as they bring the enrolled act itself, and whether they can stand that test is a judicial question. The act stands or falls by the records which the houses themselves have made.

The argument that the journals might be altered after they had been approved by the houses is unworthy of more than a passing notice. So may the original

act be altered after it has been authenticated by both houses. Was not this precisely what Pottle testified Jacob Sharp offered him \$10,000 for? He wanted the engrossing clerk to change the act by inserting in it words that were not there when it passed. Again it is urged that no citizen would know what the law is if he had to examine the journals. Does any citizen ever examine the enrolled act? So far as he makes any examination at all, all he looks to is the printed volume of statutes. But the enrolled act controls, as we shall see hereafter, and if on its face it is void, no court has been heard to say that it should not be declared void merely because the citizen never examines the enrolled act, and because it would be inconvenient for him to do so. A printed statute is nearly as liable to be shown void, or different from what it appears to be, by a reference to the enrolled act, as the latter is to be shown void by reference to the journals. Very few statutes are adjudged void in either case. Not one citizen in ten thousand knows of the existence of a statute even in the printed volume till he finds himself in litigation which involves the existence of the statute. Scarcely a single person ever knows that a statute has become a law the very day it takes effect. Can he plead ignorance of it till he hears of it? How specious then this reasoning that no man would know the law if the journals controlled! Which is the more important to the State, that a citizen should occasionally escape the consequence of his ignorance of facts which might have been ascertained by a mere inspection of the journals, or that legislators should defy the people's will as embodied in the organic law? Is one man, or are a few men greater than all? If it be said that the journals may leave the matter in doubt, so it is replied is the meaning of a statute very often a matter of serious doubt, regarding which courts and judges differ. When the act has been finally construed, can the citizen set up his own *bona fide* construction of it, based upon the advice of counsel and confirmed by the decisions of all the courts except the court of last resort—can he set up his views of it under these circumstances in bar of the opinion and judgment of the court that differs from him? Who knows the common law beyond a question until the courts have settled it? and who can say he is certain about it even then? The law is full of hardships. Courts are constantly avoiding the greater of two evils. What evil can be greater than exempting legislators from all constitutional restraints in passing statutes? How much do the rights of a citizen who possibly may be surprised by finding void a statute of which he may have never before heard—how much do such rights weigh in the other scale? Moreover rigid enforcement of observance of the Constitution will tend to keep legislatures within the requirements of the Constitution in enacting laws, and thus lessen the possibility of injury to the citizen by decreasing the number of acts that are void on account of violations of the supreme law. Thus this doctrine will largely defeat this particular argument urged against it. But journals, we are told, are kept merely for the convenience of the body whose proceedings they record. The question is not for what purpose the houses keep the journals, but why does the Constitution require them to keep the journals? Was it necessary for the people to see to it by express provisions that the Legislature should not suffer the inconvenience of being without a record? Did legislators need the suggestion or the grant of power to keep journals? Were they not kept by all legislative bodies in England and in this country long before such provisions were incorporated into the constitutions of the different States? Being required to do what they had the power to do and had done before and would have continued to do, though the Consti-

tution had been silent on the subject, what is the more rational inference—that the houses were commanded to do this thing for their own convenience, or that the people were determined that constitutional prohibitions, regulations and restrictions should not be disregarded; and that they might not be, the people directed their servants to make a record of their proceedings in passing laws, that their acts, as legislators, as shown by the record, might be tried by the people's fundamental and sovereign law? But says the court in the New Jersey case, if the journal was to control, why was it not so nominated in the Constitution? There is no force in this argument. Organic laws do not deal in particulars. They do not bear upon their face in express words all the deductions from their general provisions. This reasoning would overthrow every clear inference from express provisions, because what is apparent by necessary implication was not expressed in so many words. The arguments which the writer has reviewed are substantially all that are or can be urged against a resort to the journals.

All the cases agree that the silence of the journals will not impeach the act unless they are silent as to some particular thing which the Constitution specifically requires to be entered upon them. A general provision that journals shall be kept and the proceedings of the House entered thereon, will not be construed as imperatively requiring all or any of the facts essential to a valid statute to be spread upon the journal. Every presumption being in favor of the validity of a statute and nothing appearing on the face of the journals to destroy it, the court will under such a general provision, presume that it was constitutionally passed. *Hunt v. State* (Tex.), 3 S. W. Rep. 233; *Perry v. Railroad Co.*, 58 Ala. 546; *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571; *Attorney-General v. Rice* (Mich.), 31 N. W. Rep. 203; *Koehler v. Hull* (Iowa), 14 id. 738; *State v. City of Hastings*, 24 Minn. 78; *Miller v. State*, 3 Ohio St. 475; *State v. Brown*, 20 Fla. 407-424; *Smither v. Garth*, 33 Ark. 17; *Wabash Railroad Co. v. Hughes*, 38 Ill. 186; *Chicot Co. v. Davis*, 40 Ark. 200; *Supervisors v. People*, 26 Ill. 181; *County of Leavenworth v. Barnes*, 94 U. S. 71. But where the Constitution expressly and specifically provides that certain facts shall be entered upon the journals, then the silence of the journals in this particular, by the common consent of all the cases, is fatal to the act. Whether these cases rest on the grounds that such silence raises a presumption that the facts did not occur, or whether the silence is fatal because the Constitution has required not only that the facts should exist, but that they should also be recorded, is perhaps immaterial. The conclusion is the same whichever view is taken. *Hunt v. State* (Tex.), 3 S. W. Rep. 233; *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571; *Perry v. Railroad*, 58 Ala. 546; *State v. Buckley*, 54 id. 599; *Koehler v. Hull*, 14 N. W. Rep. 738; *Fordyce v. Godman*, 20 Ohio St. 1; *The Railroad Tax Cases*, 13 Fed. Rep. 722-767; *Osborn v. Staley*, 5 W. Va. 85; S. C., 13 Am. Rep. 640; *South Ottawa v. Perkins*, 94 U. S. 230; *Amoskeag Nat. Bank v. Ottawa*, 105 id. 667.

The distinction between the case where there is a general provision requiring the proceedings to be entered upon the journals and the case where there is a specification of the things to be recorded is clearly expressed in *Hunt v. State*: "In the instance we are considering the Constitution expressly requires that the journals shall show the fact of the signing of the bill by the presiding officer of each house, etc. This is an imperative requirement and as plain as the English language could make it. As we understand the rule stated in the quotation just made, the fact of such signing of the bill must appear from the journals. Such fact cannot be presumed or be established by any other evidence while the journals are in existence, because the

Constitution expressly requires the journals to show the fact, and thereby as long as said journals exist make them the best, the only and the conclusive evidence of the fact. If there was not an express requirement that the journals should show the fact of signing, then the mere silence of the journals as to such signing would not affect the validity of the statute, because in such case the legal presumption would prevail that the bill had been signed in the manner required." When the journals show that the bill received the requisite vote, assuming that there were none others present than those who on the journals appear to have voted, the court will not presume that other members were present, though the vote did not include all the members of the House. In *Wise v. Bigger*, 79 W. Va. 579, the Constitution required a bill to be passed over the governor's veto by a two-thirds vote of the members present. The journals showed that nineteen members of the Senate voted for and nine against the passage of the bill in question over the veto of the governor. The Senate was composed of twenty-nine members. The court decided that it was not necessary for the journal to show affirmatively that the other member was not present; that it would be presumed that only those who appeared by the journals to have voted were present, as the contrary presumption would defeat the statute.

In *Osborn v. Staley* the Senate, consisting of twenty-two members, had voted for the act in question by a vote of eleven to ten. This appeared from the journals, and they also contained an entry showing that one of the members elected to that Senate had resigned. The Constitution required all acts to be passed by a vote of the "members elected." It was urged that there was no majority, for the reason that the senator who resigned was a "member elected" within the meaning of this provision. The court was in doubt on the question and solved the doubt in favor of the statute, saying: "A reasonable doubt must be solved in favor of the legislative action and the act be sustained."

This and the other Virginia case are in the trend of authority, for the very cases which hold that the journals may be referred to declare that the statute must have the benefit of every reasonable doubt.

This rule is so elementary that it will not be necessary to refer to the cases. They all recognize it. In determining whether a statute is void because some constitutional provision has not been complied with, the construction of such provision is necessarily involved. If this provision is construed to be mandatory the act is void; if merely directory, the statute will be valid. Judge Cooley and some of the cases take the view that all constitutional requirements are mandatory. This eminent jurist presents a forcible argument in support of his views. (See pages 95 and 183 of his work on Constitutional Limitations.) In *Hunt v. State* (Tex.), 3 S. W. Rep. 233, Judge Cooley is quoted with approval on this point, and the court says that the great weight of authority seems to support the doctrine that the courts are not at liberty to regard any provision of the Constitution as directory. It is doubtful if a single case can be found where this question is authoritatively decided. In those cases where this opinion has been expressed the provision construed was clearly mandatory, and no necessity existed for laying down so broad a rule. To the writer this does not appear to be the true doctrine. No precise rule can be stated to govern all cases. However while some provisions should be and have been construed as merely directory, it is certainly a sound doctrine that they are not to be regarded and held to be merely directory with the same facility as in the case of statutes. The strong—the almost irrefutable presumption should be that the people inserted in

their organic law no idle words, no meaningless directions, and courts should pause for clear light to guide them to the decision before they expunge from such an instrument the words "shall" and "must" and interpolate in their place "may" or "ought to." But to hold that a provision is imperative where no good could possibly result from such an interpretation, would be adopting too narrow a rule of construction and one which would defeat the spirit of the Constitution. Suppose it should provide that every bill introduced should be written on parchment, would a failure to comply with this requirement destroy an act of vital importance to the people and passed by the unanimous vote of both houses? In the following cases various provisions were held to be merely directory: that the bill should be three times read before its passage, *Miller v. State*, 3 Ohio St. 480; *Pierce v. Nicholson*, 6 id. 178; *McGill v. State*, 34 id. 264; *Supervisors v. Suppose*, 25 Ill. 181; that the yeas and nays should be taken and entered in the journals, *People v. Supervisors*, 8 N. W. 317; that the presiding officer of each house should sign the bill, *Cottrell v. State* (Neb.), 1 N. W. Rep. 1008.

The writer does not think any of these decisions sound, as the provisions construed seem to be mandatory for the reason that they are all of great importance in the enactment of laws. See also *Leavenworth v. Htgenbotham*, 17 Kans. 62; *Hill v. Boyland*, 40 Miss. 618; *Washington v. Page*, 4 Cal. 388; *St. Louis v. Foster*, 52 Mo. 513; *McPherson v. Lonard*, 29 Md. 377.

The following provisions were held to be mandatory that the yeas and noes should be entered on the journals: *Hunt v. State*, 3 S. W. Rep. 233; *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571; *Wabash Railroad v. Hughes*, 38 Ill. 274; *Ryan v. Lynch*, 68 id. 160; *Post v. Supervisors*, 105 U. S. 637; that the signatures of the presiding officers should be appended to a statute, *Moody v. State*, 48 Ala. 115; S. C., 17 Am. Rep. 28; *State v. Glenn*, 18 Nev. 34; S. C., 1 Pac. Rep. 186; *State v. Mead*, 71 Mo. 266; *Legg v. Annapolis*, 42 Md. 203; that a bill shall be read three times before passage, *Board of Supervisors v. Heeman*, 2 Minn. 330; *Stechert v. East Saginaw*, 22 Mich. 104; *Well v. Kenfield*, 54 Cal. 111; that the omission of the formal enacting clause is fatal, *State v. Rogers*, 10 Nev. 250; S. C., 21 Am. Rep. 721. In *Koehler v. Hill*, 14 N. W. Rep. 738, the question involved was as to the validity of a constitutional amendment. The journals showed that the resolution for amendment adopted by the House was not the same as that adopted by the Senate. For this reason the amendment was held void. The Constitution required the proposed amendment to be entered on the journals with the yeas and nays. The court held that this required an entering of the bill at length on the journals, or such an entry as would leave no doubt as to the scope and meaning of such proposed amendment; and that entering merely the title or object thereof was not sufficient, and that the requirement was mandatory, and that therefore the amendment was void because such requirement was not complied with. The court, in holding this requirement mandatory, rather inclined to the view that all constitutional provisions are mandatory. On an application for a rehearing the court adhered to its former ruling. 15 N. W. Rep. 609. On the question whether the provision was mandatory, the court said, at page 629: "Courts sometimes exercise the power of declaring statutory provisions directory. Even in the case of a statute the power is a delicate one, and must be indulged very sparingly. But in the case of a constitutional provision the exercise of this power is of much more doubtful propriety." The court then quotes with approval the language of Judge Cooley already referred to.

Will the courts go beyond the journals? Several

cases answer the inquiry in the affirmative. In *Berry v. Balt. & Drum Point Railroad Co.*, 41 Md. 446; S. C., 20 Am. Rep. 69, the court was compelled to and did examine not only the journals but the engrossed bill as finally acted upon by both houses. So in *People v. Starne*, 35 Ill. 121; S. C., 85 Am. Dec. 348, the original bills were examined in connection with the journal. See also *Fowler v. Pierce*, 2 Cal. 165. The courts in several other cases have used language broad enough to warrant an investigation beyond the journals. *People v. Petrea*, 92 N. Y. 128; *Gardner v. Collector*, 6 Wall. 499; *Post v. Supervisors*, 105 U. S. 667.

In *People v. Petrea* the court say: "The tendency of judicial authority supports the proposition that whenever a question arises as to the constitutionality of a statute, the court may resort to any source of information which in its nature is original evidence of any fact relevant to the inquiry."

But what was said was obiter; and there is no foundation in principle for an examination beyond the journals, unless by reference in some way the other data are made part of the journals.

Whether an act was constitutionally passed is always a question of law for the court. *Sherman v. Story*, 30 Cal. 253; S. C., 89 Am. Dec. 93; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667; *People v. Commissioners of Highways*, 54 N. Y. 276. No case has ever questioned this doctrine, and it will be found to be recognized in nearly every case which has been cited. The courts will therefore take judicial notice of the journals when they are the record by which the existence of a statute is to be tested. This principle will be found in many of the cases heretofore cited. In fact the only State which holds the contrary is Illinois. *Grob v. Cushman*, 45 Ill. 119; *Hensoldt v. Petersburg*, 63 id. 157; *Bedard v. Hall*, 45 id. 91. But the journals prove themselves when offered in evidence. Same cases. On the same principle admissions by parties will not bind themselves or the court as to the existence of a statute or the facts upon which its existence depends. The court will decide for itself uninfluenced by such admissions. *Hoppel v. Boethauer*, 70 Ill. 166; S. C., 22 Am. Rep. 70; *People v. Commissioners of Highways*, 54 N. Y. 276; *Attorney-General v. Rice* (Mich.), 31 N. W. Rep. 203.

The journals cannot be altered by parol evidence. *Koepler v. Hill*, 14 N. W. Rep. 738; S. C., 15 id. 609; *Attorney-General v. Rice*, 31 id. 203; *State v. Smith* (Ohio), 7 N. E. Rep. 447. This is too obvious to need further citation. If the journals be lost or destroyed, there is nothing by which the act can be impeached, and the enrolled act is therefore conclusive. *Spangler v. Jacoby*, 58 Am. Dec. 571; S. C., 14 Ill. 297, where the court say: "If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made on the journal." If a statute fails to show on its face any thing essential to be there shown to make it valid, it is void. In such a case, to quote the language of *King v. Arundel*, Hob. 110, "the act itself carries its death wound in itself." *People v. Commissioners of Highways*, 54 N. Y. 276; *State v. Rogers*, 21 Am. Rep. 738. No resort to the journal is necessary in such a case.

Of course the printed statute must yield to the enrolled act if there is any conflict.

A statute cannot be held void because it appears that persons whose votes were necessary to the passage of it were seated by the Legislature in violation of the Constitution. The decision of each house on such a question is final. *State v. Smith* (Ohio), 7 N. E. Rep. 447; *People v. Mahaney*, 13 Mich. 481.

The same Legislature may at the same or a subsequent session correct its journal and thus make valid a law that would otherwise be invalid. This was held

in *Tureley v. County of Logan*, 17 Ill. 152. It appeared that a law had been passed providing for the removal of the county seat of Logan county, but it did not appear from the journals that the law had been duly passed. An injunction was granted restraining the officers from erecting county buildings at the new county seat on the ground that the act was void. Afterward the same Legislature met in extra session and the journals were so amended as to show that the statute had been constitutionally passed. The court therefore held the act was valid. This affords no argument against testing the act by the journals. A mistake is as liable to occur in the enrolled act, and thus a valid statute made to appear void until the error is corrected. The hardship to those who in the meantime believe the act to be void, is as great in the latter case as in the former; nay, it is greater in the latter, for very few if any are ever misled by the journals into believing void a statute that appears valid as enrolled and printed, for very few if any consult the journals, while many may be deceived by such an error in the original act, for statutes are printed as enrolled, and thus the error making the statute seem void will be manifest on the pages of the statute book. Suppose, for illustration, that the enacting clause is omitted through mistake, the same error will appear in the printed statute.

If a portion of a statute is shown by the journals to have never passed, is the whole act void as well as the portion lawfully enacted as the other? The same rule on principle should obtain in a case of this kind as when some portion of an act is unconstitutional. If the illegal portion is so distinct from the rest of the act that the purpose of the statute is not defeated by the failure of the illegal portion to become law, the rest of the act will stand. So when a part of a statute is void because it was never enacted. This was expressly held in *Berry v. Balt. & Drum Point R. Co.*, 41 Md. 446; S. C., 20 Am. Rep. 69, where the court said: "Here, as the entire published statute except the third section was regularly passed by the Legislature and approved by the governor, there can be no reason for declaring the other portions of it void because the third section is found to be a nullity. Statutes may be void in part and good in part; and if the part that is valid is entirely distinct and severable from that which is void, the courts will uphold and enforce the former as if passed disconnected from the latter."

The following doctrines are settled by the best considered cases:

First. At common law the enrolled act was conclusive as to its own existence.

Second. It might however carry its death wound on its face and therefore be void.

Third. Under conditions or organic laws requiring legislatures to keep journals of their proceedings, the journals may be resorted to for the purpose of ascertaining whether the statute in question was ever constitutionally passed or enacted at all.

Fourth. Courts will take judicial notice of the journals and of their contents.

Fifth. Every presumption however is in favor of the existence of a statute, and a clear case must be established before that presumption will be overthrown.

Sixth. The silence of the journals will not affect the act unless they are silent as to some requirement specifically directed by the Constitution to be entered therein.

Seventh. Except in such a case therefore the journals must affirmatively show either that the act never passed or that in the passing of it some mandatory provision of the Constitution was disregarded or violated.



Eighth. The failure to enter upon the journals a fact of facts specifically required by the Constitution to be entered thereon is fatal to the act.

Ninth. Courts will not go beyond the journals in investigating the existence of a statute. Some cases however hold or assert the contrary, but they are not sound.

Tenth. Parol evidence can never be resorted to in such an investigation.

Eleventh. If the journals are lost the enrolled act is conclusive.

Twelfth. Where a portion of a statute is shown to have never passed, the whole act is not void unless that portion is so inseparably connected with the rest that it cannot be presumed that the Legislature would have passed the statute without such portion.

Thirteenth. The enrolled act controls the printed statute.

Fourteenth. Practically all provisions in a Constitution should be regarded as mandatory. Every presumption is against their being considered merely directory. Nothing short of a very satisfactory reason should suffice to overthrow this presumption.

Fifteenth. But all constitutional provisions are not necessarily mandatory.

The great principle embodied in the foregoing rules is the enforcement of the supremacy of the Constitution without however impairing the dignity or independence of the Legislature, or begetting uncertainty as to the law, keeping at all times the domain of the law-making power inviolate from invasion by the judiciary; and controlled by that salutary and even necessary doctrine that every intendment is in support of constitutional legislative action. Let not our courts by an irrational subservience to a rule foreign, and inimical to our system of government, proclaim that the voice of the people, speaking through their fundamental laws, cannot be heard in the forum because their mandates can never be shown to have been violated by the Legislature in enacting laws.

GUY C. H. CORLISS.

GRAND FORKS, DAKOTA.

**ADDRESS BY THE HON. ROGER A. PRYOR, LL.D., OF NEW YORK, TO THE GRADUATING CLASS OF THE ALBANY LAW SCHOOL.**

MR. PRESIDENT, AND GENTLEMEN OF THE GRADUATING CLASS: The invitation with which you have honored me, imposes an obligation which I know not how otherwise so effectually to discharge, as by communicating to you the results of my observation of the means by which success at the bar is most surely achieved.

You pause to-day at a critical stage of your professional career, when abandoned by the guidance of the wise and faithful preceptors who have conducted you hitherto, you are left to your own resources and to the direction of your own judgment, in the pursuit of the prize so eagerly coveted and yet so difficult of attainment.

What if one who himself has run the race and has missed the goal; who, mindful of the infirmities and limitations that hindered his efforts, and yet observant of the arts by which more skilful competitors have grasped the reward—what if he should generalize his experience in lessons of practical utility to the adventurous but untried advocate—would you not accept the hand so extended to you, as of more help than any declamation, however eloquent, upon any theme however fraught with interest and excitement.

I will not affect to disguise from you the labors and difficulties that beset the path upon which you are about to enter.

"The immortal garland is not to be run for without dust and heat," and the victory you are to achieve will be the crown and recompense of infinite toil, of obstacles overcome, of high faculties exerted to the utmost effect, of many a miscarriage and much humiliation, of the solicitations of pleasure spurned for nobler but less attractive objects of desire, of a life consecrated in all its energies to the single aim of eminence and distinction in your chosen profession. But to the aspiring and resolute spirit the frown of difficulty and danger is but a challenge to increase of exertion, and the trumpet call of ambition of more potency than all the beckoning blandishments of indolence and ease.

To sustain then the efforts and privations exacted as the condition of success at the bar, you must be animated by an enthusiasm for your profession—an enthusiasm born not merely of a passion for its distinctions, but nourished as well by an eager and insatiate delight in the study of the law. An avidity for the prizes of the profession is undoubtedly a powerful impulse in its pursuit, but the more constant as well as the nobler motive is a love for the profession itself. If you have embraced the law with the ardor of a genuine affection; if you be truly enamored of her austere and rugged beauties; if you be resolved to woo her with the assiduity of a heartfelt devotion; be assured that you will win her, and that she will repay your fidelity by a revelation of charms which she discovers only to her unselfish suitors, and by a fruition of reward which no other profession so profusely lavishes upon its votaries. "If you love me you will find me out," was the animating assurance of the fair doctor of Padua; and Tully tells us that "without a passionate inclination and an ardor like that of love, no man ever achieved any thing great, especially distinction as an advocate." Enthusiasm, I repeat with emphasis—enthusiasm in the study of your profession, is the first and fundamental condition of success in its pursuit.

Enthusiasm, however, is but an incitement and support under the labors requisite for the attainment of the prizes of the profession.

It is possible that by sheer force of audacity, and the tricks of a ready wit and the persuasions of a facile and fluent oratory, one may masquerade awhile as a lawyer, and attract to himself a profitable clientele; but without solid and extensive learning in the profession one cannot achieve a real and enduring eminence at the bar, nor long impose a fictitious reputation upon the public. For soon the pretensions of the charlatan will be exploded by his misleading advice and the miscarriage of his causes; and his deceived and ruined clients will apply, perhaps too late, to some competent lawyer for the reparation of their fortunes.

How then are you to acquire this indispensable knowledge of your profession? Not otherwise, be persuaded, than by the intense, incessant, life-long application of all your faculties. It was the idle vaunt of an advocate of antiquity, as distinguished by vanity as by eloquence, that he could master the civil law in *three days*; but the conceit even of Cicero would have been ashamed in the presence of the immense mass of jurisprudence extant in the age of Justinian.

With the progressive development of civilization society becomes more complex, and the relations and transactions of life indefinitely multiply; and as over every relation and transaction of life a principle of law presides, we need not marvel at the compass and intricacy of jurisprudence at this advanced age and in this enlightened country. The short and simple code which sufficed the necessities of our rude forefathers in the parent country, is expanded to the bulk of the immense and elaborate system with which you are to

grapple. But indeed no finite intelligence can comprehend completely, the infinite volume and complexity of the law in this our day—nor happily is so impossible an attainment exacted of you. In practice you will, indeed you must; address and restrict yourselves to some special departments of jurisprudence, and while with the learning of these you will familiarly acquaint yourselves, of other outlying provinces you will be content to know the general scope and characteristic features. But to whatever branch of the profession you confine your practice, you must be conversant with the law of evidence and procedure; for the rules of evidence and procedure are prevalent over the entire field of jurisprudence. Limited however as your researches will be, you cannot become proficient in any department of the law except on the condition of diligent, devoted, conscientious study; and given an equivalency of intellectual endowment, the success of competitors for forensic distinction will be in the proportion of their respective attainments in legal learning.

Obviously then it is of supreme moment to the aspirant for forensic eminence, that he pursue that method of study which shall yield him the largest results in useful and abiding acquisitions.

I assume that your diploma authenticates your acquaintance with the principles of jurisprudence; and yet throughout your professional career you will need to have habitual recourse to the works of the master authors. For perusal of such systematic treatises, not only refreshes the memory, but is of especial utility in improving the style, in training the faculties, and in methodizing your learning. But to these results it is necessary that you be conversant only with books of real merit; lest by familiarity with inferior writers your learning be vitiated by error, your taste corrupted, and your habit of thought degenerate into a loose and desultory succession of unconnected propositions. I could name authors, of no mean pretensions too, whose works are so destitute of every literary excellence and of every logical process, that the only safeguard against their evil influence upon the mental discipline is in the dulness, which repels perusal. On the other hand, the literature of the law abounds in models and masterpieces of rhetorical art, of correct reasoning, and of scientific method—works which at once inform the understanding, delight the literary sensibilities, and develop the faculty of argument. To the too-frequent selection of works of the former class as text-books in our schools, I impute much of the repugnance to the study of the law evinced even by men of superior abilities; and I cannot but believe that if the student were introduced to the profession under the auspices of the great masters, the fascinations of their genius would impel him to its pursuit with interest and avidity.

It is however to the Reports that the practicing lawyer will have the most frequent and familiar recourse—mainly no doubt because there only can be found an authoritative exposition of the rule of law that is to furnish the solution of the case in hand, but also because of the value of the study of Reports in the scheme of professional training. I know not a more profitable or more pleasing intellectual exercise than is afforded by the reading of cases in our best Reports. In the first place, the statement of the case is an instructive lesson upon that most important and at the same time most difficult feat of forensic oratory—*opus oratorum maxime*—I mean a lucid presentation of the facts upon which hinges the event of the litigation. Here we find omitted no single circumstance which bears upon the point in controversy; and no single circumstance introduced, which being irrelevant to that point, confuses the mind, and possibly diverts

it from the issue in agitation. Then too the essential facts are developed in due sequence and dependency, so as to conduct to the legal conclusion as by the force of an irrefragable syllogism.

From the darkness and confusion of chaos to educe light and order is the achievement of omnipotence; and in like manner, from a mass of complicated and discordant circumstances, to cull out and collect the essential elements into a symmetrical and complete body of fact, luminous as the orb of day, is the highest exploit of the human intelligence, as illustrated by a Mansfield and a Marshall. Without a perfect apprehension of the circumstances of a case—analogous to the diagnosis of the physician—it is impossible to subject it to scientific classification, and to know by what principle of law it is governed; and hence the ability to master and to marshal facts is the most useful and not the least admirable art in the equipment of the lawyer. Now by no means can this indispensable faculty be so effectually disciplined and developed as by study of the statements of competent reporters. The syllabus of such a reporter is in itself replete with interest and instruction—as an exposition in the shortest and clearest compass of the principles which legal reason evolves from the circumstances of the case. But it is as an auxiliary in the culture of the logical faculty that the Report is of especial utility to the student, inasmuch that the great master of dialectics recommended Smith's Leading Cases as the best lesson in the processes of ratiocination. The subtle analysis, the compact force, the delicate perception of analogy, the comprehensive grasp and the elegant diction exhibited in the opinions of a Folger and a Rapallo—I speak only of the departed—incessantly meditated and anxiously emulated, cannot but communicate to the student somewhat of the same superlative power of legal argumentation, and somewhat of the same felicity of expression and illustration.

It is then by reading, by the study of books, and not otherwise, that the lawyer can so equip himself for his profession as to secure the reward after which he aspires.

But *how* shall he read? Is there an art of study, by which the largest fund of information can be acquired with a minimum expenditure of labor? Obviously the same amount of mental power exerted during the same period, even by the same individual, does not always yield equal results. And the disparity is still more apparent between the acquisitions of different persons, though of equivalent capacities. It follows therefore that there are conditions propitious and unpropitious to fruitful study. Accordingly, from Quintilian to the present day teachers have been formulating precepts for the conduct of the understanding in the acquisition of knowledge. The *one-book maxim*, *multum legere, non multa*—little reading and much reflection—was zealously inculcated by Hobbes and Locke, while on the other hand, other instructors of equal eminence and authority have, both by doctrine and example, illustrated the advantages of omnivorous reading. My own observation is, that while the *helluo librorum* may be a prodigy of erudition, his capacity of reception is developed at the expense of his active powers, and that he is not apt to be expert and efficient in the use of his materials. Obviously, as a thorough mastery of a few books in each department of the law, implies not only reader but ampler acquisitions of learning, than can be accumulated by a disursive expatiation over a multitude of volumes, he who perfectly knows Kent's Commentaries, for example, has in his head more law than is at the instant command of any man in the profession; and then his learning, instead of being an undigested mass, is so

classified and distributed in the memory, and is so incorporated into his mental constitution, as to be always available for use and application.

But by what method may the student best fix and fasten in his mind the matter of the volume he reads? One great authority, Dr. Johnson, advises trusting to memory alone—arguing that a memorandum only transfers the impression to paper, and so discharges the mind from the obligation of recollection,—while Professor Bain inculcates the utility of abstracts and annotations for the acquisition of a clear and firm conception of the contents of the book. These two processes, you will remember, were combined in the education of the prince of orators, who by transcribing Thucydides eight times, not only held the entire work *verbatim* in his mind, but absorbed and assimilated every particle of intellectual nourishment to be derived from that rich storehouse of eloquence and philosophy.

For a plan of study my own experience suggests, that one subject at the time be grappled and mastered, and that to this end you read the best author by whom the topic is treated, in connection with the principal cases by which it is illustrated and applied; and that then you reproduce from memory a synopsis or summary of your acquisitions. By this procedure you will at once concentrate your faculties, systematize your learning and imprint it indelibly upon the mind.

And as to the method of reading, I would inculcate that you pause upon a sentence until you completely apprehend its meaning, and upon every argument, until you clearly perceive its processes; for not to understand is not to learn; and besides, an habitual acquiescence in dim and vague conceptions inevitably darkens and debilitates the intellect. Hence I would earnestly admonish you of the futility and evil of excessive study, since when the mind is fatigued it grasps nothing firmly and tenaciously; and the habit of listlessly wandering over the pages of a book is fatal to all intensity of application and capacity of acquisition. Only when the attention is awake and the faculties fresh and alert, can you read with effect, and to read without result is at once a waste of time and a deprivation of the intellect. The moment you perceive that the mind refuses to take hold—the moment that the spur is necessary to stimulate its flagging energies—the moment you feel a vacillation and vagrancy of attention—that instant lay aside your book, and for refreshment betake yourself to that best of restoratives, the delights of literature. For repose is not always recreation; and when the reason is weary it is best recuperated by the play of the faculties of taste and imagination.

And yet after all it is a distressing reflection to the student how little he remembers of what he reads. It is the remark of a celebrated author—himself a man of uncommon erudition—that “he who remembers most, remembers little compared with what he forgets;” but he adds the encouraging admonition, “do not resign all hopes of improvement because you do not retain what even the author himself has perhaps forgotten.” So important a faculty is memory, that Quintilian esteemed it the equivalent of genius—*tantum ingenti quantum memoria*—and to the lawyer it is perhaps the most indispensable of mental powers.

Many expedients are employed to fix the results of reading in the mind; but after all, “the true art of memory is the art of attention.” What we have read with interest we remember—and we remember it because its interest engaged our attention. The vivid and enduring recollections of childhood and the forgetfulness of old age are equally proverbial—but the boy remembers because the interesting novelties of the world absorb his attention, and the octogenarian

forgets because he has ceased to observe with interest the, to him, familiar and fading incidents of life. If therefore you concentrate your attention upon the book in hand, and afterward revolve its contents in frequent meditation, you will retain them without the aid of any artifice of mnemonics.

In that invaluable guide to the student—Locke’s tractate “On the Conduct of the Understanding”—it is written that “reading furnishes the mind with the materials of knowledge, but it is thinking that makes what we read our own,” to which add Bacon’s injunction of frequent conference on the subject of our reading, and you have the precepts of the best teachers on the art of study.

Be assured that a system of study conducted on these principles and pursued with diligence will soon sufficiently accomplish you in the learning of the profession.

Equipped now with competent learning in the profession, you come to apply your knowledge in the conduct of causes. But here precepts are of slight utility for your guidance, since skill in the trial of causes is not to be taught by art, but is to be acquired only by experience. The dearth of treatises on the subject attests their uselessness.

It is a curious fact, by the way, that the best rules for the examination of witnesses, were propounded nineteen centuries ago by the author of the Institutes of Oratory, and in modern times by a learned prelate of the Church of England—I mean Archbishop Whateley, in his book upon Rhetoric.

It is obvious to remark, that before engaging in a trial you must be thoroughly master of the law and the facts of the case; that you know in advance what your own witnesses will testify, and if possible anticipate the evidence of your adversary; that you never propound a question without a definite and predetermined purpose; that upon cross-examination especially you ask no question an answer to which may harm more than it can help you; that you avoid leading an adverse witness to repeat his testimony in chief, for most certainly he will strengthen it, and with the effect of a recoil of your own engine; that you preserve throughout perfect self-possession and control of your faculties; that you be not prematurely elated by an apparent advantage, nor depressed or embarrassed by a sudden discomfiture; that you watch the vicissitudes of the trial with a sleepless vigilance; that you keep steadily and constantly in view the object of your exertions, namely, the success of your cause; that to that end all your efforts—every look, every action, every word—be directed; that toward witnesses, hostile as well as friendly, you be uniformly courteous; that with your opponent you observe all the punctilios of chivalric debate; that to the jury you be respectful but not adulatory, and to the court deferential but not obsequious; above all that you maintain a perfect equability of temper; for when an advocate loses his temper he has already lost his cause.

The constituent elements of forensic genius are identical with those of the military—“untroubled perspicacity in confusion, firm decision, rapid execution, providence against attack, fertility of resource and stratagem.”

With these very general, and because general, sterile precepts for the conduct of trials, I pass to the consideration of the crown and consummation of professional excellence—I mean forensic oratory.

That the eloquence of the bar has lost its ancient lustre is the mournful refrain of the *laudator temporis acti*. Where now, he cries, are the Pinkneys and Wirts, the Emmets and Hoffmans, whose orations, enriched by the spoils of literature, and radiant with the colors of fancy, and glowing with the fires of pas-

sion, and resounding in the accents of a soul-stirring declamation, held enraptured audiences as by a spell of enchantment? And because of these none now survives, he concludes that forensic oratory has declined from its high estate; and because such eloquence is no longer extant, he infers that eloquence at the bar is no more in request. But the inference is invalidated by the assumption of the premise. The fact is, not that the eloquence of the bar has deteriorated, but rather that it has undergone a modification. When men were more under the dominion of emotion and imagination, they were affected by a style of oratory very different from that which prevails with a mind dominated by reason and intent upon the prosaic realities of every-day business; but it is still true that eloquence is the art of persuasion, and that persuasion is the specific function of the advocate.

The truth then is not that eloquence is a useless instrument for the lawyer, but that his purposes now require a different species of oratory from that which his predecessor found of such prevalent power; and that instead of the passionate appeal and tropical luxuriance of a former day, he perceives that sobriety of statement and severity of logic are of more efficacy for conviction, and in swaying enlightened and disciplined judgments to his ends.

Nevertheless these are precisely the characteristics of the loftiest strain of forensic eloquence—for where else are displayed so close a grapple of the subject of discussion, such argumentative force, such austere disdain of tinsel embellishment, such concise simplicity of expression, as in the immortal oration on the Crown? And, in Erskine's argument in support of the Rights of Juries, the same quality of pure intellectual power, the same contempt of meretricious ornament, and the same abstention from declamatory appeal are conspicuous; and yet this address to the court is the highest effort of forensic oratory.

Concede then that there is no longer a call for mere flourishes of rhetoric, still in the contentions of the bar at the present day there is ample scope and exigent occasion for eloquence in the truest sense—the power of persuasion.

The ultimate object being to gain your cause, then, whether that end be to be compassed by conviction of the reason or by influence upon the feelings, it is an indispensable condition of success that you secure and retain the attention of the tribunal addressed; otherwise the most powerful argument and the most moving appeal will be but an idle expenditure of breath. Now nothing so effectually arrests attention as a visible earnestness of manner, revealed in tone, look and gesture—a passion for your cause, subdued but palpitating in every organ of expression. A frigid indifference in the speaker communicates its own languor to the hearers; but his vivacity inflames them with a responsive animation. Mere intensity of feeling however will speedily fatigue and repel attention unless it be retained and rewarded by a commensurate excellence in the form and substance of the discourse.

A lucid and logical arrangement of topics—so perspicuous as instantly to reveal their own significance and force—a diction choice but not fastidious, rich yet not redundant—an exhibition of learning short of pedantry but sufficient for information; a concatenation of argument, compact and convincing; and an elocution graceful, animated and earnest—these are the qualities of speech by the concentrated spell of which even the most austere and impatient court will be fascinated into an involuntary thralldom.

With the learning requisite for the material of argument your professional reading will supply you; logic will teach you the art of sound reasoning; moral philosophy will unveil to you the mysteries of the

human heart and enable you to touch the springs of human passion; that copious and elegant vocabulary which is not only the fit and felicitous vehicle of worthy thought, but is in itself a beauty and a power, you will acquire by habitual converse with the classics of our language; the wealth and delicacy of fancy from which even a forensic disputation may borrow appropriate embellishment and interest, awe and efficacy too—for it is the feather that wings the arrow to the mark—this exquisite charm of oratory will be imparted to you by the munificent masters of romance and poesy.

The aim of oratory being immediate impression upon the audience, it results that its excellence is to be measured by its effect and not by its conformity to the canons of criticism. The composition may be brilliant as a literary performance and yet altogether ineffectual as an oral address—it may be magnificent but not oratory. Such were the splendid disquisitions of Edmund Burke—read even now with infinite admiration of their deep philosophy, their gorgeous imagery, and the imperial beauties of their style, but heard at the time only by the few to whom the dinner bell did not offer more persuasive attractions. Such too was the speech of Sir James Mackintosh in defense of Peltier, which, superb as an essay on the freedom of the press, was so devoid of oratorical effect, that it failed to avert the conviction of a client in whose favor concurred the pride of patriotism and the indulgent sympathies of the jury.

Obviously a composition submitted for perusal in the seclusion of the closet, addressed to a cool and critical judgment, and subject to the recurrences of revision and the pauses of meditation, exacts a perfection of structure that shall satisfy the scruples of a prolonged and patient scrutiny, and allows of a subtilty of argumentation, an elliptical brevity of expression and a subdued moderation of tone and color, which would be altogether inappropriate in spoken discourse: spoken discourse, of which the meaning must be apprehended in the instant or else be lost in the onward rush of thought and feeling—in which the nicer and more delicate felicities of style either escape observation or provoke reproof for lack of harmony with the serious business of the occasion, and to which an exaltation of passion is communicated by the contagious sympathies of the audience.

So diverse and incompatible indeed are the requisites of written and oral composition, that Fox's test of a speech was, does it read well? for if it reads well, then it is not a good speech.

And here permit me to mention a circumstance which, as I conceive, largely explains the decadence of spoken eloquence at the present day—I mean the presence of the stenographer. It is to him rather than to the audience that the orator addresses himself; and solicitous about the critical judgment of the newspaper reader, he is inattentive to the conditions of immediate effect upon his audience. A gentleman of long service in the Federal Senate, tells me that it is a common remark that the debates in secret session are far superior to those in public, and the cause is the absence of the reporter.

The characteristic qualities of oral eloquence, especially at the bar, are dictated by its end and occasion, namely, to sweep along the judgments and the feelings toward a definite conclusion; and hence that "agony" style, as the father of philosophical criticism distinguishes it—*negatively*, an abhorrence of the ornate and the glittering, of the pompous and the florid, of brilliant paradox, of turgid nonsense, of all the elaborate artifices of rhetoric; *positively*, a steady and swift pursuit of the object in view, impassioned appeal, indignant exclamation, defiant interrogation, argument condensed into self-evident and epigram-

matic propositions rather than drawn out into a chain of consecutive ratiocination, amplification and repetition under varied aspects, of the salient points, a homely and idiomatic diction—all quivering with the vivacity and animation of an earnest and glowing spirit—these are the qualities of speech which constitute true and effective eloquence.

Now how are these excellences of oratory to be acquired? For if it be true of the poet that he is such by the inborn prerogative of genius, it is otherwise with the orator; who, whatever his native endowments, must still be disciplined into proficiency by assiduous culture; and who on the other hand, howsoever embarrassed and impeded by original infirmities, may yet, like Demosthenes, attain by arduous endeavor to the highest perfection of eloquence. Of all our faculties, probably that of effective public speech is the most susceptible of growth and development, and like other faculties, it is best cultivated by use and imitation.

It was by speaking at least once every night during the session of Parliament that the greatest of debaters declared that he acquired his unrivalled ability.

If then you would become an orator, be persuaded that only by practice in public speaking can you command the self-possession, the prompt conception, the fluency and felicity of expression and the grace of delivery that are essential to the character.

Practice alone however only gives freedom and facility to the operation of your powers; and if you would augment those powers and wield them to the utmost effect, you must enrich and invigorate yourselves from the resources of the great masters of oratory. A constant contemplation of the ideals of eloquence, not only exalts the mind to a kindred emulation, but insensibly instructs it in the arts of an equal achievement.

So, by the play of its pinions in preparatory excursions, and by watching the mother bird in her loftier flights, the young eagle is trained and emboldened to pierce the empyrean and soar amid the glories of the highest heaven.

Happily for every purpose of instruction and emulation, our literature is rich in all the models of oratory. In forensic eloquence the arguments of Erskine, in Parliamentary eloquence the speeches of Macaulay, in pulpit eloquence the sermons of Robert Hall, in popular eloquence the harangues of O'Connell—exhibit to us all the resources of oratory in the utmost plenitude of genius.

Nor need we travel abroad for examples and illustrations of forensic oratory in its highest perfection; for in the sublime passion of Patrick Henry, in the gorgeous vehemence of Choate, in the brilliant and abounding fancy of Prentiss, and in the majestic simplicity of Webster, we find at home every beauty and every power of eloquence, displayed with an effect not inferior to the achievements of the mighty masters of antiquity.

But whatever the intrinsic beauty and power of the production, it is still an inert energy until oral utterance gives it the life and movement of an actual force.

The characteristic excellence of a speech, as distinguished from a written composition, consists in the delivery—and assuredly the whole effect of a speech depends upon its delivery. Hence the emphasis with which, by practice as well as by precept—by practice in the untiring endeavor to catch every grace of elocution—by precept in inculcating action as the first and the second and the third requisite of effective eloquence—hence the emphasis with which the prince of orators urged the importance of delivery in the art of eloquence. And his great adversary bore equal testimony to the effect of delivery, when to the Rhodians,

who applauded his rehearsal of Demosthenes' oration, exclaimed, "Could you have heard him deliver it!"

Of the efficacy and value of delivery—comprehending tone, look and gesture—we have an interesting example in the preaching of Whitfield, whose sermons, though intrinsically of little or no worth, caught from the magic of his action and his voice an eloquence that thrilled the skeptical Bollingbroke, that extorted applause from the fastidious Hume, and that warmed even the cool and cautious Franklin into a glow of involuntary enthusiasm.

Precepts, I fear, are of little avail to the attainment of excellence in delivery; but these are too obvious to escape remark—distinctness of articulation, correctness of pronunciation, due modulation of voice, earnestness of manner and a vivid animation of action.

By all means in speaking, banish every thought of self, and abandon yourself to the enthusiasm of the argument; for though you may be thus betrayed into some eccentricities or extravagances, still they are your own—they are true to nature—and 'tis the touch of nature that kindles the sympathy of a kindred emotion. A frigid formality of delivery, however conformable to the rules of art, is incompatible with all the effects of eloquence. Especially abstain from any verbal preparation of your discourse; for besides that, if you have the thought it will leap into life by the appropriate expression—*provisam rem verba sequenter*—the least appearance of utterance from memory is fatal to the spontaneity in which consists all the enchanting illusions of eloquence.

Animated by a generous enthusiasm for the law, expert in the tactics of a trial, enriched by judicious study with the learning of the profession, and accomplished by appropriate culture in the art of eloquence, you will win the renown, extolled by the great master as the consummate distinction of the bar, of being "the first lawyer among orators and the first orator among lawyers."

Gentlemen: The calling with which you have chosen to link the destinies of your life is indeed a noble vocation. Charged with the conservation of the highest and dearest interests of humanity—the property, the character, the happiness, the liberty, the life of the citizen—the consciousness of so lofty a commission cannot but impart to the profession a commensurate elevation of thought and expansion of sympathies.

Constrained by the variety of problems submitted for its solution to expatiate over the whole empire of civilization, it is dignified and adorned by all the learning within the reach of the human intelligence.

Its end and aim being the chastisement of wrong and the vindication of right, its abstract studies and its habitual practice alike, conduce to the education of the moral nature in conformity with the highest and purest ideals of justice.

The scourge of triumphant iniquity and the refuge of oppressed innocence, its transcendent functions require an ability which no craft can baffle and an eloquence which no heart can resist.

To be worthy of association in so noble a guild, is proof sufficient of genius and virtue; and so to be worthy, I doubt not, will be your endeavor throughout the career, upon the commencement of which I beg to bestow my heart-felt benediction.

#### NEGLIGENCE—RAILROAD COMPANIES—LESSOR AND LESSEE—INJURY TO EMPLOYEE OF LESSEE.

SUPREME JUDICIAL COURT OF MAINE, JAN. 26, 1888.

NUGENT v. BOSTON, C. & M. R. CORP.

In the trial of an action against a railroad corporation for a personal injury, the question of contributory negligence,

though depending upon undisputed facts, is properly submitted to the jury, when intelligent, fair-minded persons may reasonably arrive at different conclusions thereon.

A railroad corporation, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who while in the performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station-house.

**A**CTION on the case for personal injuries. The opinion states the facts. The verdict was for the plaintiff.

*Wilbur F. Lunt and Joseph W. Spaulding, for plaintiff.*

*Almon A. Strout, for defendant.*

**VIRGIN, J.** By a contract of March 1, 1884, the Portland & Ogdensburg Railroad Company, for certain valuable considerations therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations, between which was the Bethlehem station; the defendant "assuming all liability and risk of accident arising from defect of road-bed or track, or default of its employees or servants." On June 19, 1884, while the permit was in full force, the Boston & Lowell Railroad Company leased for ninety-nine years the defendant's railroad, stations, etc., agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever."

The plaintiff was rear brakeman on a Portland & Ogdensburg special freight, bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box-car to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot awning, of same height as the car, and eighteen inches therefrom, and he was thereby knocked off between the cars, and before he could extricate himself his right arm was so crushed by the wheels of the saloon car that amputation became necessary. The jury, after a charge to which, so far as the general merits of the case is concerned, no exception is alleged, returned a verdict for the plaintiff for \$3,100. Under the instructions the jury must have found (1) that the awning was negligently constructed on account of its proximity to the passing car; (2) that the injury was caused solely thereby; and (3) that the plaintiff was in the exercise of ordinary care at the time of the injury.

It is contended that the plaintiff was guilty of contributory negligence, and that as the facts in relation thereto were undisputed, the question was one of law, and should therefore have been decided by the presiding justice, which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties in actions of this nature have been decided by the courts on undisputed facts, still the negligence of either party cannot be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions. *Brown v. Railroad Co.*, 58 Me. 384; *Lesan v. Railroad Co.*, 77 id. 85, 91; *Shannon v. Railroad Co.*, 78 id. 52, 60; *Snow v. Railroad Co.*, 8 Allen, 441; *Treat v. Railroad Co.*, 131 Mass. 371; *Peeverly v. Boston*, 136 id. 366; *Lawless v. Railroad*, id. 1; *Railroad Co. v. Stout*, 17 Wall. 657, 663, 664. As a practical illustration of this proposition: The conductor of a freight train had resided at the place of accident for twenty years, and as conductor and brakeman, passed the station once or twice daily for

seven years. Just as his train started up, he caught hold of the side ladder of a passing car, and without any call of duty there, as he climbed toward the top, was struck and killed by the roof of the depot, which projected over, and within thirty-four inches of the car, and the court was divided on the questions of negligence involved. *Gibson v. Railroad Co.*, 68 N. Y. 449; S. C., 20 Am. Rep. 552.

So in another case where a brakeman (the plaintiff) who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and on signal for brakes ran up the side ladder of the car, and was struck, knocked off, and lost his arm by the awning, which projected within eighteen inches of the car, the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of \$10,000 as excessive. The court remarked: "It would be preposterous in us to say, or to ask a jury to say, that a brakeman, engaging in the service of the company, must be held to know whether or not there may be one among the station houses whose roof or awning so projected over the line of the road, that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it." *Railroad Co. v. Welch*, 52 Ill. 183.

We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence, and also that of the plaintiff's exercise of ordinary care.

Moreover a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And without taking space to state our reasons at length, we remark: The train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occasion to notice it in passing. When the accident happened the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it his car, being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reasonable action of body, arms and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer that the train, though on a down grade of thirty feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine's holding the train, but to perform the duty signaled by the conductor standing on the engine; and he lost his right arm in the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to the persons engaged in no special or particular duty." The plaintiff's previous knowledge of the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was by no means decisive. "The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect, even if he knew it, or to be prepared at all times to avoid it." *Snow v. Railroad Co.*, 8 Allen, 441, 450.

But while this rule may not be seriously questioned as between a railroad company and its own employees

the defendant challenges its application as between it and the plaintiff. This presents the question whether a railroad company, over a section of whose track another company—by virtue of a contract—runs its trains, is liable in tort to the latter's brakeman, who without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by the reason of the negligent construction of the former's depot. We are of opinion that it is. In such case the only materiality which attaches to the contract between the companies is to make certain that the plaintiff was lawfully, and not a trespasser, on the defendant's road. And although the defendant, in its contract with the Portland & Ogdensburg company, in express terms "assumed all liability and risk of accident from a defect of road-bed, track, or default of its employees," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses. *Tobin v. Railroad Co.*, 59 Me. 183; S. C., 8 Am. Rep. 415. It is common learning that as a compensation for the grant of its corporate franchise, intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public, independent of contract and co-extensive with its lawful use, to keep its road and its appurtenances in a reasonable, safe and proper condition. *Thomas v. Railroad Co.*, 101 U. S. 71, 83; *Bean v. Railroad Co.*, 63 Me. 238, 236.

If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action *ex delicto*, for an injury caused by a neglect of a duty created by law. Broom Com. Law (4th ed.), 675, 676, and cases; and for the neglect of such a duty, privity is not essential to the maintenance of an action of tort therefor. *Campbell v. Sugar Co.*, 62 Me. 552, 553; Broom Com. Law, 673 *et seq.* This principle is variously illustrated by the numerous cases cited in Broom Com. 655, 670, thus: A railroad company is liable for the loss of a passenger's luggage, whose fare was paid by another, not on account of breach of contract, but of legal duty. *Marshall v. Railroad Co.*, 11 C. B. (73 E. C. L.) 655. So where the defendant sold naphtha to one known to him as a retailer of fluids, to be burned in lamps for illuminating purposes, and a retailer sold a pint thereof to the plaintiff to be used in a lamp, and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of duty in the defendant, resulting in an injury to the plaintiff." *Wellington v. Oil Co.*, 104 Mass. 64, 67.

So where a chemist compounded a hair wash, and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury on the ground of the defendant's breach of duty. *George v. Skirvington*, L.R., 5 Exch. 1.

In like manner, "where a stage proprietor," said Parke, B., "who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to the latter, for it is a misfeasance toward him, if after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance toward every one travelling on the road. So if a mason contracts to erect a bridge, or other work, over a public road, which he constructs not according to the contract, and the defects are a nuisance, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between him-

self and the injured person, or by showing that he is responsible to another for breach of the contract." *Longmeid v. Holliday*, 6 Eng. Law & Eq. 563.

So where a station, being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding, a motion to set aside a verdict for the plaintiff was overruled. *Vose v. Railway*, 2 Hurl. & N. 728.

And it seems that an apothecary who administers improper medicine to his patient, or a surgeon who unskillfully treats him for his injury, is liable to the patient, even when the father or friend of the patient was the contractor. *Pippen v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. N. C. 733; 35 E. C. L. 392; *Thomas v. Winchester*, 6 N. Y. 397.

The principle is sustained in the well-considered case of *Sawyer v. Railroad Co.*, 27 Vt. 370, which was re-examined and reaffirmed by the same learned court in *Merrill v. Railroad Co.*, 54 id. 200. Also in *Smith v. Railroad Co.*, 19 N. Y. 127; *Snow v. Railroad Co.*, 8 Allen, 441; *Pierce Railroads*, 274; *Patt. Ry. Acc. Law*, § 228; 2 *Wood Ry. Law*, 1338, 1339, and notes. We are aware that this view is not in accordance with *Murch v. Railroad Corp.*, 29 N. H. 35, and *Pierce v. Railroad Co.*, 51 id. 503, which cases were cited by a divided court in this State on another point (*Mahoney v. Railroad Co.*, 63 Me. 72); but notwithstanding our high opinion of the learned court which pronounced these opinions, we think the views herein declared are more satisfactory. Our opinion therefore is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station-house of the defendant, which therefore owed a duty to him to construct and maintain its station-house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care; and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the B. & L. constitutes a defense.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of, or relieve itself from, any duty or liability imposed by its charter or the general laws of the State, by leasing its roads and appurtenances to another. *Railroad Co. v. Winans*, 17 How. 30; *Thomas v. Railroad*, 101 U. S. 71, 83. Assuming the lease of the defendant road, station-houses, etc., to the Burlington & Lamoille to have been duly authorized by the respective Legislatures of the States which granted their charter, and that the lessee had, months before the plaintiff's injury, received under the lease full possession, management and control, was the defendant thereby relieved from liability to this plaintiff for his injury? This court has held that an authorized lease of a railroad does not relieve the lessor from the liability under the general statute, nor an injury caused to property along its line by fire communicated by a locomotive of the lessee. *Pratt v. Railroad Co.*, 42 Me. 579; *Stearns v. Same*, 46 id. 95. In Massachusetts both lessor and lessee are held liable for the injury under a like statute. *Ingersoll v. Railroad Co.*, 8 Allen, 438; *Davis v. Railroad Co.*, 121 Mass. 134. Courts of the highest respectability have held, in well-considered opinions, that the duly authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employees, unless the statute authorizing the lease contains an express ex-



emption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be due to the State or to the individuals." *Singleton v. Railroad*, 70 Ga. 464; S. C., 48 Am. Rep. 574; *Nelson v. Railroad Co.*, 26 Vt. 717; 1 Redf. Railroads, 590.

This view is adopted and sustained in an opinion reviewing the cases and authorities by the court of Illinois. The court in its opinion does not rest its decision "upon the narrow ground alone of the lessee being in the exercise of a franchise which belonged to the lessor, and in so doing is to be held as the servant of the lessor corporation; but in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations toward the public; and there is a matter of public policy concerned that it should be relieved from the performance of its obligations without the consent of the Legislature;" adding, "there is no express exemption in the statute which authorized the lease." *Balsley v. Railroad Co.*, 8 N. E. Rep. 859. See also *Pierce Railroads*, 244.

In this State, where the defendant had leased its road under the authority of a statute which expressly provided that "nothing contained therein \* \* \* shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the State," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants. *Mahoney v. Railroad Co.*, 63 Me. 68. This case however does not meet the facts in the case at bar; for there the injury complained of resulted solely in the wrongful acts of the servant of the lessee, who had sole control of the trains, and not as here, from the wrong of the lessor in the negligent original construction of its depot. And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. *Railway Co. v. Curl*, 28 Kans. 622; 11 Am. & Eng. R. Cas. 458. The covenant in the lease to "save the lessor harmless," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in no wise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in anywise be recovered against it by the plaintiff, and other lawful claimants, whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises, for their condition; for it is settled law, that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable—whether in or out of possession—for the injuries which result from their state of security to persons lawfully upon them; for by the letting for profit, he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a non-feasance. Among the numerous cases supporting this general view is: *Rosewell v. Prior*, 2 Salk. 459, more fully reported in 12 Mod. 635, 639, where the

defendant erected a house, thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought. \* \* \* for before his assignment over, he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over." See also *Rez v. Pedley*, 1 Adol. & E. 822; *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio, 311; *House v. Metcalf*, 27 Conn. 631; *Todd v. Flight*, 9 C. B. (N. S.) 377. In the last case, Earle, C. J., after reviewing *Rez v. Pedley* and *Rosewell v. Prior*, said: "These cases are authorities for saying that if the wrong causing the damage arise from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle, so contended for on behalf of the plaintiff, is the law, and that it reconciles the cases." Also *Nelson v. Brewery Co.*, 2 C. P. Div. 311; *Owings v. Jones*, 9 Md. 108; *Ganby v. Jubber*, 5 Best & S. 78; on error, id. 486. See opinion, same case, 9 Best & S. 15; *Stratton v. Staples*, 59 Me. 94. This principle is recognized in *Campbell v. Sugar Co.*, 62 Me. 552, and in *McCarthy v. Bank*, 74 id. 315, 325; S. C., 42 Am. Rep. 591; *Burbank v. Machine Co.*, 75 Me. 373; *Allen v. Smith*, 76 id. 335, 341. See also *Godley v. Hagerty*, 20 Penn. St. 387, affirmed in *Carson v. Godley*, 26 id. 111, where buildings were let to the government as bonded warehouses, and being defectively built, and of insufficient strength, they fell by reason of storage of heavy merchandise. So in Maryland, in *Albert v. State*, 7 Atl. Rep. 697, the Court of Appeals approved the instruction: "If the jury found that defendant was the owner of the wharf, and rented it to the tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover." So in *Swords v. Edgar*, 59 N. Y. 28; S. C., 17 Am. Rep. 235, the court, after an elaborate review of the cases, held that the lessor of a pier, in the possession of their lessee, from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect, which existed at the time of the demise. In a very recent case in Rhode Island, of like facts, the court held both lessor and lessee jointly liable. *Joyce v. Martin*, 10 Atl. Rep. 620. See also the recent case of *Rankin v. Ingersen*, 47 N. J. L. 18; S. C., 54 Am. Rep. 109; also a Massachusetts case, *Dalay v. Savage*, 145 Mass. 38.

We are aware that there are a few cases which hold, that even if premises are dangerous when demised, the lessor is not liable to one injured thereby if the tenant in the lease covenanted to keep them in repair. *Pretty v. Bickmore*, L. R., 8 C. P. 401. And the same principle was subsequently affirmed in a case of very similar facts. *Gwinnell v. Eamer*, L. R., 10 C. P. 658. See also *Leonard v. Storer*, 115 Mass. 86; S. C., 15 Am. Rep. 76, where the lessee covenanted to "make all needful and proper repairs, both internal and external." The language of the court, when taken in connection with the facts, is explainable in consonance with the early English cases before cited. See also the *dictum* in the recent case in Massachusetts, already cited, of *Dalay v. Savage*. But this principle has been able reviewed in the strong opinion of Folger, J., in *Swords v. Edgar*, *supra*. This condition declines to accept the doctrine of the above cases, for the reason that they "ignored the rule announced in *Rosewell v. Prior*, *supra*, and followed and established in many cases." Folger, J., speaking for the whole court upon this question, said: "The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the

covenant. He is not given thereby a right of action against the lessee, greater nor more sure than he had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so that a person, on whom there rests a duty to others, may by an agreement between himself and third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill would not; as if in this case insufficient repair of the pier had been made by a builder, who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor to keep in order and repair is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from responsibility."

The New Jersey case of *Rankin v. Ingwersen*, *supra*, sustains the same view. And we adopt the doctrine of the case from which we have so largely quoted as sound on legal principles and public policy. And even if a lessee's covenant would, when broad enough in its terms, operate as a relief of the lessor's liability, the covenant here would not affect the case in hand, for it is restricted and limited to "maintaining, preserving and keeping the station-houses in as good order and repair as the same now are, so that there shall be no depreciation in the general condition thereof at any time during the term."

The testimony as to the proximity of the awnings of the other stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff, and the defendant pursued the same line of inquiry, not only on cross-examination, but in the direct examination of its own witnesses, Stowell and Winters. We think also that Sawyer's testimony was legitimate.

Motion and exceptions overruled.

Peters, C. J., Walton, Libbey, Foster and Haskell, JJ., concurred.

#### NEW YORK COURT OF APPEALS ABSTRACT.

**ARBITRATION AND AWARD—EXECUTORY AGREEMENT TO SUBMIT—BAR TO ACTION.**—By the terms of a contract it was agreed that a fair compensation should be paid for any damage that might accrue by the breaking, bursting or leaking of certain water-pipes, or from any other cause, and that such damages should, unless the parties could agree upon the amount, "be appraised and fixed by two disinterested persons—one to be selected by each party—and in case they could not agree, by an umpire to be selected by them; and the award of two of the three thus selected to be final and conclusive." *Held*, that such agreement was merely collateral to the stipulated right of compensation and did not make an award of arbitrators a condition precedent to the right of recovery. April 10, 1888. *Seward v. City of Rochester*. Opinion by Finch, J.

**IMPEACHMENT OF AWARD—MISCONDUCT OF UMPIRE—EVIDENCE—INADEQUATE AWARD.**—(1) In an action to set aside an award on the ground of misconduct of the umpire selected to determine the value of a certain lot, evidence as to the value of the lot and the character and competency of plaintiff's witnesses who testified as to the value is inadmissible. (2) It appeared that two witnesses for plaintiff had appeared before the umpire and respectively fixed the value of the lot at \$45,000 and \$50,000. Two witnesses for defendant estimated the value at \$20,000. *Held*, that the

umpire's finding of \$25,000 as the value did not show such misconduct on his part as would avoid the finding. April 10, 1888. *Hoffman v. DeGraff*. Opinion by Earl, J.

**EASEMENT—CREATION—OVERLAPPING BUILDING.**—The owner of certain premises had erected a building on the easterly part of the same, and afterward conveyed that part to defendant's grantor by a deed describing the land by metes and bounds, with no mention of buildings. Plaintiffs having acquired title to the western part, had a survey made, which showed that a portion of said building stood upon the land conveyed to them. *Held*, there being no reservations in his deed, and the fact of the overlap not being patent, that defendant has no easement in plaintiffs' land and no right to that part of the building standing thereon. Where the easement or servitude is not contained in the grant, the sign of the servitude should be apparent, or as it was expressed in some of the authorities, and quoted with approval by Judge Rapallo in *Butterworth v. Crawford*, 46 N. Y. 349, the marks of the burden should be open and visible. In the same case that learned judge said, with reference to the rule of law creating an easement on the severance of two tenements: "Unless the servitude be open and visible, or at least unless there be some apparent mark or sign which would indicate its existence to one reasonably familiar with the subject on an inspection of the premises, the rule has no application." Such was not the state of facts here. It does not appear that it was known to any one that the buildings extended beyond the line of the defendant's lot, and no ordinary or usual inspection or examination or any thing short of a survey would probably have revealed that fact. It was undoubtedly the result of inadvertence in the erection of the building and of the fence. It is impossible therefore to say that there was here any apparent sign or mark of a servitude in or of a burden upon the premises now owned by the plaintiff. That the brick wall of the house standing on defendant's lot should have furnished the indication of the existence of a servitude in or a charge upon the premises now owned by the plaintiffs, as is intimated in the General Term opinion, involves the idea of a consciousness of the fact, upon inspection, that a side wall of a building, not being a party-wall (as was the case in *Rogers v. Sinsheimer*, 50 N. Y. 646), was built over the boundary line of the lot which was about to be conveyed. I think that is an untenable view of the situation of the parties when the premises now owned by defendant were transferred, and that what the rule requires is that the fact that the premises retained by the grantor are a servient tenement charged with an easement should be patent as a feature of the land which directs the attention to its existence upon such examination as would be ordinarily given. The case of *Griffiths v. Morrison*, 106 N. Y. 166, recently decided by this court, was an action of ejectment. The description in the deed to defendant's grantor was by metes and bounds, and did not embrace a strip of land which was within the area of the adjoining lot; but the defendant claimed the right, in the nature of an easement, to retain possession of the strip, because the house was built and extended over the strip in question by the person who was the owner of both lots. In that case plaintiff had conveyed to the defendant's grantor, and his deed conveyed the buildings on the land, together with the tenements, hereditaments and appurtenances thereto belonging—language wanting in the description of the deed in the present case. Judge Peckham, delivering the opinion of the court, which was concurred in by all the members, held that the defendant did not have the right to retain possession of the strip, and confined the defendant's use of the

buildings standing on his premises to the limits of the land actually conveyed by the deed. He held that the language of the deed conveyed only that part of the building which was on the land described, and that no right exists upon or in relation to the land not conveyed, and which belonged to the plaintiff; that the estate granted was a lot of land of the dimensions given in the deed and such building as was on that lot; and that the estate did not extend to any portion of the building which was outside of and beyond such lot. We think that to the extent the building in this case stands upon the plaintiff's land it deprives him of its possession. As it was said in *Griffiths v. Morrison*, the character of the easement claimed by the defendant in effect does not differ from the claim of the fee to the strip in question. The controversy here is trivial, when the amount of land claimed is considered, but important principles seem involved which call for an expression of our views. Our conclusion is that as the servitude or easement claimed by the defendant is not found in the grant, and was not, in the nature of the case, apparent, and there was no necessity for its existence, the defendant's claim must fail. April 24, 1888. *Retners v. Young*. Opinion by Gray, J.

**FRAUDULENT CONVEYANCE—WHAT CONSTITUTES—SUBSEQUENT CREDITORS—EXCEPTIONS—GENERAL AND SPECIFIC—APPEAL—REVIEW—LAW AND FACTS.**—(1) A woman free from debts and owning personal property to a large amount was about to marry, and the marriage being considered hazardous, conveyed her farm, where she was to live with her husband, to her parents by deed placed immediately on record. Four years afterward she fraudulently raised money by mortgage on the land. *Held*, that there was no evidence to support a finding that the deed was made in fraud of creditors. (2) An exception as follows: "Defendant excepts to all that part of finding number eleven which finds that the deed therein mentioned \* \* \* was without any real consideration, and that the same was never delivered \* \* \* and that the said E. never delivered or authorized to be delivered the said deed to any person for said grantees therein named," is substantially an exception to each one of the findings, and not merely a general exception to the whole. (3) Where the delivery of a deed is charged in the complaint, admitted in the answer, and assumed on the trial, a finding that there was no delivery is error, which can be reviewed on appeal as a matter of law, and which is ground for a new trial. April 24, 1888. *Todd v. Nelson*. Opinion by Peckham, J., Earl and Gray, JJ., dissenting.

**MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—INDEPENDENT CONTRACTOR—PROVINCE OF JURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—TRIAL—RECEPTION OF EVIDENCE—DAMAGES—PERSONAL INJURIES—EVIDENCE.**—(1) A city is liable for a defect in a street crossing caused by excavations made by a contractor, when the street has been opened to the public, and the defect has existed so long that the authorities, by the exercise of reasonable care, might have known of it. 2 Dill. Mun. Corp., §§ 791-793, 1088; *Storrs v. City of Utica*, 17 N. Y. 104; *Brusso v. City of Buffalo*, 90 id. 679; *Kunz v. City of Troy*, 104 id. 844, 849. (2) Where there is evidence tending to prove negligence on the part of a city as to a defect which caused plaintiff's injury, and no proof that plaintiff contributed to the injury, the question of the liability of the city should be left to a jury, and their verdict is conclusive. (3) Travellers are not required to use greater care and caution than before in crossing a street opened to the public soon after excavations have been made therein, unless there is something to apprise them of danger. (4) It is proper to ask mem-

bers of a city council, on whom the charter imposes the duty of keeping its streets in order, as to the amount of attention they have given this duty. (5) One upon whom the city charter imposes the duty of superintending all work upon its streets cannot testify that such work was under the supervision of another. (6) The effect of an improper answer to a question not objected to should be removed by motion to strike out or by request for instructions to jury to disregard it. (7) It is competent to prove the present physical condition of the injured plaintiff and hear the opinions of competent physicians as to whether such condition could have resulted from the injury. In *Ehr-gott v. Mayor*, 96 N. Y. 264, the plaintiff was permitted to give, under objection, the evidence of physicians as to what was the cause of his present condition and other evidence tending to show that his diseases were the results of the strain and shock caused by being dragged over a dash-board as the result of an accident to his wagon caused by a ditch in the street. The judge in his charge left it to the jury to determine whether the injuries which plaintiff complained of were the proximate, direct result of the accident, and charged them that whether his injuries resulted from the strain experienced in being pulled over the dash-board or from the exposure after the accident, the defendant is still responsible for the injuries from which the plaintiff is now suffering. This was held not to be error. Judge Earl said: "A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen or the injuries which may be caused. \* \* \* Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries." And that learned judge stated the rule as follows: "That a wrong-doer is responsible for the natural and proximate consequences of his misconduct, and what are such consequences must generally be left for the determination of the jury." We think that for the proper application of that rule, it is perfectly competent to furnish the jury with evidence of the present physical condition and bodily sufferings and of the opinions of competent physicians as to whether such could have resulted from the accident, and as to their permanence. The rule established by the cases of *Strohm v. Railroad Co.*, 96 N. Y. 305, and of *Tozer v. Railroad Co.*, 106 id. 617, referred to by counsel, simply precludes the giving of evidence of future consequences which are contingent, speculative and merely possible, as the basis of ascertaining damages. Those authorities in no wise conflict with the rule allowing evidence of physicians as to a plaintiff's present condition of bodily suffering or injuries, of their permanence, and as to their cause. We conceive such to be the best mode and manner of furnishing information for the guidance of the jury in awarding damages. It is for the jury to say, upon the evidence, whether they believed the plaintiff's then condition to be the direct and proximate result of her accident, for which the defendant should be made answerable in damages, if caused by its misconduct, and not contributed to by any default of plaintiff in the exercise of ordinary care and prudence. April 10, 1888. *Turner v. City of Newburgh*. Opinion by Gray, J.

**PARTNERSHIP—SURVIVOR—POWER TO ASSIGN WITH PREFERENCES.**—A surviving insolvent partner of an insolvent firm may make a general assignment containing preferences. In *Egberts v. Wood*, 3 Paige, 517, the chancellor held that "the legal interest in all the assigned property was in the surviving partner, and at law they alone were chargeable with all the debts of the firm. They had therefore the right, without the consent or concurrence of the representatives of the deceased partners, to appropriate this property

for the payment of the debts of the firm in such manner and by giving such preferences as they might think proper. The decedent has no interest in the question as to what debts shall be paid first, in case the partnership effects are insufficient to pay the debts." In *Hutchinson v. Smith*, 7 Paige, 26, it was held that a general assignment by a surviving partner for the payment of firm debts, making preferences, previous to the Revised Statutes regulating the distribution of the estates of deceased persons, if made with the assent of the representatives of the deceased partners, was valid and could not be successfully assailed by the firm creditors. As we have before seen, if the firm is insolvent, neither the assent of the representatives nor the statutes regulating the distribution of a deceased person's estate can legally affect the power of a survivor to make such assignment. In *Loeschig v. Hatfield*, 5 Robt. (N. Y.) 28, it was held that a surviving partner could transfer the whole assets of the firm to a firm creditor, in payment of his debt, without the assent of the representatives of the deceased partner, provided it was done in good faith, and that such transfer could not, in the absence of fraud, be disturbed by other creditors of the firm. This decision was affirmed by the commission of appeals in 51 N. Y. 660, and that decision was followed by this court in *Cushman v. Addison*, 52 N. Y. 628. In *Haynes v. Brooks*, 42 Hun, 528, the General Term of the first department held that an assignment in trust of the firm property, for the benefit of firm creditors, by the survivor, making preferences, was a valid disposition of such property, although the representatives of the deceased partner did not assent to the assignment. This decision very much impaired, if it did not overthrow, the previous decision of the same court in *Nelson v. Tenney*, 36 Hun, 327. We may also refer to the case of *Beate v. Burger*, 17 Abb. N. C. 162, as supporting the general principles above laid down. A quite conclusive authority upon the question discussed is found in *Emerson v. Seuter*, 118 U. S. 3. It is there held that a sole surviving partner who is himself insolvent may make a general assignment of all the firm's assets for the benefit of all joint creditors, with preferences to some of them, and that the representatives of a deceased partner have no right to interfere or prevent such a disposition of the firm property. We quite approve of the reasoning of the learned justice who wrote in that case, and consider it conclusive upon the questions involved here. April 24, 1888. *Williams v. Whedon*. Opinion by Ruger, C. J. [See 49 Am. Rep. 347. Ed.]

**STATUTE OF LIMITATION — NEGLIGENCE — PERSONAL INJURY TO PASSENGER.**—Under the Code of Civil Procedure of New York, § 382, subd. 3, providing that actions for personal injury resulting from negligence shall be brought within three years, an injury received by a passenger while passing along an outside platform of a street-car, by command of the conductor, is the result of negligence, and this and not the contract of carriage, is the ground of an action, and it must therefore be brought within three years. If there is any defect in the vehicle by which passengers are carried, and an injury occurs thereby, they are liable, if at all, on the sole ground of negligence. The form of the action, whether *ex contractu*, as claimed to be the case here by appellant's counsel, or *ex delicto*, does not affect the case under this statute. *Carrill v. Railroad Co.*, 58 N. Y. 123, 134. April 17, 1888. *Webber v. Herkimer & M. St. R. Co.* Opinion by Gray, J.

**WATER AND WATER-COURSES — SURFACE-WATER — CONCENTRATION — INCREASED VELOCITY — MATERIAL INJURY — APPEAL — REVIEW — QUESTIONS OF FACT — JUDGMENT — RES ADJUDICATA — INTERLOCUTORY ORDER — EQUITY — DECREE — MEASURE OF**

**RELIEF — EVIDENCE — TRIAL — RECEPTION OF EVIDENCE — HARMLESS ERROR.**—(1) One who, in the ordinary course of husbandry, causes surface-water to flow upon the land of an adjoining owner with slightly increased velocity, without materially increasing the volume or diverting the flow from its natural course, or causing material injury to the adjoining owner, commits no wrong. (2) Where the General Term has adopted a referee's finding of facts, but reversed the judgment based on his conclusions of law, unless it appear that such reversal was on questions of fact, the Court of Appeals can only consider the law of the case. (3) An order continuing a preliminary injunction, made pending the action, is not an adjudication establishing a right of action. (4) Equity grants such relief only as the nature of the case, and the facts as they exist, not at the beginning, but at the close, of the litigation, demand. (5) When one's evidence is not objected to as outside the pleadings, he is entitled to the benefit of any cause of action established by the evidence. (6) In a trial before a referee, where plaintiff has introduced the opinions of witnesses, based on their own observation and the evidence of other witnesses, defendant may properly be allowed similar testimony. (7) When an improper question is allowed and exception taken, but the answer thereto is not responsive, the allowance of such question is not a material error. April 10, 1888. *Peck v. Goodberlett*. Opinion by Danforth, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**REPLEVIN — ACTION ON BOND — DAMAGES.**—A judgment for defendant and an assessment of damages for the wrongful taking, under the Maine statute providing that in a replevin action, if it appears that defendant is entitled to a return of the goods, he shall have judgment for their return, with damages for the taking, does not prevent the defendant from recovering for a depreciation in the value of the property taken between the taking and the judgment in replevin in an action against the principal and sureties on the replevin bond, damages for such depreciation not having been assessed in the judgment in replevin. The principal argument on the part of the defendants in the present suit is that in the statute of Maine, which provides that in a replevin suit, "If it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs," the words "damages for the taking" mean all damages resulting from the taking and detention of the goods; that if the defendant in replevin recovers judgment for a return of the goods replevied, he may at his election have the damages which he has sustained by reason of the taking and detention of them to the time of such judgment assessed in the replevin suit, or he may recover those damages in a suit on the bond, but cannot have both; that if he elects, as he did in the present case, to have his damages assessed in the replevin suit, he cannot in a subsequent suit on the bond, founded on a failure to return the goods, recover any damages which accrued prior to the judgment in the replevin suit; and therefore cannot recover for any depreciation in the value of the goods which occurred between the time of the taking and the date of the judgment of return; that any damages collectible for such depreciation must, if the defendant makes the election referred to, be assessed in the replevin suit as an item of damages resulting from the detention of the goods; and that as the plaintiff in this suit failed to have such damages assessed in the replevin suit, he cannot recover them in the present suit. This point seems to us at best to be altogether technical and not to be

founded on any sound principle. April 2, 1888. *Washington Ice Co. v. Webster*. Opinion by Blatchford, J.

**EXECUTORS AND ADMINISTRATORS—MORTGAGE—RELEASE—POWER OF LEGAL OWNER OF DEBT.**—A. and B. jointly loaned \$5,000, taking as security a mortgage to A. alone. A. died and appointed B. his executor, but the latter failed to qualify as such. For a valid consideration he executed the following release: "I hereby release from any and all lien by reason of this mortgage the following" (describing the premises). "Witness my hand and seal as such executor." Held, that although the legal title to the bond and mortgage was in B. as executor, and he having failed to qualify, his act in that capacity was void, yet the legal title to the debt was in him as surviving joint creditor, with authority to control its collection, and therefore the release was valid as being made by him as such creditor; and this notwithstanding the use of the words "as executor." Upon the death of John H. Barnett, the debt of Freeman was due to Abraham G. Barnett personally as surviving creditor, with authority as such to sue for and recover it, although he would of course be bound to account to John H. Barnett's representatives for half of any thing that he might recover; and Rudisill's bond and mortgage continued to stand as security for that debt, and although the legal title in this bond and mortgage vested in Abraham G. Barnett as executor, yet the equitable interest in them belonged half to him as executor and half to him personally. If he had received from the mortgagor payment of the sum secured by the mortgage, whether as executor or as surviving creditor, in either case he would hold half of that sum to his own use and half as executor. So a valid release of the whole or part of the land mortgaged, made by him, whether as an executor or as an individual, would bar him both in his official and in his private capacity; and any substituted security received by him as a consideration for the release would ultimately inure to the benefit of the same persons; that is to say, one half to his own benefit and the other half to the benefit of those entitled under the will. In short, neither the parties to whom nor the amount in which he would be liable to account for any thing received upon a payment or release would be affected by the capacity in which he assumed to act. If he had never been named as executor, a release of the debt by him, being surviving creditor, would have been valid at law, and his release of the mortgage, which was security for that debt, would have been good in equity. There is no reason therefore which can influence a court of equity why he might not as surviving creditor release part of the mortgaged land from the mortgage. The two characters of executor and of surviving creditor being united in the person of Abraham G. Barnett, the court, if he had executed the release in his own name merely, without describing himself as acting in either capacity, would presume that he acted in the character which would make the release valid and effectual. *Yeston v. Lynn*, 5 Pet. 224, 220. The form in which the release was drawn up and executed does not affect the equities of the case. The release is signed "Abraham G. Barnett, executor of the estate of John H. Barnett, deceased." When a person having title in property in different capacities executes a deed in one capacity only, and holds the consideration received for the benefit of those entitled to it, a court of equity at least will be slow to hold the deed invalid for want of a more complete and formal execution. In *Corser v. Cartwright*, L. R., 7 H. L. 731, a man who was one of two executors of his father, and also the residuary devisee of his lands, charged with the payment of his debts, made a mortgage of the lands, reciting that he was entitled to them in fee, and not describing himself as executor. Lord Romilly, M. R., held that

this mortgage was not an exercise of the power vested in the executors for paying the testator's debts, but was only a mortgage of the beneficial interest of the devisee, and therefore ineffectual against the testator's general creditors. But his decree was reversed by the lords justices in chancery, and their decree was affirmed by the House of Lords upon the motion of Lord Chancellor Cairns, who said: "What I find is this, that the estates with which your lordships have to deal are clearly devised to and the legal estate vested in the residuary devisee, who was also one of the executors. I find him selling or mortgaging, and I find him, beyond all doubt, able to sell and able to give to a mortgagee a good title to the legal estate. I find that that legal estate is in his hands, and therefore any money that is produced by the sale or mortgage of the legal estate is subject to and chargeable with the payment of debts and legacies; and that therefore the money coming into his hands must be money which ought to be applied to the payment of debts and legacies. But then I find that he himself is an executor of the testator; that he himself is the person who ought to hold assets impressed with the liability to satisfy debts and legacies. I find therefore that assets which ought to be applied to the payment of debts have come into the hands of an executor, and that he has given a receipt for them. Therefore on the one hand the mortgagees have got the legal estate; and on the other hand they have got a receipt from the proper person for money which ought to be applied to the payment of debts and legacies. That, being so, it appears to me that their title is entire and complete." *Id.* 740. In *Bank v. Murch*, 23 Ch. Div. 138, that decision was followed and applied to this state of facts: One of two brothers, partners in business, died, leaving a will, by which he directed his debts to be paid, and devised his real estate in trust with power of sale and appointed his widow executrix and trustee. The widow and the surviving brother sold and conveyed real estate of which the two brothers had been tenants in common, and which was in fact partnership property, by deeds reciting that the brother in his own right and the widow as trustee under the will were seized of it in fee as tenants in common, but not stating that she was executrix or that the property was partnership property. This conveyance was held to be valid, Lord Justice Fry saying: "It is plain that as executrix she could sell the whole of the partnership property." "Then it is said that if she had power so to do, yet by omitting to state in the deeds by which she conveyed the freehold property that she was acting as executrix, she precluded herself from asserting that she was acting in that character. In my judgment she did not. It must be borne in mind that as executrix hers clearly was the hand to receive the purchase moneys, and therefore those moneys came to the right hand, the hand of the person whose duty it was duly to apply the assets in satisfaction of the creditors of the deceased as well as of the beneficiaries under his will. Moreover whether she was acting as trustee or as executrix, she was under an obligation to do the best she could for the estate. Her fiduciary character was substantially the same, whether she was acting as executrix or as trustee. I think therefore that I should be straining at a gnat if I were to hold that the mere fact that she spoke of herself in the instruments as trustee and not as executrix was enough to prevent the validity of a transaction, which in her character of executrix, I hold that she had the power of carrying into effect." "The legal estate passed from her, because she held it as trustee, and the money reached the hands of the person who was bound to distribute it among the persons entitled to it. I therefore overrule this objection." *Id.* 151-153. In the present case the legal title, indeed in the bond

and mortgage of Rudisill, was in Abraham G. Barnett as executor, and could not at law be released by him in any other capacity. But the legal title in the debt, for which the bond and mortgage stood as security, and to which in equity they were inchoate, was in him as surviving creditor. In equity therefore he had the right, as surviving creditor, to release the mortgage in whole or in part; and any consideration for such a release, whether received by him as executor or as surviving creditor, would inure to the benefit of himself and of the estate of his testator, in equal moieties. If he had received payment of the debt and given a receipt for it as executor, he would have held the money, half as executor and half to his own use, just as he would have held it if he had receipted for it in his own name only; and it cannot be doubted that the addition "as executor" in the receipt would not have prevented the payment from extinguishing the debt and consequently the mortgage by which it was secured. If the whole debt had belonged to him alone, the description of himself as executor in the release could not have prevented its operating upon his interest in the debt and in the mortgage by which that debt was secured. As the survivor of two joint creditors, he had the same power (independently of any authority as executor) to release the debt and the mortgage, as if he had been the sole creditor. The release therefore, notwithstanding the superfluous description of the releasor as executor was, by reason of his being surviving creditor, binding upon the interests of the representatives of the deceased creditor, as well as upon his own. March 19, 1888. *Wall v. Bissell*. Opinion by Gray, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**NEGLIGENCE—DANGEROUS PREMISES—DANGEROUS CHEMICALS.**—Plaintiff's horse stepped into a mud-hole on a private way over the land of defendant, used in approaching his mill from the public road, within a few feet from defendant's cotton-seed oil mill, and immediately thereafter showed signs of pain. On being examined by a blacksmith, something like a scald or burn was discovered above the hoofs of two of his feet. The horse's hoofs and ankles were severely burned, and he died from the effects of the burns. It was in evidence that caustic soda is used in the mill for refining the oil, and that when dissolved in water it will burn animal flesh. There was no evidence tending to show how the caustic soda got from the mill into the mud-hole. *Held*, that the jury were justified in inferring negligence on the part of the defendant in allowing the dangerous substance to get where it was. This case does not depend so much upon the doctrine of keeping roads in repair and reasonably safe, as it does upon another principle of law. As said before, this was a dangerous chemical used in and about his mill. The danger of it was known to the proprietors. It was the same as if they had had some dangerous animal confined on their premises. If they had had such a dangerous animal, and it had escaped and injured persons whom they had invited to the mill, they certainly would have been liable, unless they had shown that they had exercised reasonable care in keeping the animal. If they could show this, of course they would not be liable. Analogizing the dangerous chemical to a dangerous animal, they ought to have shown that they had exercised ordinary care to prevent this dangerous chemical from getting from the house into the mud, and becoming dissolved with it. Ga. Sup. Ct., Nov. 29, 1887. *Atlanta Cotton-Seed Oil Mills v. Coffey*. Opinion by Simmons, J.

**NUISANCE—OBSTRUCTION OF NAVIGABLE RIVER—SPECIAL DAMAGE.**—In an action for damages caused

by a nuisance consisting of a railroad bridge across the bed and channel of a navigable river, and for its abatement, the complaint alleged that plaintiff is compelled to pass almost daily between two points on the river, and that during the season of navigation he would almost daily pass up and down the river in a steamboat owned by him, carrying himself and other passengers between the two cities, if it were not for the obstruction caused by the bridge, but is prevented from using his steamboat for that purpose, unless he uses a circuitous route, and increases the distance about four miles, and by which he is delayed in passing a lock in the government canal; and that his freight, in which he is largely interested as a manufacturer, has to be carried the same distance further than it otherwise would, or be carried by railroad at a much greater expense. *Held*, that this failed to show any damage special to plaintiff, and not suffered by the whole public who navigate or may desire to navigate the river between these two points, and that plaintiff could not therefore maintain the action. It is believed that every case in this court in which private actions for damages resulting from common nuisances, or for injunctions to restrain their erection, have been sustained, comes fairly within the rule first above stated, and that none of them trench upon the rule last stated; that is to say, in each case actual present damages, special and peculiar to the plaintiff, were proved. Thus the alleged nuisance in *Walker v. Shepardson*, 2 Wis. 384, greatly impaired the value and lawful use by the complainant of his wharf. In *Barnes v. Racine*, 4 Wis. 454, it interfered with the convenient use of the plaintiff's lots, wharves, shipyards and mills, and impaired their value. In *Williams v. Smith*, 22 Wis. 594, it cut off (or would have done so) the only way of access to the premises of the plaintiff. In *Enos v. Hamilton*, 27 Wis. 256, it shut off access to the plaintiff's mill, and deprived him of the use thereof, and prevented him from seasonably stocking it for future work. In *Improvement Co. v. Lyons*, 30 Wis. 61, it caused a loss to the plaintiff of \$600 in tolls. In *Green v. Nunnemacher*, 38 Wis. 50, it drove customers from the plaintiff's saloon and tavern, diminished his profits, and injured the health of himself and family. And in *Gates v. Railroad Co.*, 64 Wis. 64, it stopped or delayed the boats and rafts of the plaintiff in their actual passage down a navigable river to his great damage. The complaint in this action contains no averments bringing it within either of the above cases, nor it is believed, within any other case ever decided by this court. Wis. Sup. Ct., Jan. 31, 1888. *Clark v. Chicago & N. W. Ry. Co.* Opinion by Lyon, J.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, June 5, 1888:

Judgment reversed, new trial granted, costs to abide event—*Manhattan Company, appellants, v. William J. Phillips and another, respondents*.—Judgment of conviction in the Albany Sessions of violating section 328 of the Penal Code, in giving prizes with packages of tea, reversed and defendant discharged—*People, respondents, v. Hugh B. Gilson, appellant*.—Order affirmed with costs—*Charles Robinson, respondent, v. New York, Lake Erie & Western Railroad Company, appellant*.—Judgment and conviction of the Suffolk county matricide affirmed—*People, respondent, v. Francis A. Hawkins, appellant*.—Judgment affirmed with costs—*Samuel C. Reed, respondent, v. Ezra A. Hoyt, appellant*.—Judgment affirmed with costs—*Hon. C. Hier v. New York, West Shore & Western Railroad Company*.—Judgment affirmed with costs—*Julia L. Costello, respondent, v. Ann M. Costello, appellant*.—Orders affirmed, and judgments also.



lute ordered for the defendant, with costs—Frederick Uhlman, appellant, v. New York Life Ins. Co., respondents, and Simon Uhlman v. Same.—Order affirmed with costs—In re petition of E. Ellery Auderson to vacate, etc.—Order affirmed with costs—Stephen C. Jackson and others v. Minnie Suydam and others.—Order affirmed with costs—In re Will of Lyman Soule, deceased.—Judgment affirmed with costs—John Byrne, respondent, v. James N. Matthews, appellant.—Dismissed with costs—Hanover Fire Insurance Company v. Germania Fire Insurance Company; Appeal of Alex. Stoddart.—Order affirmed with costs—People, ex rel. Thomas J. Killen, appellant, v. Clarence B. Angle, secretary, etc., respondent.—Order of General Term affirmed as to "River View" property, and orders of General and Special Terms as to amount in lot 194 reversed—People, ex rel. Nathan Warren and others, respondents, v. Edward Carter and others, assessors of Troy, appellants.—Order affirmed with costs—Susan C. Platt v. Annie R. Platt and others.—Appeal dismissed with costs—James B. M. Grosvenor and another, appellants, v. Isaac Sickle, respondent.—Order affirmed with costs—John N. Cornell, appellant, v. Daniel Donovan and others, respondents.—Judgment affirmed with costs—Elizabeth R. Taylor, respondent, v. Edwy L. Taylor, impleaded, etc., appellant.—Judgment and order affirmed with costs—Richard Lathers, appellant, v. Christopher B. Keogh, respondent.—Judgment affirmed with costs—Henry McCabe, appellant, v. J. Frank Emmons and another, respondents.—Judgment affirmed with costs—Andrew McLean, appellant, v. James H. Prentice and others, appellants.—Judgment affirmed with costs—David Jenkins and others, respondents, v. William Douglass, appellant.—Judgment affirmed and judgment absolute ordered against defendant on stipulation with costs—Porter G. Denison, respondent, v. W. M. F. Taylor, appellant.—Judgment affirmed with costs—Frank L. Belton, appellant, v. Alfredrick S. Hatch, president, etc., respondent.—Judgment reversed, new trial granted, costs to abide event—Anna Barry, appellant, v. Hamburg-Bremen Fire Insurance Company, respondent.—Judgment reversed, new trial granted, costs to abide event—Christopher Myer, appellant, v. Thomas S. Blair and another, respondents.—Judgment affirmed with costs—Eliza E. De Witt, respondent, v. Cornelius Van Schoy and another, appellants.—Judgment affirmed with costs—Mary C. Rank, appellant, v. Augustus H. Grote, respondent.—Judgment affirmed with costs—Henry P. DeGraaf, appellant, v. Jacob F. Wyckoff, respondent.—Judgment affirmed with costs—Thomas M. Carter, respondent, v. Brooklyn Life Insurance Company, appellant.—Judgment and conviction affirmed—People, respondents, v. Chiara Cignarole, the Brooklyn Italian husband murderer, appellant.—Judgments in both affirmed with costs—John Lynch, appellant, v. Oscar Pfeiffer, respondent (two cross cases and appeals).—Judgment affirmed with costs—Daniel Mack, respondent, v. Robert Mills and another, appellants.—Judgment affirmed with costs—Leonard Dodge, respondent, v. Nancy Zimmer, appellant.—Judgment and conviction of murder in the first degree affirmed—People, respondents, v. Daniel Lyons, appellant.—Judgment affirmed with costs—William Leinkamp, respondent, v. Emil Colman and another.—Order affirmed and judgment absolute ordered for defendant with costs—Edward A. Millman, appellant, v. John Christgau, respondent.—Judgment affirmed with costs—June A. Colwell and another, appellants, v. John Bell, impleaded, etc., respondent.—Judgment modified so as to reform the agreement in accordance with the findings of fact, and as modified affirmed without costs of appeal to this court

—Peter Born, appellant, v. Henry Schreweiser and others.—Judgment affirmed with costs—Wm. Baylis, appellant, v. Frederick J. Stimson, respondent.—Judgment affirmed—People, respondents, v. George W. Lake, appellant.—Order affirmed with costs—Julia B. Peck v. Theodore G. Peck and others.—Judgment of General Term affirmed with costs—John Hudson, appellant, v. The Ocean Steamship Company of Savannah, respondent.—Judgment of courts below affirmed with costs—Daniel P. Barnard, appellant, v. James C. Brower, respondent.—Judgment affirmed with costs—Charles S. Smith, respondent, v. James S. Cole, appellant.—Judgment affirmed with costs—Ann Fitzgerald, respondent, v. Charles R. Quann, appellant.—Judgments affirmed with costs—Michael Barr, respondent, v. Security Insurance Company, appellant, and Same v. Providence Insurance Company.—Judgment reversed, new trial granted, costs to abide event—Elijah H. Purdy and others, respondents, v. Mary J. Coar, impleaded, etc., appellant.—Appeal dismissed for want of stipulation and notice of appeal for judgment absolute—Charles Gundlich, respondent, v. Joseph Hensler, appellant.—Order affirmed and judgment absolute ordered for defendants with costs—People's Bank of the City of New York, appellant, v. St. Anthony's Roman Catholic church of Brooklyn, E. D., Bishop Loughlin and others, respondents.—Order of General Term reversed and judgment on the report of the referee affirmed with costs—Hiram F. Inglehart and another, respondents, v. The Thousand Island Hotel Company and others, appellants.—Judgment of the General Term affirmed with costs—Thomas Mackellar, respondent, v. George W. Rogers, impleaded, etc., appellant.—Judgment affirmed with costs—George W. Mead, respondent, v. Mary E. Jenkins and others, appellants.—Judgment reversed, new trial ordered before a new referee, costs to abide event—Julia E. Stillman, appellant, v. George B. Northup and others, respondents.—Judgment affirmed with costs—Alma L. Brooks, appellant, v. Patrick C. Davey and another, respondents.—Judgment affirmed with costs—Daniel Webber, appellant, v. Winfred Piper and another, respondent.—Judgment affirmed with costs—George B. Mee and another, respondents, v. James McNider, appellant.—Judgment affirmed with costs—Bank of Montreal, appellant, v. Carl N. Recknagel and others, respondents.—Judgment on appeal of Kennedy affirmed by default, and judgment on appeal of Tracy's executors affirmed with costs—Hervey Kennedy v. Henry H. Porter and others.—Conviction affirmed—People, respondents, v. Egbert Palmer, appellant.

#### NOTES.

A prominent young attorney on Pearl street was plaintiff Thursday in a case before Justice Brouwer, which has finally adjudicated a novel question of law and ethics. The attorney in question has at the foot of the stairway leading to his office a sign large and artistic, which proclaims to the anxious world the location of the office of the said minister of justice. The plaintiff claimed that this sign was obscured by shoes hung in front of it by the tenant of the store below, and that thereby many clients were lost, to the great damage of both attorney and clients. The jury after profound consideration of the testimony, arguments of the counsel and the charge of the court, rendered a verdict that the plaintiff recover six cents damages and that the shoes be removed instantly. This is the first case to be found in the books recognizing this effective method of remedying such grievances, and will be handed down in the profession as a leading case on the subject.—*Grand Rapids Daily Democrat.*



# The Albany Law Journal.

ALBANY, JUNE 16, 1888.

## CURRENT TOPICS.

GOVERNOR BOUTWELL'S new book, "The Lawyer, the Statesman, and the Soldier," will furnish a few hours' pleasant vacation reading to members of our profession. The subjects of these biographical sketches or studies are Choate, Webster, Lincoln and Grant, through whose times the writer has lived, and with all of whom he was intimately acquainted. He writes in a rather reserved and austere style, with evident impartiality, unless with regard to Grant, and when he becomes enthusiastic it seems to be compelled by the force of the testimony which he has adduced, and by the recollections of what he has seen and heard. The reader will probably place the highest value on his estimate of Lincoln, whose character is only just now beginning to be appreciated by the world in its unique beauty and glory. The essayist has hardly any thing new to tell us of Choate. The character of that greatest of American advocates has been very particularly and accurately portrayed in this journal by Judge Neilson and others, and Governor Boutwell does not add much to our knowledge, nor place the subject in any new or striking light. His testimony however is valuable as cumulative and confirmatory. He speaks of Choate's wondrous gifts of combined imagination and logic, his remarkable scholarship, his marvelously affluent and appropriate diction, the strange fascination of his oratorical manner, his untiring industry, the sensitiveness and refinement of his character, his kindness, courtesy and charity, and the purity of his moral nature. All these endowments and acquirements of the Bayard of the American Bar, the knight without fear and without reproach, he celebrates in sober and chastened phrases. A few extracts—alas! how few remain!—he gives us, including the exordium of the address in the Dalton divorce case, which in our humble judgment is the noblest and most exquisitely beautiful piece of advocacy ever uttered by an American lawyer, and his vivid and just remarks on what goes to make a good judge. Choate is compared with the greatest lawyers, Mason, Webster and Curtis, and pronounced "the equal of either of them in the propriety and scientific arrangement of his arguments, though not in the power of statement; but in learning, in genius, in the capacity to weave and unweave the webs of human statement, he was superior to either of these men, as he was to all the lawyers of America of the generations to which they belonged." He "combined a rare subtlety of observation and ingenuity of argument, gilded by an affluent imagination found nowhere else but in the fields of romance, with a clear and incisive logic which charmed alike the rustic and the stu-

dent, and compelled the assent of the critic and the judge." "His antagonists and competitors were Webster, Mason, Franklin Dexter, Hillard, Dana, Everett, Phillips"—what a galaxy!—"and whether at the bar or on the platform he could have commanded an audience at the expense of each and all of those gifted men." And finally: "Long ago I gave a half promise to myself that I would make a mark upon the sands of time, though slight it might be, as a tribute to his genius. From that acquaintance I received the impression that he was the ablest jury lawyer that America had then seen. Since his death I have had other twenty years for observation and reflection, and I announce my conclusion in one half-sentence—that for all the varied exigencies of professional life Rufus Choate was the best equipped advocate who ever stood in a judicial forum and spoke the English language." To which let us add our own poor tribute and opinion—that one who never heard Choate does not know what advocacy is, and that the man who has most nearly approached him in our present time is John K. Porter.

Of Webster Governor Boutwell says: "In many qualities, considered individually, Mr. Webster has been surpassed; but in absolute greatness of intellect, our search for his equal must be far and wide, not only among his contemporaries, but through the whole domain of history." His testimony confirms our opinion that Webster was not a learned lawyer. Among Story's papers "were seventy-five letters from Mr. Webster asking for suggestions and opinions upon legal points and topics." "He was not a learned man," but "his pre-eminence was due to his intellectual supremacy." In "the whole range of human history, can its ten great orators be named, and Mr. Webster be excluded from the list?" The final sentence is the most striking of all: "The two great orators of antiquity pleaded the cause of dying States, but it was Mr. Webster's better fortune to aid in giving form and character to a young and growing nation." The address in the Knapp murder trial is justly pronounced the greatest of his efforts, being equally sustained throughout. "In most of Mr. Webster's arguments and orations there are spaces which are uninteresting to the reader, and in their delivery they were uninteresting to the hearer." The biographer tells a story of the great man which is new to us. After his suicidal speech of March 7, 1850, advocating the slavery compromise measures, the city government of Boston, headed by Mayor Bigelow, refused him Faneuil Hall in which to explain his position. This was "an indignity which he never forgot and which he never forgave." After that there was a celebration at Boston of the establishment of railway communication with Canada, attended by President Fillmore and several of his cabinet, and some guests from Canada. Mr. Boutwell, as governor, invited Mr. Webster, then secretary of State, to attend, and he consented and offered to present the members of the State government to the presi-

dential party, but he would have nothing to do with the "cita." "We passed to the reception-room, where we found Mayor Bigelow engaged in introducing the members of the city government. Mr. Webster paid no attention to the mayor, but he took possession of the floor, and in a loud voice he proceeded to announce the names of the gentlemen whom he had in charge. His only apparent regret was the fact that they were not more numerous. It is difficult to comprehend the *hauteur* of Mr. Webster's bearing, or the weight of the indignity that he heaped upon the mayor and his associates. Mr. Webster was entitled to precedence, but he asserted himself as though the mayor were an offensive intruder, and too low or too base for notice." This was "black Dan" in his direst mood. For ourselves, we are glad that we did not see him then nor hear him on the 7th of March, but that we saw and heard him on Bunker Hill in '48, which is to us what hearing Demosthenes on the Crown would have been to the Greek, or Burke in the Hasting trial to the Englishman.

Of the goodness and greatness of Abraham Lincoln, the noblest product of American civilization, the writer gives a just and interesting estimate. That this wisest, most patient, and most humane spirit should have been evolved from the mud cabin of his childhood, and the hard and narrow experiences of his early manhood, will ever be a wonder to mankind, and never in history has one so misunderstood, so depreciated and so vilified in his life, been so admired and sainted in his death. Such is the homage which the world pays to virtue—a proof that the divine spark is not absent from most of the human race. The most interesting part of Mr. Boutwell's remarks on Lincoln is that in which he justly dwells on his wonderful rhetorical style. "Of all the self-made men of America," he says, "Lincoln owed least to books, schools and society," and yet we find him writing in the most exquisitely felicitous and harmonious style, not a word too much nor a word too little, and every word not only fitting but the fittest—as in his inaugural address, and in the Gettysburg address, the most beautiful, pathetic and inspiring of its class, which Pericles did not surpass and which Everett could not equal. Whence came these gifts and these powers to this uneducated, obscure, ungainly man? The writer compares him in this respect with Shakespeare in the following passage, which is to be commended to the Baconian theorists: "His opportunities for training in the schools were few, and his hours of study were limited. The books that he could obtain were read and reread, and a grammar and geometry were his constant companions for a time; but his means of education bore no logical relation to the position he finally reached as a thinker, writer and speaker. Lincoln is a witness for the man William Shakespeare against those hostile and illogical critics who deny to him the authorship of the plays that bear his

name, because they cannot comprehend the way of reaching such results without the aid of books, teachers and universities. When they show similar results reached by the aid of books, teachers and universities, or even by their aid chiefly, they will then have one fact tending to prove that such results cannot be reached without such aids; but in the absence of the proof we must accept Shakespeare and Lincoln and confess our ignorance of the process by which their greatness was obtained. Books, schools and universities are helps to all, and they are needed by each and all in the ratio of the absence of natural capacity. By the processes of reason employed to show that Shakespeare did not write 'Hamlet' it may be proved that Lincoln did not compose the speech which he pronounced at Gettysburg. The parallel between Shakespeare and Lincoln is good to this extent. The products of the pen of Lincoln imply a degree of culture in schools which he never had, and a process of reasoning upon that implication leads to the conclusion that he was not the author of what bears his name. We know that this conclusion would be false, and we may therefore question the soundness of a similar process of reasoning in the case of Shakespeare." In his estimate of General Grant, which we have no space to review, Governor Boutwell might well have spoken also of his singular and remarkable literary excellence. A man who never had any rhetorical training in schools, and whose life was passed mainly in hardships and in camps, wrote the most admirable of military commentaries, far surpassing Caesar's, giving in a few pages, and in a style of crystalline clearness and manly simplicity and vigor, a picture of the greatest military operations of modern times, without perplexing detail and with a masterly sense of essentials, which a child can comprehend and a strategist must admire.

We have always feared that our judges of the Court of Appeals would get into trouble in riding those horses. They are probably led to do it because they have such a teeming calendar. The fact is, if exercise is all that the judges want, saw-horses are much more effective and safer. Now here is Judge Andrews swept off his horse by a telephone wire. Perhaps the horse was too wiry. All the judge's friends—and they include every man who ever knew him—will rejoice that the wire was not loaded, and that his escape was *damnum absque injuria*. But this accident settles it that the wires must go under ground.

#### NOTES OF CASES.

IN *Clark v. State*, Tennessee Supreme Court, April, 1888, it was held that the act of opening a cash drawer for the purpose of stealing money is an attempt to commit larceny, although there was no money in the drawer at the time. The court said:

"The direct question here presented has never been passed upon by this court, but it is by no means one without authority. It has received much discussion in the text-books, and in the adjudged cases from other courts. The English cases are conflicting. In *Reg. v. Collins*, Leigh & C. 471, it was held there could be no attempt to pick the pocket of a person who had no money at the time in her pocket; while in *Reg. v. Goodhall*, 1 Denison Br. Cas. 187, it was held an attempt to produce a miscarriage could be committed on a woman supposed to be but not in fact pregnant. It appears to us that these cases cannot be reconciled, although Mr. Heard, in his second edition of *Leading Criminal Cases* (vol. 2, pp. 482, 483) has attempted to do so. We are constrained to agree with Mr. Bishop that 'these differing opinions must have sprung from opposite views in the two benches of judges.' Bish. Crim. Law (7th ed.), § 741, note 1. The American cases seem to be uniform, or at least substantially so, for here the few conflicts are more apparent than real. In *Rogers v. Commonwealth*, 5 Serg. & R. 463, the Pennsylvania court held that an indictment for assault with intent to steal from the pocket is good, though it contains no setting out of any thing in the pocket to be stolen. Duncan, J., in delivering the opinion of the court, said: 'The intention of the person was to pick the pocket of whatever he found in it, and although there might be nothing in the pocket the intention to steal is the same.' So in Massachusetts, under a statute differing in terms but the same in substance as our own above herein quoted, it was held that the indictment need not allege, and the prosecutor need not prove, that there was in the pocket any thing which could be the subject of larceny. *Commonwealth v. McDonald*, 5 Cush. 365. See also *Commonwealth v. Jacobs*, 9 Allen, 274. To the same effect is *State v. Wilson*, 30 Conn. 500. So in Indiana it has been held that an assault on one with intent to rob him of his money may be committed, though he has no money in possession at the time. *Hamilton v. State*, 36 Ind. 280; S. C., 10 Am. Rep. 22. If an indictment for an attempt to steal the contents of a trunk or room would not be good where it transpired that there was nothing in the trunk or room, then it would seem to follow that the indictment, in case where there were goods in the trunk or room, would have to allege what particular goods the thief purposed to steal; and if necessary to allege, it is necessary to prove; and how could this be proven where there was a variety of different goods, and the thief was arrested before he had laid hands upon any article? Again, if a thief is caught with his hand in your pocket before he can grasp any of its contents, and it is found that the pocket contains both money and a watch, how can it be proven that he intended to steal both; and if not both, which? And in the case last put is there any more of an attempt to steal, the thief being ignorant of the presence of the watch or money, than there would be, had he with similar intent and ignorance, placed his hand

in an empty pocket? In each case there is the substantive and distinct offense as prescribed by the statute. There is the criminal intent, and an effort made to carry out the intent to the point of completion, interrupted by some unforeseen impediment or lack outside of himself, special to the particular case, and not open to observation, intervening to prevent success, without the abandonment of effort or change of purpose on the part of the accused. As said by Mr. Bishop: 'It being accepted truth that the defendant deserves punishment by reason of his criminal intent, no one can seriously doubt that the protection of the public requires the punishment to be administered, equally whether in the unseen depths of the pocket, etc., what was supposed to exist was really present or not.' 1 Bish. Crim. Law, § 741. The community suffers from the mere alarm of crime. Again: 'Where the thing intended (attempted) is a crime, and what is done is of a sort to create alarm—in other words, excite apprehension that the evil intention will be carried out—the incipient act which the law of attempt takes cognizance of is in reason committed.' 1 Bish. Crim. Law, § 742. The true legal reason for the conclusions reached is that the defendant, with the criminal intent, has performed an act tending to disturb the public repose. Id., § 744. Mr. Wharton's views on this at one time perplexing question are in accord with Mr. Bishop. See 1 Whart. Crim. Law (9th ed.) §§ 182, 183, 185, 186, 192." Pregnancy not essential to an attempt to commit abortion, *State v. Fitzgerald*, 49 Iowa, 260; S. C., 31 Am. Rep. 148. Snapping uncapped gun, *Mullen v. State*, 45 Ala. 48; S. C., 6 Am. Rep. 691. Breaking an empty safe, *State v. Beal*, 37 Ohio St. 108; S. C., 41 Am. Rep. 490. See note, 41 Am. Rep. 492.

In *Johnson v. Merithew*, Maine Supreme Judicial Court, Jan. 28, 1888, it was held that where several lives are lost in the same disaster there is no presumption that either party survived the other because of the difference in age or sex. The court said: "Death may be proved by showing facts from which a reasonable inference would lead to that conclusion, as by proving that a person sailed in a particular vessel for a particular voyage, and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven, or the persons on board of her might be carried. *White v. Mann*, 26 Me. 361." If death may be inferred from facts shown, it logically follows that the time of the death may be fixed, with more or less certainty, in the same manner. *Watson v. King*, 1 Starkie, 121. In the case at bar the vessel commanded by Aaron W. Nickerson, heavily laden with coal, sailed from Troon, in the south of Scotland, for Havana—a voyage usually accomplished in from twenty-five to forty days—in the track of many sailing vessels and steamers plying between the north of Europe and America. In the case of shipwreck it

is improbable, if not impossible, that the Benj. Hazeltine, if driven ashore, should not have been reported in the United States within six months of her loss. If any on board of her had been rescued by passing vessels they would within that time sent the intelligence of shipwreck to the home port of the vessel. The circumstances surrounding the vessel, and the voyage that she entered upon, may well authorize the inference of her loss with all on board within the six months following the date of her departure from Scotland, and a jury would be authorized to find the death of her master and his family prior to September 11, 1880. The weight of authority at the present day seems to have established the doctrine that where several lives are lost in the same disaster there is no presumption from age or sex that either survived the other; nor is it presumed that all died at the same moment; but the fact of survivorship, like every other fact, must be proved by the party asserting it. *Underwood v. Wing*, 4 De Gex, M. & G. 633, affirmed on appeal in *Wing v. Angrave*, 8 H. L. Cas. 183; *Newell v. Nichols*, 75 N. Y. 78; S. C., 31 Am. Rep. 424; *Coye v. Leach*, 8 Metc. 371; 41 Am. Dec. 518, and note of cases, 522. In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because the fact is presumed, but because from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory. In the case at bar the father was a man forty years of age, and his minor children under ten. The last known of either was upon their sailing from Scotland. No evidence whatever gives any light upon the particular perils they encountered at death. The children are not proved to have survived their father, and therefore he died without issue, and his one-third of the demanded premises descended to his father."

In *Silverwood v. Latrobe*, Maryland Court of Appeals, March 15, 1888, it was held that subsequent rules of a cemetery company forbidding the entrance of any one but a lot-owner, or one of his family, to do any work in the cemetery, are inoperative as against an existing grantee. The court said: "The right 'to make such by-laws, rules and regulations as they may deem proper for conducting the affairs of the corporation, for the government of lot-holders and visitors, and for the transfer of stock and the evidence thereof,' is a right given by nearly every charter creating a corporation, and the grant of this right does not invest a corporation with political powers, and delegate to it any portion of the State's sovereignty. Undoubtedly this corporation had the right to make by-laws, but no by-law was in existence when the appellant purchased and paid for his lot which prevented him from employing his own agents for its cultivation and improvement. \* \* \* Therefore when in the terms of a deed or other instrument a man has a right to do a certain thing, he can do it either with his own hands or by the hands of an

agent, and if the agent is interfered with by the grantor it is an interference with the rights of the grantee. When burying-lots in a cemetery have been conveyed by a corporation, a right of property is conferred on the purchaser which is like any other right to real estate. *Windt v. Church*, 4 Sandf. Ch. 471. Unlike the case of *Partridge*, 39 Md. 681, the appellant has a title to the lot by virtue of an instrument of writing, under seal, which operates as a deed of conveyance. The act of 1837 declares the property thus acquired to be real estate. The grantee has a qualified fee limited to the purposes of sepulture. The second clause of the instrument, conveying the property, gives him the right to plant and cultivate trees, shrubs and flowers. This he could do either with his own hands or by employing an agent to do the work for him. When he accepted the deed and paid the purchase-money he acquired this right. Had he been unable to secure the right, it is possible, and even probable, that he would not have purchased the property. No order subsequently passed by the grantors can be so construed as to have a retroactive operation, and thus limit or annul the privilege secured to the grantee by a solemn instrument under seal. As said by Alderson, J.: 'When the law allows a party to contract it will not permit that contract by any matter arising *ex post facto* to be made of no value.' *Giles v. Grover*, 1 Clark & F. 106. In *Ashby v. Harris*, L. R., 8 C. P., 523, this very question was decided. The burial board of the parish of St. Pancras, being a corporation, had granted, by an instrument under seal, the privilege of making and constructing a private grave, and the exclusive right of burial and interment therein. The grantee had been accustomed to plant and cultivate flowers by the hands of agents. Ten years after the grant had been made the board determined to undertake the planting of graves themselves, and the superintendent was authorized to prevent other persons from entering the cemetery for such purposes. Notice was also given to the owners of private graves of the determination of the board. After such notice had been given, Harris, as the agent of the grantee, entered for the purpose of planting the grave conveyed by the said instrument under seal. He was assaulted, and an action for damages was instituted. It was held that 'the board clearly had no right to make regulations to interfere with that which they had granted in perpetuity;' that 'any subsequent regulations made by them would be repugnant and void. They might make general rules and regulations for the management of the cemetery, but not special rules which would derogate from prior grants.'" See *ante*, 68, 167.

#### CHARITIES—BEQUEST TO CHARITABLE USES—UNCERTAIN BENEFICIARY.

NEW YORK COURT OF APPEALS, FEB. 7, 1888.

HOLLAND V. ALCOCK.

A bequest of all the residue of testator's estate to his executors, "to be applied by them for the purpose of having

prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul, and the souls of my family, and also the souls of all others who may be in purgatory," is invalid for the lack of a defined and ascertained beneficiary.

Such a trust may not be impeached under the English law of superstitious uses prevailing in England.

In New York the English doctrine of charitable uses and trusts and the *cy-pres* power has no longer any application; but the creation of organized bodies by the Legislature, endowed with the legal capacity to hold property for charitable purposes, is the substituted policy.

Thomas J. Keigharn and E. H. Benn, for appellants.

J. Newton Williams and David McClure, for respondents.

**RAPALLO, J.** The third clause of the testator's will is in the following words: "All the rest, residue and remainder of my estate I give and bequeath to my said executors, to be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." The validity of this clause is the question now presented for adjudication. The action is brought by five nieces and a nephew of the testator, who claim to be his next of kin and heirs at law, and as such entitled to his residuary estate in case the disposition thereof attempted to be made by the third clause of the will is adjudged to be invalid. The estate consists wholly of personal property, and amounted at the time of the testator's death, in 1882, to about the sum of \$23,000. By the second clause of his will the testator devised and bequeathed all his estate, real and personal to his executors, in trust for the uses and purposes set forth in the will, which were to pay certain legacies, amounting in the aggregate to about \$16,500, and to apply the residue as directed in the third clause, before recited. That clause must therefore be regarded as creating or attempting to create a trust of personal property for the purpose specified. The plaintiffs claim that the trust thus attempted to be created is void; that as to the residuary estate the testator died intestate; and that distribution thereof should be made among the next of kin, etc. The defendant Alcock, one of the executors, demurred to the complaint. At Special Term the demurrer was overruled and the plaintiffs had judgment. On appeal to the General Term the judgment was reversed, and judgment was rendered in favor of the defendant Alcock, thus affirming the validity of the third clause of the will. The plaintiffs now appeal.

Some of the points involved in the case now before us were passed upon in the late case of *Gilman v. McArde*, 90 N. Y. 451; S. C., 52 Am. Rep. 41. In that case the deceased had in her life-time placed in the hands of the defendant a sum of money, on his promise to apply it to certain purposes during the life-time of the deceased and of her husband, and after the death of both of them to pay their funeral expenses, etc., and to expend what should remain in procuring Roman Catholic masses to be said for the repose of their souls. This court declined to decide whether a valid trust had been created in respect to the surplus, there being no ascertained or ascertainable beneficiary who could enforce it; and the majority of the court expressly reserved its opinion upon that question, disposing of the case upon the ground that a valid contract *inter vivos*, to be performed after the death of the promisee, had been established, that there was nothing illegal in the purpose for which the expenditure was contracted to be made, and that there was no want of definiteness in the duty assumed by the promisor; and we held that as there had been no

breach of the contract, but the promisor was ready and willing to perform, he was entitled, as against the legal representatives of the promisee, to retain the consideration. The point upon which the majority of the court in the case last cited reserved its decision is now again presented. There is no contract *inter vivos*, but the will expressly bequeaths the fund in question to the executors in trust for the purposes therein specified; one of which is to apply the residuary estate to the purpose of having prayers offered in a Roman Catholic church for the repose of the souls of the testator, of his family, and of all others who may be in purgatory. It is claimed that this disposition contains all the elements of a valid trust of personal property, that there are definite and competent trustees, that the purpose of the trust is lawful, and that it is sufficiently definite to be capable of being enforced by a court of equity, as the court could decree the payment of the fund to a Roman Catholic church or churches for the purpose directed by the will. But if all this should be conceded, there is still one important element lacking. There is no beneficiary in existence or to come into existence who is interested in or can demand the execution of the trust. No defined or ascertainable living person has or ever can have any temporal interest in its performance; nor is any incorporate church designated so as to entitle it to claim any portion of the fund. The absence of a defined beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. It is said by Wright, J., in *Levy v. Levy*, 33 N. Y. 107, that "if there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary, who can claim its enforcement, is void, whether good or bad, wise or unwise." It is only in regard to the class of trusts known as "charitable" that a different rule has ever prevailed in equity in England, and still prevails in some of our sister States. Whether the English doctrine of charitable uses and trusts prevails in this State will be considered hereafter. In all other cases the rule as stated by Judge Wright is universally recognized, both in law and in equity.

It is claimed that the trust now under review is not void according to the general rules of law for want of a defined beneficiary, because the trust is for the purpose of having prayers offered in a Roman Catholic church to be selected by the executors. It is contended that this is in effect a gift to such Roman Catholic church as the executors shall select, inasmuch as the money to be expended for the masses would, according to the usage, be payable to the church or churches where they were to be solemnized, and therefore as soon as the selection is made, the designated church or churches will be the beneficiary or beneficiaries, and entitled to the payment; that the trust is therefore, in substance, to pay the fund to such Roman Catholic church or churches as the executors may select; and that a duly-incorporated church, capable of receiving the bequest, must be deemed to have been intended. Passing the criticisms to which the assumptions contained in this proposition are subject, and considering the trust as if it had been in form to pay over the fund to such Roman Catholic church as the executors might select, to defray the expense of offering prayers for the dead, the objection of indefiniteness in the beneficiary would not be removed. The case of *Power v. Cassidy*, 79 N. Y. 602; S. C., 35 Am. Rep. 550, is relied upon by the respondents as supporting their claim. In that case the bequest was of a fund to the executors in trust, to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York as a majority of the executors should decide, and in such proportions as they might think proper. The opinion

of the court by Miller, J., holds that giving full force and effect to the rules that the object of the trust must be certain and well defined; that the beneficiaries must be either named or capable of being ascertained within the rules of law applicable to such cases; and that the trusts must be of such a nature that a court of equity can direct their execution, and making no exception in favor of charitable uses—the bequest should be upheld, as coming within the general rule; that the clause designates a certain class of objects of the testator's bounty, to which he might have made a valid direct bequest, and that by conferring power upon his executors to designate the organizations which should be entitled to participate, and the proportion which each should take, he did not impair the legality of the provision so long as the organizations referred to had an existence recognized by law and were capable of taking and could be ascertained; that the evidence showed that at the time of the execution of the will, and of the testator's death, there were in the city of New York incorporated institutions of the class referred to in the will, and that a portion of these had been designated by a majority of the executors; that none but incorporated institutions could lawfully have been selected, and that even if the executors had failed to make a selection or apportionment, the court would have had power to decree the execution of the trust, there being no difficulty in determining what institutions came within the class described by the testator. It must be observed that in the case cited the beneficiaries were confined to Roman Catholic institutions of a certain class in the city of New York. These were necessarily limited in number. By 1 Rev. St., p. 734, § 97, it is provided that a trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust; by section 99, that when the terms of the power import that the estate or fund is to be distributed between the persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons in exclusion of the others; by section 100, that if the trustee of a power, with the right of selection, shall die leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated as objects of the trust; and by section 101, that where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the Court of Chancery. Regarding these provisions as declarations of general rules applicable to all trust powers, and governing trusts of personal as well as real property, the decision in *Power v. Cassidy* in no manner infringes upon the rule that the designation of a beneficiary, entitled to enforce its execution, is essential to the validity of a trust; and the only point as to which the correctness of that decision is open to any doubt is whether, in fact, the beneficiaries in that case were sufficiently defined and capable of ascertainment to enable a court of equity to enforce the trust in their behalf. The view taken in respect to that point was certainly very liberal; but the court has in subsequent cases repeatedly announced that the decision was not to be extended, and it is evident that without a material extension, it cannot be made to cover the present case. Here, if the church or churches from among which the selection is to be made are to be regarded as the beneficiaries, they are not limited, as in *Power v. Cassidy*, to a Roman Catholic church or churches in the city of New York, but include all the Roman Catholic churches in the world. No one church or the churches of any particular locality can claim the benefit of the bequest. In this respect the case at bar is analogous to

that of *Prichard v. Thompson*, 85 N. Y. 76, where the bequest was of a sum of money to the executors, to be distributed by them "among such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable and educational uses," as the executors or the survivors of them might select, and in such sums as they might determine. This bequest was held void because of the indefiniteness of the designation of the beneficiaries. The opinion was written by the same learned judge who delivered the opinion in *Power v. Cassidy*, and by him distinguished from that case on the ground that in *Power v. Cassidy* the class of beneficiaries was specially designated and confined to the limits of a single city, and to a single religious denomination, so that each one could readily be ascertained, and each had an inherent right to apply to the court to sustain and enforce the trust; while in the case at bar every charitable and educational institution within two States was included. This case (*Prichard v. Thompson*) also establishes that the power to the executors to select the beneficiary or beneficiaries does not obviate the objection of the omission of the testator to designate them in the will, unless the persons or corporations from among whom the selection is to be made are so defined and limited that a court of equity would have power to enforce the execution of the trust, or in default of a selection by the trustee, to decree an equal distribution among all the beneficiaries. This discussion has proceeded in answer to the claim that the church or churches where the masses were to be solemnized were the intended objects of the testator's bounty, and the beneficiaries of the trust; but the correctness of that position is by no means conceded. It is however not necessary to discuss it. If the bequest had been of a sum of money to an incorporated Roman Catholic church or churches, duly designated by the testator, and authorized by law to receive such bequests, for the purpose of the solemnization of masses, a different question would arise. But such is not this case. The bequest is to the executors in trust, to be by them applied for the purpose of having prayers offered in any Roman Catholic church they may select.

It has been argued that the absence of a beneficiary entitled to enforce the trust is not fatal to its existence where the trustee is competent and willing to execute it, and the purpose is lawful and definite; that it is only where the trustee resists the enforcement of the trust that the question of the existence of a beneficiary entitled to enforce it arises. I have not found any case in which this question has been adjudicated or the point has been made, and it does not seem to be presented on this appeal. The case now before us arises on a demurrer by the defendant Alcock, one of the executors, to the complaint, on the ground that it shows no right in the plaintiffs. The complaint alleges that the defendant Alcock, together with Frederick Smyth, was named as executor in the will; that the defendant Alcock did not qualify, and has never acted, as executor or as trustee of the alleged trust sought to be created by the third clause, nor participated in any form in carrying out the same; but that his co-executor, Frederick Smyth, has taken possession of the whole estate as such executor and trustee. Smyth is not a party to this appeal. It comes up on the demurrer of Alcock alone, and there is nothing in the complaint to show that he is willing to execute the trust; but on the contrary it shows that he has in no manner acted or qualified himself to act therein. But aside from these considerations I do not think that the validity or invalidity of the trust can depend upon the will of the trustee. If the trust is valid, he can be compelled to execute it; if invalid he stands,

as to personal property undisposed of by the will, as trustee for the next of kin, and the equitable interest is vested in them immediately on the death of the testator, subject only to the payment of his debts and the expenses of administration. When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use without accountability to any one, and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor, which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the performance of which no ascertainable person has any interest, and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose.

It is contended however that charitable uses and trusts are not subject to the general rules of law upon this subject, and that the bequest now under consideration is of that class. The distinguishing features of this class of trusts, as administered in England from an early period, were that they might be established through trustees, who might consist either of individuals or a corporation; and in the case of individual trustees, they might hold in indefinite succession, and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor; while private trusts were not permitted to continue longer than a life or lives in being and twenty-one years and a fraction afterward. The persons to be benefited might consist of a class, though the individual members of the class might be uncertain. The scheme of the charity might be wanting in sufficient definiteness or details to admit of its practical administration, and in such cases a court of equity would order a reference to a master in chancery to devise a scheme for its administration, which should as nearly as possible conform to the intentions of the founder of the charity; and thus was called into operation what was known as the "*Cy-près* Doctrine." These charitable trusts were regarded as matters of public concern, and were enforceable by the attorney-general, although in many cases the court would compel their performance without his intervention at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefited, such as one of the poor or maimed, etc. In a comparatively recent case argued in this court, many instances of ancient charities were cited which had been enforced by the Court of Chancery in England, such as *Cooke's Charity*, decided A. D. 1552, whereby the testator ordered the purchase of lands and the erection of a free grammar school; *Bond's Charity*, decided A. D. 1553, in which the testator's will, dated in 1508, directed that there should be established a Bede house at Bablock, and there should be built a chapel, and therein one mass to be said on Sunday, and therein to be ten poor men and a woman to dress their

meat and drink—the priest to be a brother of Trinity guild and Corpus Christi guild, etc.; *Houell's Charity*, decided in 1557, whereby the testator directed his executors to provide a rent of 400 ducats yearly forever, to be appropriated each year to promote the marriage of four orphan maidens, honest and of good fame. This trust appears to have been enforced in chancery upon a bill filed by certain orphan maidens in behalf of themselves and others. We are also referred to numerous other charities for the support of the poor, for erection of almshouses, hospitals, maintaining school-masters, keeping churches in repair and other similar purposes. In the case of *Bond's Charity*, cited above, a license was granted by King Henry VII, in 1508, to the testator's son and others to grant lands to support a priest to sing mass, and twelve poor men and one woman to say prayers and obsequies for the king, the brothers and sisters of the guild, and for their souls, and especially for the soul of the testator, Thomas Bond, in the then newly-erected chapel at Bablock. It appears that religious or pious uses were, when the Roman Catholic religion prevailed in England, recognized as charities. In 1534 Henry Barton devised to the rector of St. Mary's and the churchwardens and their successors certain lands at a perpetual rent, payable to the guild of Corpus Christi, etc., so that said rector of St. Mary's and his successors, or their parish priests, when they should say prayers in the pulpit of the church, should pray for the souls of Richard Barton, the testator's father, of Dionesia, his mother, and for the souls of their children and all the faithful deceased, and in case they should neglect to do so for two days after the proper time, that the master and wardens of said guilds, etc., should levy a distress upon said lands for twelve pence by way of penalty, and retain such distress until such prayers should be said. This property appears to have been afterward seized by the crown under the statute of chauntries (1 Edw. VI) and granted by Edward VI to one Stapleton; but the rector, etc., of St. Mary's having re-entered, it was made to appear in a litigation between them and the successors in interest of Stapleton that no prayers for souls had been made, nor had the rents of the premises been devoted to any manner of superstitious use within the space of six years and more next before the first year of the reign of King Edward VI, since which time the rents and profits had been employed by the parson and churchwardens of the parish in good uses and purposes. The case was tried in the 22d and 23d Eliz., and the parish was allowed to retain the land for general charitable purposes.

The purposes for which charities were established in England were so numerous and varied, and the learning contained in the books on that subject is so vast, that it would be futile to attempt to go into it in detail or to do more than briefly refer to their history, so far as is necessary to determine whether the English doctrine of charitable uses and trusts, as distinguished from private trusts governed by the general rules of law, still has any place in the jurisprudence of this State. The statute of 1 Edw. VI, A. D. 1547, known as the "Statute of Chauntries," recited that a great part of superstition and errors in Christian religion had been brought into the minds of men by reason of their ignorance of their true and perfect salvation through the death of Jesus Christ, and by devising vain opinions of purgatory, and masses to be done for those who are departed, which doctrine is maintained by nothing more than by the abuse of trentals, chauntries and other provisions for the continuance of such blindness and ignorance; that the amendment of the same, and converting them to good and godly uses, such as the erection of grammar schools, the education of youth, and better provision



for the poor, cannot in the present Parliament conveniently be done, nor be committed to any person than to the king, who by the advice of his most prudent council can and will most wisely alter and dispose of the same. It then recites the act of 37 Hen. VIII for the dissolution of colleges, chauntries, etc., and enacts that all colleges, free chapels and chauntries not in the actual possession of the late or present king (with certain specified exceptions) and all their lands and revenues, are declared to be in the actual seizure and possession of the present king, without office found; and that all sums of money, etc., which by any conveyance, will, devise, etc., have been given or appointed in perpetuity toward the maintenance of priests, anniversaries or obits, be vested in the king. Certain colleges, free chapels and chauntries, such as those within the universities of Oxford and Cambridge, and others specified in the statute, were exempted from its provisions; but the king was empowered to alter the chauntries in the universities. In this manner property which had been devoted by the donor to uses which had come to be regarded as superstitious were, through the king, put to charitable uses which were deemed lawful; and this policy was carried out by many decrees of the Court of Chancery. The statute of 39 Eliz., A. D. 1597, authorized persons owning estates in fee-simple during twenty years next ensuing the passage of the act, by deed enrolled in the High Court of Chancery, to found hospitals, houses of correction, alms-houses, etc., to have continuance forever, and place therein a head and members, and such number of poor as they pleased; and such institutions were declared to be corporations, with perpetual succession. It will be observed that this was but a temporary act, which gave power only for twenty years next ensuing its passage, to found the chauntries mentioned. This statute also contained a provision entitled "An act to reform deceits and breaches of trust touching lands given to charitable uses," which recited that divers institutions had been founded, some by the queen and her progenitors and some by other godly and well-disposed people for the charitable relief of poor, aged and impotent people, maimed soldiers, schools of learning, orphans, and for other good, charitable and lawful purposes and intents, and that lands and goods given for such purposes had been unlawfully converted to the lucre and gain of some few greedy and covetous persons; and then proceeds to provide for the issue of commissions out of chancery to inquire into those wrongs, and decree the observance of the trusts according to the intent of the founders thereof. This statute was followed by that of 43 Eliz., ch. 4, "To redress the misemployment of lands, goods and stocks of money heretofore given to charitable uses." This act is known as the "Statute of Charitable Uses," and was at one time, together with that of 39 Eliz., regarded as the foundation of the law of charitable uses and of the jurisdiction of chancery in cases of charities. But the reports of the record commission established in 1819 have disclosed that the jurisdiction had been exercised and charity laws administered by the courts of chancery from a much earlier period. The act however throws light upon what were at the time considered and recognized as charitable uses, for they are enumerated in the preamble as follows, viz.: The relief of the poor, the maintenance of the sick and maimed soldiers and mariners, schools of learning, free schools, and schools in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the maintenance of houses of correction; the marriage of poor maidens; the aid of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; the aid

of poor persons in the payment of taxes. The act then provides for the issuing of commissions by the lord chancellor of England or the chancellor of the duchy of Lancaster, and the redress of breaches of trust, as in the statute 39 Eliz. In this enumeration of charitable uses there is none which would cover the present case; and indeed, under the statute of chauntries and other statutes prohibiting superstitious uses, it would not have been recognized in England as valid as a charity or otherwise. But assuming, as perhaps we ought to assume, that before gifts for the support of priests, chauntries, etc., came to be regarded as superstitious uses, they were within the principles of charity, and that they became illegal only by virtue of the statutes against superstitious uses; in this State, where all religious beliefs, doctrines and forms of worship are free, so long as the public peace is not disturbed, the trust in question cannot be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use. The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic Church, of which the testator was a member; and those professing that belief are entitled in law to the same respect and protection in their religious observances thereof as those of any other denomination. These observances cannot be condemned by any court, as matter of law, as superstitions, and the English statutes against superstitious uses can have no effect here. Const. U. S. amend., art. 1; Const. N. Y., art. 1, § 3. If in other respects the bequest was by the law of England valid as a "charitable" use, and the English doctrine of charitable uses prevails in this State, the objections to its validity on the ground of indefiniteness of the trust, perpetuity and the absence of an ascertainable beneficiary can be overcome; otherwise they must prevail at least so far as relates to the absence of a beneficiary, which is sufficient to dispose of the case without reference to the other points. We will therefore treat the bequest as a charitable use.

The principal cases in this State in which the doctrine of charitable uses has been discussed are *Williams v. Williams*, 8 N. Y. 527; *Owens v. Missionary Soc.*, 14 id. 380; *Beekman v. Bonsor*, 23 id. 296; *Doubling v. Marshall*, id. 366; *Levy v. Levy*, 33 id. 97; *Rose v. Beneficent Ass'n*, 1863 (not reported); *Bascom v. Liberton*, 34 N. Y. 583; *Burrill v. Boardman*, 43 id. 254; S. C., 8 Am. Rep. 604. These cases were argued by counsel of eminent ability, and in the arguments and opinions display a depth of learning and thoroughness of research which render it useless to attempt a discussion of the question here as an original question, or to do more than summarize the main points upon which the arguments turned, and ascertain how the case stands upon those authorities. So lately as the case of *Burrill v. Boardman*, 43 N. Y. 254, the question was argued as still an open one; and that case was decided on the ground that the trust was valid without resorting to the doctrine of charitable uses. Comstock J., in a note to the eleventh edition of Kent's Commentaries (volume 4, p. 306, note 2) states that the essential requisites of a valid trust are (1) a sufficient expression of an intention to create a trust; (2) a beneficiary who is ascertained or capable of being ascertained; that the appointment or non-appointment of a trustee of the legal estate is not material; that if the trust or beneficial purpose be well declared, and if the beneficiary is a definite person or corporation capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether the grantor, testator, heir or next of kin, as the case may be; and that, outside of the domain of charitable uses, no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in delivering the opinion of this court in

*Beekman v. Bonsor*, 23 N. Y. 310, the same learned judge says that the joint authority of the cases of *Williams v. Williams*, 8 N. Y. 527, and *Owens v. Missionary Soc.*, 14 N. Y. 386, establishes the propositions (1) that a gift to charity is maintainable in this State if made to a competent trustee, and if so defined that it can be executed, as made by the donor, by a judicial decree, although it may be void, according to general rules of law, for want of an ascertained beneficiary; (2) that in other respects the rules of law applicable to charitable uses are within those which appertain to trusts in general; (3) that the *cy-près* power which constitutes the peculiar feature of the English system, and is exercised in determining gifts to charity where the donor has failed to define them and in framing schemes of approximation near to or from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this State on this subject. But he declined to re-examine these cases, as he concludes that the law of charities could not be invoked in the case then under consideration. The same learned judge however in the subsequent case of *Bascom v. Alberson*, 34 N. Y. 584, in which he acted as counsel, reviewed at length the question whether the English law of charitable uses prevailed to any extent whatever in this State. His argument was preserved in print, and was used in *Burrill v. Boardman*, 43 N. Y. 264, and in that argument, referring to what he had said in his opinion in *Beekman v. Bonsor* as to the proposition that a gift to charities, if well defined and made to a competent trustee, was maintainable in this State, although it might be void, according to general rules of law, for want of an ascertained beneficiary, and to the similar remark in his opinion in *Downing v. Marshall*, 23 N. Y. 382, characterizes his own remarks in those two cases as a most inconsiderate repetition, as a *dictum*, of a proposition laid down by another judge; calling attention to the fact that the repetition was a mere *dictum*, because in the two cases in which it was made the trusts were held void.

The case of *Williams v. Williams*, 8 N. Y. 524, is the leading case in the court of last resort in this State in support of the doctrine that the English law of charitable uses is in force in this State, and it fully supports the proposition that it is. In that case the testator, after making a bequest to an incorporated church, bequeathed the sum of \$6,000 to Zophar B. Oakley and other individual trustees, with power to perpetuate their successors, as a perpetual fund for the education of the children of the poor who should be educated in the academy of the village of Huntington, with directions to accumulate the fund up to a certain point, and apply the income in perpetuity to the education of the children whose parents' names were not upon the tax-lists. The opinion was delivered by Denio, J., and concurred in by four of the other judges, three judges dissenting. The opinion held that this bequest, by the general rules of law, would be defective and void, as a conveyance in trust for the want of a *cestui que trust* in whom the equitable title could vest, and could be sustained only by force of that peculiar system of law known in England under the name of the "Law of Charitable Uses;" that the objection that the bequest assumed to create a perpetuity would also be fatal if the Revised Statutes applied to gifts for charitable purposes. But the learned judge held that according to the laws of England as understood at the time of the American Revolution, and as it still existed, devises and bequests for the support of charity or religion, though defective for want of such a grantee or donee as the rules of law required in other cases, would, when not within the purview of the mortmain act, be supported in the Court of Chancery; that the law of charitable uses did not originate in,

and was not created by the statute 43 Eliz., ch. 4, but had been known and recognized and enforced before that statute, and was ingrafted upon the common law, and consequently was not abrogated by the repeal in this State of the statute 43 Eliz. in 1788 (Laws 1788, ch. 46, § 37), that the provisions of the Revised Statutes did not affect property given in perpetuity for religious or charitable purposes; and that consequently the bequest to Zophar B. Oakley and others in trust for the children of the poor was valid.

In *Owens v. Missionary Soc.*, 14 N. Y. 380, the testator bequeathed the residue of his estate to the "Methodist General Missionary Society," an unincorporated association existing when the will was made, and when it took effect, in 1834, but which subsequent to the testator's death became incorporated. In a suit between the incorporated society and the next of kin of the testator, the bequest was held void, and that the next of kin were entitled to the residue. Opinions were delivered by Selden, J., and Denio, J. Judges A. S. Johnson, T. A. Johnson, Hubbard and Wright concurred in the opinion of Selden, J., which held that the bequest was not valid as one made to the association for its own benefit, because of its incapacity to take; nor could it be sustained as a charitable or religious use, as it was not accompanied by any trust as to the application of the fund. Also that where there was no trustee competent to take, our Court of Chancery had no jurisdiction to uphold a trust for a charitable or religious purpose; and it distinguished the case from *Williams v. Williams* on the ground that there the bequest was to trustees competent to take. Although the tenor of the opinion is against following the example of the English chancellors in applying a peculiar and partial system of rules to the support of charitable gifts, Judge Selden disavows the intention of denying the power of courts of equity in this State to enforce the execution of trusts created for public and charitable purposes in cases where the fund is given to a trustee competent to take, and where the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, even although no certain beneficiary other than the public at large may be designated. Denio, J., while reaffirming the decision in *Williams v. Williams*, placed his vote upon the ground that the trust was not one which could be executed by the court as a charitable use, the purposes of the society being "to diffuse more generally the blessings of education, civilization and Christianity throughout the United States and elsewhere;" that although trusts in favor of education and religion had always been considered charitable uses, and were recognized as such in the statute of Elizabeth, the advancement of civilization generally was not classed among charities, and the whole fund might be disposed of for purposes promotive of universal civilization, which still would not be charitable objects in the understanding of the law. Six of the judges were of opinion that the charity was not sufficiently defined by the terms of the will, and that the judgment in favor of the next of kin should be affirmed on that ground.

The next case in order is *Beekman v. Bonsor*, 23 N. Y. 298. In that case the amount to be given to the charitable purpose, as well as the manner in which the fund was to be applied, was left to the discretion of the executors. They renounced, and it was held that the trust was incapable of execution, that the *cy-près* power, as exercised in England in cases of charity, had no existence in this State, and that the next of kin were entitled to the fund. Numerous points were discussed in the opinion, which was by Comstock, J., and he there made the *dictum*, which he afterward recalled, that a gift of charity which would be void by the general rules of law for the want of an ascertained

beneficiary, will be upheld by the courts of this State if the thing given was certain, if there was a competent trustee to administer the fund as directed, and if the charity itself was precise and definite.

*Downing v. Marshall*, 23 N. Y. 366, held that a devise and bequest to an unincorporated missionary society were void, on the same grounds as in the case of *Owens v. Missionary Soc.*, *supra*.

Up to this time the doctrine of the case of *Williams v. Williams* as to the validity of trusts for charities, even in the absence of a definite beneficiary, has been acquiesced in. But in *Levy v. Levy*, 33 N. Y. 97, it was vigorously assailed by Wright, J., who discussed the question anew whether the English doctrines of trusts for charitable uses were law in this State. That learned judge expressed a decided opinion that they were not (page 105 *et seq.*); that that peculiar system of jurisprudence proceeded in disregard of rules deemed elementary and fundamental in other limitations of property, in upholding indefinite charitable gifts, by the exercise of chancery powers and the royal prerogative; that it was not the exercise of the ordinary jurisdiction of chancery over trusts, but a jurisdiction extended and strengthened by the prerogative of the crown and the statute of 43 Eliz. over public and indefinite uses defined in that statute as "charities;" that even in England it had been deemed necessary to restrain and regulate by act of Parliament the creation of these indefinite charitable trusts, by the statutes of mortmain and other restrictions, and it cannot be supposed that the system was deliberately retained in this State freed from all legislative restriction. He calls attention to the fact that in 1788 the Legislature of this State repealed the statute of 43 Eliz., the statute against superstitious uses and the mortmain acts. That at that time it was supposed that the law for the enforcement of charitable trusts had its origin only in the statute of Elizabeth; and argues that the Legislature of 1788, in thus sweeping away all the great and distinctive landmarks of the English system, must have intended that the effect of the repeal should be to abrogate the entire system of indefinite trusts, which were understood to be supported by that statute alone; and that the whole course of legislation in this State indicates a policy not to introduce any system of public charities except through the medium of corporate bodies. That in 1784 the general law for the incorporation of religious societies had been enacted, and that before, and contemporaneously with the repeal of the statute of Elizabeth and the statutes of mortmain, special acts incorporating such societies were passed, and other acts have been passed creating or authorizing corporations for various religious and charitable purposes, in all of which are to be found limitations upon the amount of property to be held by such societies; thus indicating a policy to confine within certain limits the accumulation of property perpetually appropriated, even to charitable and religious objects. That the absolute repeal of the statute of Elizabeth and the mortmain acts was wholly inconsistent with the policy thus indicated, unless it was intended to abrogate the whole law of charitable uses as understood and enforced in England. The opinion then refers to the course of legislation in this State following the repeal of the English statutes authorizing corporations for charitable, religious, literary, scientific and benevolent purposes, and in all cases limiting the amount of property to be enjoyed by them. This legislation is claimed to disclose a policy differing from the British system, and absolutely inconsistent with the supposition that uses for public or indefinite objects, and of unlimited duration, can be created and sustained without legislative sanction. Since the case of *Williams v. Williams*, decided thirty-five years ago, there has been no ad-

judged case in this court which supports a charitable gift on the principles enunciated by Judge Denio in pronouncing that decision. Of course this observation applies only to the indefinite charity which the case included, and not to the gift in favor of a religious corporation.

After the decision of that case the struggle in this court for the overthrow of charitable uses began in the case of *Owens v. Missionary Soc.*, 14 N. Y. 380. The opponents of such trusts had for their justification the repeal in 1788 in this State of all the British statutes which upheld such trusts in England, and the substitution of a charity system maintained by our statute laws in the form of corporate charters, containing, by legislative enactment, power to receive, hold and administer charitable gifts of every variety known in the practice of civilized communities and our statute of uses and trusts, defining the trusts which may lawfully be created. This statute has been held binding on the courts, although of course it ceases to operate when the Legislature charters a corporation for a charitable purpose, with power to take and hold property in perpetuity for such purpose. From the case of *Owens v. Missionary Soc.*, 14 N. Y. 380, through the cases of *Marshall v. Downing*, 23 N. Y. 366; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 id. 584; *Burrill v. Boardman*, 43 id. 254; S. C., 3 Am. Rep. 694; and *Holmes v. Mead*, 52 N. Y. 332 (decided in 1873)—the struggle was continued, and the announcement definitely made, in the latest of those cases, that the controversy was closed by the adoption of the principles enunciated in the said last-mentioned case. In *Williams v. Williams*, Judge Denio, whose great learning and ability are universally acknowledged, maintained, as the basis of his conclusion in favor of charitable trusts as the law of this State, that they came to us by inheritance from our British ancestors, and as part of our common law. That particular postulate being finally overthrown, and the British statutes having been repealed at the very origin of our State government, we should be a civilized State without provision for charity if we had not enacted other laws for ourselves. But charity, as a great interest of civilization and Christianity, has suffered no loss or diminution in the change which has been made. The law has been simplified and that is all. Instead of the huge and complex system of England, for many generations the fruitful source of litigation, we have substituted a policy which offers the widest field for enlightened benevolence. The proof of this is in the great number of charitable institutions scattered throughout the State. It is not certain that any political State or society in the world offers a better system of law for the encouragement of property limitations in favor of religion and learning, for the relief of the poor, the care of the insane, of the sick and the maimed, and the relief of the destitute than our system of creating organized bodies by the legislative power, and endowing them with the legal capacity to hold property which a private person or a private corporation has to receive and hold transfers of property. Under this system many doubtful and obscure questions disappear and give place to the more simple inquiry whether the grantor or donor of a fund designed for charity is competent to give; and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift. In *Williams v. Williams*, *supra*, in maintaining a gift for pious uses to an incorporated religious society, Judge Denio assigned the reasons which have been universally approved since that time; and they are summed up by saying that charitable limitations of property in favor of corporations competent, by statute law, to hold them, are valid or invalid on the same grounds as other limitations of property between

natural persons, and are referable to the general system of law which governs in the ordinary transactions of mankind. From his reasoning in the other branch of the case before him, it appears that he had not reached the conclusion established in the later cases, namely, that with us charity is found in our corporation laws, general and special, which have been extended so as to embrace the purposes heretofore known and recognized as charitable, and which are continually extending and improving, so as to meet the new wants which society in its progress may develop.

As the result of the foregoing views, the judgment of the Supreme Court at General Term should be reversed and that of the Special Term affirmed.

All concur, Earl, J., not voting.

### CONTRACT—CONSIDERATION—AGREEMENT BY WIFE TO LIVE WITH HUSBAND.

MASSACHUSETTS SUPREME JUDICIAL COURT,  
MARCH 30, 1888.

MERTILL V. PEASLEE.

A wife, who on account of cruel and abusive treatment on the part of her husband, was entitled to a divorce, separated from him, and consulted counsel with a view to obtaining a divorce and alimony; whereupon the husband agreed that in consideration that she would not proceed against him for the divorce and alimony, and would return to him, and live with him as his wife, he would secure to her benefit a certain sum. In pursuance of this agreement the wife refrained from instituting proceedings, and returned and lived with her husband until the latter's death, and he, on his part, executed to the plaintiff a note, which the latter was to hold as trustee for the wife, and collect after the husband's death. *Held*, that an action by the trustee on the note could not be maintained, the consideration for the note being illegal.

**A**CTION on a note. The opinion states the case.

*Henry Carter and J. P. & B. B. Jones*, for plaintiff.

*Charles W. Bell and William H. Moody*, for defendants.

**W. ALLEN, J.** The note was given to carry out a contract between husband and wife, by which, in consideration that she should live with him as his wife during their joint lives, he was to cause to be paid to her \$5,000 after his decease, if she survived. The consideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. Perhaps a husband can hire his wife to do any thing for him which a servant can be hired to do, or can buy of her any thing that is the subject of barter; but a servant cannot be hired to fulfill the marital relation, and the fellowship of the wife is not an article of trade between husband and wife. Like parental authority and filial obedience *conjugal consortium* is without the range of pecuniary considerations. The law fixes and regulates it on public considerations, and will not allow the parties to discard and resume it for money. It is the same where the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right, affecting only the parties to the marriage, but a right which is an incident of the *status* of marriage,

and which affects children, the family, and society, and which must be exercised upon considerations arising from the nature of the right. It is given to the injured party, to be used in the interests of justice and of society. It is as much against public policy to restore interrupted conjugal relations for money as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others, or the interests of the public, when it is sold for money; and the law cannot recognize such a consideration for it. It implies forgiveness, founded on the supposed penitence of the wrong-doer, and the hope that he will not again offend. Resumed marital intercourse, after a justifiable separation, without such forgiveness, and only for money, shows connivance rather than condonation. See *Copeland v. Boaz*, 9 Baxt. 223; *Van Order v. Van Order*, 8 Hun, 315; *Roberts v. Frisby*, 38 Tex. 219; *Miller v. Miller* (Iowa), 35 N. W. Rep. 464; *Adams v. Adams*, 91 N. Y. 381; *Garth v. Earnshaw*, 3 Younge & C. 584; *Gtpps v. Hume*, 2 Johns. & H. 517; *Brown v. Brine*, 1 Exch. Div. 5.

In the present case the wife had left her husband, and had a good cause of divorce from him on account of extreme cruelty. But the agreement did not look to a provision for the separate support of the wife, nor to a bar against proceedings by her for a divorce, except as that was involved in the resumption of her marital relations. Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion. See *Newsome v. Newsome*, L. R., 2 Prob. Div. 308. When the wife, who was living separate from her husband, for justifiable cause, voluntarily returned to him, the law conclusively presumed that she returned because she had condoned the offense, and not because she was paid to live with him; and it will not enforce or recognize as valid a promise of the husband to pay money to the wife to induce her to return to him, or to condone the offense.

In the opinion of a majority of the court the entry must be, exceptions overruled.

**HOLMES, J. (dissenting).** We must assume, and a majority of the court do assume, that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled not without discussion, and we are bound by the decisions. *Buller v. Ives*, 139 Mass. 202. See *Nichols v. Nichols*, 136 id. 256. In the case at bar the evidence tended to show that the defendant's testator had been guilty of extreme cruelty to his wife, entitling her to a divorce, and that she had separated from him, and had consulted counsel with a view to obtaining a divorce and alimony. The consideration for the note in suit was that "she would not proceed against him for a divorce or alimony, and would return to him, and live with him as his wife." This consideration, however construed, was fully furnished. She did not proceed against him, and she did return, and did live with him as his wife until his death. I do not understand it to be denied that this conduct on the wife's part was such a change of position, or detriment in the legal sense of that word, as to be a sufficient consideration for a promise, if not an illegal one. We must take it that the wife had a right to refuse to return to cohabitation; and it seems to follow, that apart from illegality, the return itself was sufficient consideration for the note. *Burkholder's Appeal*, 105 Penn. St. 31, 37. The case is not like those where the wife was only doing what she was legally bound to do. This was the

ground of decision in *Miller v. Miller* (Iowa), 35 N.W. Rep. 464 (Dec. 13, 1887), and so far as appears, was the fact in *Copeland v. Boas*, 9 Baxt. 223; *Roberts v. Frisby*, 38 Tex. 219. The last two cases seem to go in part also, upon the ground that a contract by a husband, upon a consideration moving from the wife, is void, notwithstanding the intervention of a trustee—a ground which cannot be taken here in view of the cases first cited. At all events, giving up or refraining from proceedings for divorce and alimony, which the wife is entitled to maintain, is both a sufficient and a legal consideration. *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; 14 Sim. 405; and 5 H. L. Cas. 40; *Hart v. Hart*, 18 Ch. Div. 670, 685; *Sterling v. Sterling*, 12 Ga. 201, 204. So that I understand the precise reason on which the decision of the majority goes, to be that coupling the wife's return to cohabitation with the legal consideration of giving up her divorce suit made the contract illegal. I find no decision or *dictum* in favor of this proposition. On the other hand, the Court of Errors and Appeals of New York have unanimously sustained the validity of a note given by the husband to a trustee for his wife, upon substantially the same consideration as in the case at bar, and have declared themselves unable to see any thing against public policy in the transaction. It seems probable that the Supreme Court of Pennsylvania would decide in the same way, and it is hardly open to doubt that the same view would be taken in England. *Adams v. Adams*, 91 N. Y. 381; *Burkholder's Appeal*, 105 Penn. St. 31, 37; *Newsome v. Newsome*, L. R., 2 Prob. Div. 308; *Jodrell v. Jodrell*, 9 Beav. 45, 56, 59, and cases *supra*; *Strong v. Burton*, Act. Can. 286.

It seems to me that reason as well as authority is opposed to the decision. The actual return to cohabitation was perfectly lawful whatever the motive which induced it. I cannot think that it is unlawful to make a lawful act, which the wife may do or not do, as she chooses, [the consideration of the promise, merely because by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money. Pub. Stat., chap. 78, § 1, cl. 3. I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations. I agree too to what is said in *Adams v. Adams*, *ubi supra*. The arrangement "tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy; but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other."

I am authorized to say that Mr. Justice Charles Allen and Mr. Justice Knowlton concur in this opinion.

[*Copeland v. Boas*, 9 Baxt. 223; S. C., 40 Am. Rep. 89, is in harmony with this decision; but *Phillips v. Meyer*, 82 Ill. 67; S. C., 25 Am. Rep. 255, is opposed.—Ed.]

#### NEW YORK COURT OF APPEALS ABSTRACT.

**APPEAL—WAIVER—ACCEPTANCE OF COSTS—SUPPLEMENTAL BILL—DISCRETION OF COURT.**—Where plaintiff obtains leave "to file and serve supplemental com-

plaint, \* \* \* with \$10 costs of motion" to defend, defendant does not, by accepting the costs, waive his right to appeal from the rest of the order: the costs being given absolutely, and not on condition. An order of the General Term refusing leave to serve a supplemental complaint is discretionary, and reviewable by the Court of Appeals. April 24, 1888. *Farmers' L. & T. Co. v. Bankers & Merchants' Tel. Co.* Opinion by Danforth, J.

**MATTERS NOT APPARENT OF RECORD—MOTION FOR NEW TRIAL—DECISION—AFFIRMANCE—DISMISSAL.**—Where a motion for a new trial fails to show that it was based solely on exceptions or questions of law, this court will not review the order granting a new trial. (2) Under the New York Code, § 194, providing that if the Court of Appeals determines that no error was committed in granting a new trial in the lower court, it must render judgment absolute upon the right of the appellant, the Court of Appeals may, where it appears that a new trial was properly granted, and that justice can be best served by an affirmance of the order, affirm the same, and render judgment absolute, although the motion for the new trial fails to show but that it was based on questions of fact not properly reviewable on appeal, and might have been dismissed. April 24, 1888. *Kennicut v. Parmelee*. Opinion by Earl, J.

**JURISDICTION—APPEALABLE ORDERS.**—An order directing judgment to be entered on the verdict is not appealable, but an appeal may be taken from the judgment entered in pursuance of said order. April 24, 1888. *Delaware, L. & W. R. Co. v. Burkard*. Opinion by Earl, J.

**CARRIER—PASSENGERS—LOSS OF BAGGAGE—EVIDENCE OF VALUE—JEWELRY—DUTY TO INFORM CARRIER.**—(1) In an action by an emigrant against a steamship company for lost baggage, the testimony of a custom house inspector as to the value of the baggage which emigrants of the same class and nationality as plaintiff generally carried, is incompetent to show the probable value of plaintiff's baggage. *Railroad v. Fraloff*, 100 U. S. 24. (2) The Revised Statutes of the United States, § 4281, prohibiting any shipper of jewelry, gold or silver, etc., from lading such articles as freight or baggage, without giving notice to the master of the character thereof, and having the same entered on the bill of lading, has no application to an emigrant carrying as baggage articles of jewelry and silverware such as would ordinarily be regarded as proper baggage. April 24, 1888. *Carlson v. Oceanic Steam Nav. Co.* Opinion *per Curiam*. Earl, Peckham and Gray, JJ., dissenting on first ground.

**CRIMINAL LAW—MURDER IN THE FIRST DEGREE—EVIDENCE—EXPERT—HEARSAY—INSTRUCTIONS—INDICTMENT—FORM—ELECTION BETWEEN COUNTS—VERDICT IN ABSENCE OF COUNSEL.**—(1) It appeared that the defendant had lived unhappily with his wife, and had threatened her life; that he was infatuated with another woman, and after being with her until 2 o'clock one morning, went directly home, and shortly afterward returned in eager haste, and informed her of his wife's death. The wife had been in good health, and an autopsy pointed to death from asphyxia. A witness of unimpeached character testified that defendant confessed to him that he had suffocated his wife. *Held*, that a verdict of murder in the first degree was not against the weight of evidence. (2) The testimony of the overseer of the poor that he had furnished aid and provisions to the defendant's family at a time when he had deserted his family, and gone away with the other woman, was competent as tending to show his want of affection for his wife, negligence in care of her, etc. (3) The prosecution claim-

ing the deceased was smothered by force, the question as to whether certain cuts on the under lip of deceased, apparently made by the teeth, could have been made by deceased in the absence of any outside cause, is proper to submit to a physician as expert. (4) The testimony of a physician that he saw another physician, at an autopsy on the body of deceased, pass his finger down the trachea, and also up into the larynx, such testimony being for the purpose of showing that there was no obstruction by which deceased might have choked to death, is not objectionable on the ground that such looker-on could not tell whether the finger met any obstruction. (5) Under the New York Code of Criminal Procedure, § 444, providing, that upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any inferior degree, where the indictment charged murder in the first degree, it is the duty of the jury first to consider whether he is guilty of that charge, and if not, to consider the other degrees. (6) Under the New York Code of Criminal Procedure, §§ 273, 275, 276, prescribing the form of indictments, an indictment conforming to such requirements is not defective, in that it does not otherwise state when and where the court was held at which the indictment was found, or the names of the justice and grand jurors at such court. (7) Where several counts in an indictment all charge the same crime, merely differing in their account of the manner of its execution, it is discretionary with the court whether it will compel the prosecution to elect which count it will rely upon. (8) Absence of counsel when the jury return the verdict in a criminal case is not ground for reversal of judgment unless it appears that the defendant was in some way prejudiced thereby. April 24, 1888. *People v. Wilson*. Opinion by Earl, J.

**FACTORS—CONSIGNMENTS—DRAFTS—ADVANCES ON BILLS OF LADING—GENERAL LIEN FOR BALANCE—ESTOPPEL—IGNORANCE OF RIGHTS.**—(1) A shipper drew against his consignment for sale upon the consignees, with whom his account was already overdrawn, and transferred the property, by assignment of the duplicate bills of lading, to the bank, which discounted the drafts. The consignees refused to accept or to pay the drafts, but afterward received the property from the carrier upon the original bills of lading. *Held*, that the consignees had no right to apply the property, or its proceeds, in discharge of the shipper's liability to themselves arising from other transactions, and that the bank had acquired title to each consignment to the extent of the draft discounted on security thereof. (2) Plaintiff's omission to enforce his right of ownership in former cases cannot affect a subsequent case which involves different property; and in the absence of proof that plaintiff's ignorance of his rights has prejudiced defendants, he is not now estopped to assert those rights. April 10, 1888. *First Nat. Bank of Batavia v. Ege*. Opinion by Ruger, C. J.

**LANDLORD AND TENANT—LEASE—BREACH OF COVENANT FOR PASSAGE-WAY—DESCRIPTION OF PREMISES—AMBIGUITY.**—(1) Where defendants refused to take possession of and pay rent for a basement leased for offices, on the ground of breach of covenant to construct and keep lighted a passage-way seven feet wide from B. street, which was in front of the basement, through to N. street, as an entrance to the offices, it appeared that plaintiff built the way from B. street to the rear of the basement; but from this point it was a dark room, filled with obstructions, and entered by means of a door, and that N. street was reached by a ladder with steps thirty inches wide. *Held*, that the covenant was broken. (2) A lease describing the premises as "the basement in No. 9 B. street (said

basement being about eighty feet in depth by the full width of the building)" the basement being in fact more than 100 feet in depth, demises only eighty feet, and there is no ambiguity proper for the consideration of the jury. This basement, or that part which was let, was to be used for offices, as stated in the lease, and it is obvious that the provision for a thoroughfare from one entrance to the other on the two different streets was a most important one, being of the very substance of the lease, and which if not complied with, would absolve the defendants, the lessees, from all obligations to take possession of the premises or to pay rent in case of not taking possession. It was not a question to be submitted to the jury as to whether there had been a substantial compliance with the covenants of the lease. The evidence as to the state in which the premises were left by the lessor is so far uncontradicted as to have made it the duty of the court to have decided as matter of law that the lessor had not in that respect complied with the covenants of the lease. Instead of so doing, the court substantially left to the jury the question. April 17, 1888. *Timbridge v. Read*. Opinion by Peckham, J.; Earl and Andrews, JJ., dissenting.

**MECHANICS' LIENS—SUB-CONTRACTORS—ABANDONMENT OF WORK BY CONTRACTOR—COMPLETION BY OWNER—SURPLUS—NOTICE—VERIFICATION.**—(1) Sub-contractors who are lienors are entitled to a sum due the contractor by the owner of a building unfinished because of the failure to pay said sum at the stage of the work agreed upon. (2) A contractor who had abandoned work on a building because the owner failed to make a payment as agreed, was notified by said owner that unless he resumed work in two days she would proceed to finish the work, and hold him for the damages, and in pursuance of such notice she did finish the work, and at less than the price to be paid the contractor. *Held*, that the sub-contractors, having filed their liens, were entitled to a *pro tanto* application of the amount in excess of the actual cost to the satisfaction of their claims. (3) The New York act of 1862, which applies to Kings county, and requires no verification of the notice of a mechanics' lien, was not repealed by the New York act of 1880, chap. 486, applying to the cities of the State generally. April 24, 1888. *Graf v. Cunningham*. Opinion by Peckham, J.

**MORTGAGE—CHATTEL—RIGHTS OF MORTGAGEE—INSURANCE—TRIAL—OBJECTION TO MODE—JURY—TRIAL BY—DEMAND FOR MONEY ONLY.**—(1) The mortgagee of a life insurance policy cannot, the debt being overdue, but no foreclosure had, retain from the insured's representatives more than the amount of his debt, with interest and expenses of collecting the money. (2) After plaintiff has closed her case to the jury, defendant is too late in objecting that the action should have been tried as in equity, and not at law. (3) A complaint asking that the surplus received by a mortgagee from mortgaged sureties be paid over to the legatee of the mortgagor demands a judgment for money only, within the New York Code of Civil Procedure, § 968, and so calls for a trial by jury. April 24, 1888. *King v. Van Vleck*. Opinion by Earl, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

**CONSTITUTIONAL LAW—DUE PROCESS—SPECIAL ADMINISTRATOR'S ACCOUNTING WITHOUT NOTICE TO DISTRIBUTEES.**—The Revised Statutes of Missouri, chap. 1, art. 1, § 14, authorizing a special administrator having charge of an estate during the pendency of a suit to have a final settlement of his accounts with

the regular administrator, without giving notice to distributees, which settlement, in the absence of fraud, is deemed conclusive against such distributees, does not deprive any person of his property without due process of law, as the regular administrator represents all the distributees claiming under the will. April 16, 1888. *Robards v. Lamb*. Opinion by Harlan, J.

**PUBLIC LANDS—PATENTS—SUITS TO CANCEL—LACHES—SUIT BY GOVERNMENT.**—A lapse of forty-five years since the cause of action accrued, is a bar to an action by the government to cancel a land patent obtained by fraud, so as to enable it to issue another to those entitled to it, since the United States is not the real party in interest, and is affected by the laches of those whose interests it asserts. The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. *U. S. v. Railway Co.*, 118 U. S. 125, and cases there cited. But this case stands upon a different footing, and presents a different question. The question is are these defenses available to the defendant in a case where the government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person? It has been not unusual for this court for the purposes of justice to determine the real parties to a suit by reference, not merely to the names in which it is brought, but to the facts of the case as they appear on the record. Thus, in the case decided at this term (*In re Ayers*, 123 U. S. 492, 493), the court held that the State of Virginia, though not named as a party defendant, was the actual party in the controversy. Mr. Justice Matthews, who delivered the opinion, said: "It is therefore not conclusive of the principal question in this case that the State of Virginia is not named as a party defendant. Whether it is the actual party \* \* \* must be determined by a consideration of the nature of the case as presented on the whole record." So in the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76, the court looked behind and through the nominal parties on the record to ascertain who were the real parties to the suit. Chief Justice Waite, in delivering the opinion of the court, used the following language: "No one can look at the pleadings and testimony in these cases without being satisfied beyond all doubt that they were in legal effect commenced, and are now prosecuted solely by the owners of the bonds and coupons. \* \* \* The bill, although signed by the attorney-general, is also signed and was evidently drawn by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the attorney-general are only nominal actors in the proceeding. The bond-owner, whoever he may be, was the promoter and is the manager of the suit. \* \* \* And while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them." In the case of *U. S. v. Railway Co.*, *supra*, in which it was decided that the statute of limitations of the State of Tennessee was no defense to an action of the United States upon certain negotiable bonds held by them for public use, Mr. Justice Gray is careful to say: "This case does not present the question what effect the statute may have in an action on a contract in which the United States have nothing but the formal title, and the whole interest belongs to others;" and cites *Maryland v. Baldwin*, 112 U. S. 490; *Miller v. State*, 38 Ala. 600. In the former case it was held that a suit in the name

of a State for the benefit of parties interested, is to be regarded as a suit in the name of the party for whose benefit it is brought. Mr. Mr. Justice Field, delivering the opinion of the court, said: "The name of the State is used from necessity when a suit on the bond is prosecuted for the benefit of a person interested, and in such cases the real controversy is between him and the obligors on the bond;" and the case was decided upon a consideration of the merits as if the party interested was alone named as plaintiff. And he cited approvingly the following language in *McNitt v. Bland*, 2 How. 9: "As the instrument of the State law, his (the governor's) name is in the bond and to the suit upon it; but in no just view \* \* \* can he be considered a litigant party. Both look to things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law." In *Miller v. State* the other case cited by Mr. Justice Gray, the court said: "As laches is not to be imputed to the government, the statute of limitations does not apply to the State, unless it be clear from the act that it was intended to include the State. \* \* \* In our opinion the rule that the statute of limitations does not run against the State has no application to a case like the present, when the State, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third party who alone will enjoy the benefits of a recovery." In *Moody v. Fleming*, 4 Ga. 115, 118, which was a case where a party was applying for a *mandamus* in the name of the State, the court said: "It is insisted that here the State is a party, moving the contest, and setting up a right to have this survey certified, and that the tenant will not be protected by his possession, because the statute of limitations does not run against the State. We have decided, and the decision is sustained by unbroken masses of authority, that the statute of limitations does not run against the State. The answer however to this argument is this: The State of Georgia is not the real party to the proceeding. \* \* \* The process is in the name of the State, but the right asserted is a private right. The issue is between two of the citizens of the State." We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through whom one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants. These principles, so far as they relate to general statutes of limitation, the laches of a party and the lapse of time have been rendered familiar to the legal mind by oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in general recognize and give effect to the statute of limitations as a defense to an equitable right when at law it would have been properly pleaded as a bar to a legal right. They refuse to interfere to give relief when there has been gross negligence in prosecuting a claim, or where the lapse of time has been so long as to afford a clear presumption



that the witnesses to the original transaction are dead and the other means of proof have disappeared. April 30, 1888. *United States v. Beebe*. Opinion by Lamar, J.

**RAILROADS—REGULATION OF CHARGES—UNREASONABLE RESTRICTIONS—DUE PROCESS OF LAW.—**

(1) Under the Constitution of Arkansas, art. 12, § 6, giving the Legislature power to prevent excessive charges by railroad companies, a regulation by the Legislature of three cents per mile as the maximum to be charged for carrying passengers will not be considered unreasonable, because it reduces the net income to one and one-half per cent on the original cost of the road, and to two per cent on the amount of its bonded debt, or as confiscating property without due process of law, where there is no evidence to show that plaintiffs, who had purchased the property at a foreclosure sale, had paid a price equal to the original cost of the road or to the bonded debt. Under the Constitution of Arkansas, art. 17, § 10, giving the Legislature the power to regulate fares and freights, a classification by the Legislature of railroad rates in proportion to the length of the line of the road, if applied equally to all roads of the same class, does not violate the constitutional provision securing to all the equal protection of the laws. The general rule of law that governs this case has been clearly stated and developed in opinions of this court, delivered by the late chief justice. *Munn v. Illinois*, 94 U. S. 113; *Railroad Co. v. Iowa*, id. 155; *Peik v. Railway Co.*, id. 164, 178; *Railroad Co. v. Ackley*, id. 179; *Railroad Co. v. Blake*, id. 180; *Stone v. Wisconsin*, id. 181. Upon like grounds in *Ruggles v. Illinois*, 108 U. S. 526, and *Railroad Co. v. Illinois*, id. 541 (decided at October Term, 1882), the statute of Illinois of April 15, 1871 (Laws Ill., 1871, p. 640), which classified the railroads in the State according to their gross annual earnings per mile, and put different limits on the compensation of the different classes per mile for carrying a passenger and his baggage, was adjudged, in opinions delivered by the chief justice, to be constitutional and valid, in restricting to the limit of three cents a mile existing corporations whose charters gave them power to make all by-laws, rules and regulations not repugnant to law, and gave their directors power to establish such rates of toll as they should by their by-laws determine. And two justices who did not assent to those opinions concurred in the judgments, because it was not shown that the rate prescribed by the Legislature was unreasonable. In *Stone v. Trust Co.*, 116 U. S. 307, decided at October Term, 1885, the obligation of a contract created by a charter granting similar powers to a railroad corporation and its directors was held not to be impaired by a statute of Mississippi establishing a board of railroad commissioners charged with the duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State; and the chief justice said: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or inter-State commerce." 116 U. S. 325. He added, however: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or

without due process of law." 116 U. S. 331. The opinions of the two dissenting justices were grounded upon the provisions of the charter and upon its not having been expressly made subject to alteration or repeal by the Legislature. The cases, decided at the same time, of *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, and *Stone v. New Orleans & N. E. R. Co.*, id. 352, were substantially similar. As applied to freights and fares for transportation not extending beyond the limits of the State by which the railroad company is incorporated, the authority of the Legislature is not affected by the later decision in *Railway Co. v. Illinois*, 118 U. S. 557. The case at bar is quite clear of any of the questions upon which the members of the court have heretofore differed in opinion. If the *Memphis & Little Rock Railroad Company*, as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the Legislature in 1853, but was a new corporation, subject to the provisions of the Constitution and laws in force when it first came into existence, that is to say in 1877. *Railroad Co. v. Commissioners*, 112 U. S. 609. The Constitution of Arkansas of 1874 contains the following provisions: "Corporations may be formed under general laws, which laws may from time to time be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or that may be hereafter created, whenever, in their opinion, it may be injurious to the citizens of the State, in such manner however, that no injustice shall be done to the corporations." Article 12, § 6. "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroad, canal and turnpike companies, for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures." Article 17, § 10. The Legislature of Arkansas, by the statute of April 4, 1887, fixed the maximum fare that any corporation, trustees or persons operating a line of railroad might charge and collect for carrying a passenger within the State at eight cents a mile on a line fifteen miles long or less, five cents a mile on a line more than fifteen and less than seventy-five miles long, and three cents a mile on a line more than seventy-five miles long. The line of the road of the plaintiffs in error is more than seventy-five miles long, and they charged more than three cents a mile, and were therefore held to be subject to the penalty imposed by the statute for any violation of its provisions. The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case by reason of the admitted fact that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and one-half per cent on the original cost of the road, and only a little more than two per cent on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile, fixed by the Legislature, is unreasonable. Still less does it ap-

pear that there has been any such confiscation as amounts to a taking of property without due process of law. (2) It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws. The Legislature, in the exercise of its power of regulating fares and freights may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws. A similar question was presented and decided in *Railroad Co. v. Iowa*, above cited. It was there objected that a statute regulating the rate for the carriage of passengers by different classes of railroads, according to their gross earnings per mile, was in conflict with article 1, § 4, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." In answering that objection, the chief justice said: "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires." "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper therefore to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all and under any circumstances. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done." 94 U. S. 163, 164. April 16, 1888. *Dow v. Beidelman*. Opinion by Gray, J.

#### CODE OF ETHICS OF THE ALABAMA BAR ASSOCIATION.

THE purity and efficiency of judicial administration, which under our system is largely government itself, depend as much upon the character, conduct and demeanor of attorneys in their great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries.

"There is perhaps no profession after that of the sacred ministry in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and mantraps at every step, and the mere youth at the very outset of his career needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide—the only torch to light his way amidst darkness and obstruction."—*Shawwood*.

A comprehensive summary of the duties specifically enjoined by law upon attorneys, which they are sworn

"not to violate," is found in section 791 of the Code of Alabama.

These duties are:

"1st. To support the Constitution and laws of this State and the United States.

"2. To maintain the respect due to courts of justice and judicial officers.

"3d. To employ, for the purpose of maintaining the causes confided in them, such means only as are consistent with truth; and never to seek to mislead the judges by any artifice or false statement of the law.

"4th. To maintain inviolate the confidence, and at every peril to themselves to preserve the secrets of their clients.

"5th. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which they are charged.

"6th. To encourage neither the commencement nor continuance of an action or proceeding from any motive of passion or interest.

"7th. Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed."

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by analogy to the duties enjoined by statute, and the rules of good neighborhood.

The following general rules are adopted by the Alabama State Bar Association for the guidance of its members:

#### DUTY OF ATTORNEYS TO COURTS AND JUDICIAL OFFICERS.

1. The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, cannot excuse the withholding of the respect due the office while administering its functions.

2. The proprieties of the judicial station in a great measure disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should as a rule refrain from published criticism of judicial misconduct, especially in reference to causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of the judge is necessarily involved in determining his removal from or continuance in office.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial personal and official relations between bench and bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence—knowingly misquoting the language of a decision or text-book—knowingly mistating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel—offering evidence which it is known the court must reject as illegal, to get it before the jury, under guise of arguing its admissibility—and all kindred practices—are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening argument positions intended finally to be relied on, in order that opposite counsel may not discuss them, is unprofessional. Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side-bar" remarks and sparing discourse, to influence the jury or by-standers. Personal colloquies between counsel tend to delay, and promote unseemly wrangling, and ought to be discouraged.

6. Attorneys owe it to the courts and the public whose business the courts transact, as well as their own clients, to be punctual in attendance on their cases; and whenever an attorney is late he should apologize or explain his absence.

7. One side must always lose the cause; and it is not wise, or respectful to the court, for attorneys to display temper because of an adverse ruling.

#### DUTY OF ATTORNEYS TO EACH OTHER, TO CLIENTS, AND TO THE PUBLIC.

8. An attorney should strive at all times to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow-man.

9. An attorney should not speak slightly or disparagingly of his profession, or pander in any way to unjust popular prejudices against it; and he should scrupulously refrain at all times, and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

10. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do every thing to succeed in his client's cause. An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability," to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless it is steadfastly to be borne in mind that the great trust is to be performed within, and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or loosen the duty of obedience to law and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or

any manner of fraud or chicanery, for the client's sake.

11. Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.

12. An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, for-swears himself. The State's attorney is criminal if he presses for a conviction when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle pro.*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

13. An attorney cannot reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defenses as the law of the land permits, to the end that no man may be deprived of life or liberty but by due process of law.

14. An attorney must decline in a civil cause to conduct a prosecution when satisfied that the process is merely to harass or injure the opposite party, or to work oppression and wrong.

15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

16. Newspaper advertisements, circulars and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency and wholly unprofessional.

17. Newspaper publication by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.

18. When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client as to any matter.

19. The same reasons which make it improper in general for an attorney to testify for his client, apply with greater force to assertions, sometimes made by counsel in argument, of a personal belief of the client's innocence or the justice of his cause. If such assertions are habitually made they lose all force and subject the attorney to falsehood; while the failure to make them in particular cases will often be esteemed a tacit admission of belief of the client's guilt, or the weakness of his cause.

20. It is indecent to hunt up defects in titles, and the like, and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust, make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit. Stirring up strife and litigation is forbidden by law, and disreputable in morals.

21. Communications and confidence between client and attorney are the property and secrets of the client, and cannot be divulged except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

22. The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterward from others involving the client's interests in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material, in a subsequent suit, as the basis of any judgment which may injuriously affect his rights, the attorney cannot appear in such cause without the consent of his former client.

23. An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere conveyancer, and was not consulted as to the facts, and unknown to him the transaction amounted to a violation of the criminal laws, he may assail it on that ground, in suits between third persons, or between parties to the instrument and strangers.

24. An attorney openly and in his true character may render purely professional services before committees, regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

25. An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts. Even then such a position is embarrassing, and ought to be avoided. An attorney represents conflicting interests within the meaning of this rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

26. "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor in hearing the other side well lashed and vilified."

27. An attorney is under no obligation to minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the attorney's conscience in professional matters. He cannot demand as of right that his attorney shall abuse the opposite party, or indulge in offensive personalities. The attorney, under the solemnity of his oath, must determine for himself whether such a course is essential to the ends of justice, and therefore justifiable.

28. Clients, and not their attorneys, are the litigants, and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

29. In the conduct of litigation and the trial of causes the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history, or mental or physical peculiarities or idiosyncrasies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forc-

ing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do any thing therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.

31. Where an attorney has more than one regular client, the oldest client, in the absence of some agreement, should have the preference of retaining the attorney as against his other clients in litigation between them.

32. The miscarriages to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

33. Prompt preparation for trial and punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

34. An attorney is in honor bound to disclose to the client at the time of retainer all the circumstances of his relation to the parties, or interest or connection with the controversy which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite party will hinder or seriously embarrass the full and fearless discharge of all his duties.

35. An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it he ought to seek to adjust it without litigation if practicable.

36. Where an attorney, during the existence of the relation, has lawfully made an agreement which binds his client, he cannot honorably refuse to give the opposite party evidence of the agreement, because of his subsequent discharge or instructions to that effect by his former client.

37. Money or other trust property coming into the possession of the attorney, should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

38. Attorneys should as far as possible avoid becoming either borrowers or creditors of their client; and they ought scrupulously to refrain from bargaining about the subject-matter of the litigation, so long as the relation of attorney and client continue.

39. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but after advising frankly with the client it should be left to his determination.

40. Important agreements affecting the rights of clients should, as far as possible, be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of court.

41. An attorney should not ignore known customs or practices of the bar of a particular court, even when the law permits, without giving opposing counsel timely notice.

42. An attorney should not attempt to compromise with the opposite party without notifying his attorney, if practicable.

43. When attorneys jointly associated in a cause can-

not agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively, in which event it is his duty to ask to be discharged.

44. An attorney coming into a cause in which others are employed should give notice as soon as practicable, and ask for a conference, and if the association is objectionable to the attorney already in the cause, the other attorney should decline to take part unless the first attorney is relieved.

45. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party without notice to his attorney.

46. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset, as to the amount of the attorney's compensation, and where it is possible, this should always be agreed on in advance.

47. In general it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.

48. Men, as a rule, over-estimate rather than under-value the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth, though his poverty may require a less charge in many instances, and sometimes none at all.

49. An attorney may charge a regular client, who intrusts him with all his business, less for a particular service than he would charge a casual client for like services. The element of uncertainty of compensation where a contingent fee is agreed on, justifies higher charges than where compensation is assured.

50. In fixing fees the following elements should be considered: 1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2d. Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d. The customary charges of the bar for similar services. 4th. The real amount involved, and the benefit resulting from the service. 5th. Whether the compensation was contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice, and not a mere money-getting trade.

51. Contingent fees may be contracted for, but they lead to many abuses, and certain compensation is to be preferred.

52. Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances; and where the circumstances make it proper to charge, the fees should generally be less than in case of other clients.

53. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without villification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness' testimony, and often rob deserved strictures of proper weight.

54. It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue, or hunger, the uncomfortableness of their seats, or the court-room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court; whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury toward court or opposite counsel, if such requests are denied. For like reasons one attorney should never ask another in the presence of the jury to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws.

55. An attorney ought never to converse privately with jurors about the case; and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color for imputing evil designs, and often leads to scandal in the administration of justice.

57. An attorney assigned as counsel for an indigent prisoner ought not ask to be excused for any light cause, and should always be a friend to the defenseless and oppressed.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, June 12, 1888:

Orders affirmed in both appeals with costs—Thomas M. King and others, respondents, v. John H. Post, appellant, impleaded with Reon Barnes and others. —Order of General Term reversed and judgment for defendant ordered upon the order non-suiting plaintiff with costs—Throop Grain Cleaner Company and another, respondents, v. H. Cardenis Smith, appellant. —Judgment affirmed with costs—Ida Hornboetel, appellant, v. Francis S. Kinney and another, respondents. —Judgment affirmed with costs—Daniel B. Childs and another, respondents, v. George J. Seabury, impleaded, etc., appellant. —Motion for reargument denied with costs—John A. McDougal v. State. —Motion for reargument denied with costs—Samuel T. Ludlow v. George W. Mead. —Motion to open default granted on payment of fifty dollars costs—Samuel McElroy v. Brooklyn Underground Railroad Company. —Motion to revive action granted, to substitute DeGraff and Murray executors, etc., of Caroline Sweeney, deceased, and also to substitute Elias Root, as attorney for such executors; the balance of the motion denied without costs—Caroline Sweeney v. John Chadwick. —Motion to show cause denied with costs—Henry A. Vanderbeek v. William Taylor and others. —Motion to dismiss denied; that to put case over granted without costs—Elnathan Sweet v. Dorilus Morrison. —Motion to dismiss granted with costs—Daniel Goldsmith v. Union Mutual Life Insurance Company. —Motion to dismiss granted with costs—Henry C. Adams v. Harry A. Babcock. —Motion to vacate order. Ordered that the

order dated May 1, 1888, be vacated; that the undertaking upon the appeal be at the option of the respondent set aside; that the appeal be permitted to stand upon the deposit made, without any stay of execution, unless the respondent shall permit the undertaking to stand—*Lucy G. Weldner v. Timothy G. Phillips*.—Motion to dismiss granted with costs—*John C. Campbell v. Henry Maudeville and others*.—Ordered that the regent's certificate be filed *nunc pro tunc* as of the day when the examination was completed, June 19, 1886—In re application of George E. Pierce to file certificate, etc.—Ordered that the regent's certificate be filed *nunc pro tunc* as of the day when the examination was completed, November 19, 1887—In re application of Seth C. Adams for leave to file certificate, etc.

#### NOTES.

Mr. Justice Day, in sentencing five men at Liverpool for robbery with violence to the cat, said it was for their own good and the good of society.—*Gibson's Law Notes*. What new crime is this?—"robbery with violence to the cat!"

**DOGS AS WORKERS.**—I suppose it is only natural to man, as soon as he gets hold of a new labor-saving or power-adding appliance, to see what use can be made of it for the destruction of his species. He is now busily engaged in trying to apply cycles to the purposes of warfare, with what results the opinion of experts appears, as far as I can make out, to be far from unanimous. But what is much worse than this attempt to press the harmless wheelman into the service of the soldier is the project recently started of turning the dog to military account. No doubt the idea has certain attractions of its own. The dog has the chief military virtues in the highest degree. In courage, in alertness, and in devotion he is the equal of the bravest of any brave band of fighting men that has ever won a place in history from the days of Leonidas to our own. But no one who knows the race can suppose, we should imagine, that the dog has any need to attest these faculties on the battle-field, and the inconsiderate promoters of this new project cannot have sufficiently considered the question whether we are justified in demoralizing the animal by compelling him to accept our imperfect standard of ethics. It is sufficiently discreditable to the human race that close intercourse with the dog through so many generations should have raised so little their own standard of morality, but this is perhaps owing to the fact that it is only in comparatively recent times that the dog has been admitted to the place in society which is really his own. To many of their friends—I mean the friends of both parties—it gave an indescribable shock to discover the attitude of our national poet toward the canine race, and to learn that the critic—I crave his pardon if I wrong him, but I think he was a German—who waged with malicious triumph that no one could find a line complimentary to the dog throughout the whole of Shakespeare, got the better of the eager patriots by whom the bet was taken, and like Mr. Hannibal Chollup, "realized the stakes." So at least as the story runs was the decision of the umpire to whom the wager was referred—that arbiter being of opinion that Crab in the *Two Gentlemen of Verona* is not so treated by his creator as to indicate any intention on the part of the latter to make amends for the many unsympathetic or opprobrious references to the dog which are scattered up and down the plays. Nor, I grieve to say, can I find any conclusive ground

for contesting the decision. \* \* \* I am afraid we must admit that the virtues of the most virtuous of animals were unappreciated by the greatest of poets, and I think we may say further that the general appreciation of these virtues is of very modern growth indeed. The hunter knew them of old, and the shepherd, and it is a far cry to the day when the dying Argus lloked the hand of the Wanderer returning in the twentieth year; so that in one sense the love between dog and man may be said to be a reversion to primitive ways. But it is long also since the world ceased to be a world of shepherds and of hunters, and civilization had to endure for many a century before the present cordial relations were established between the two races.—*H. D. Traill, in the English Illustrated Magazine*.

Down on Liberty street is a broom factory. The top story is where they make brooms. The straw is sorted, tied into wisps, combined into bundles, attached to a stick, wound by an apparatus like a turning lathe, sewed, and there you have a broom in the rough. It is still full of straw seed, and must be cleaned. That is where the dogs come in. First there is a small drum about two feet long and a foot in diameter, fitted lengthwise with eight rows of blunt teeth a couple of inches long. This is connected by a belt to a large wooden wheel, perhaps six feet in diameter and two feet in thickness, which revolves upon a horizontal axis. The inner surface of the wheel is fitted with cleats at intervals of six inches or so, and the sides of the wheel are inclosed by bars close enough together to keep the dogs from falling out. In this when any brooms are to be cleaned, Rover and Nellie are hustled. They stand at the bottom of the wheel of course, with their nose pointing in the same direction, the wheel is started by the workmen in charge, and away go the two dogs. "Git up, Rover!" "Go along, Nellie!" and they gallop up the inside of that wheel as though they were after a big fat dinner. Away goes the wheel, and the belt and the drum, a broom is laid across the drum, the steel teeth comb out the straw seeds in two seconds; another broom goes on; and so on, until the pile of new brooms is exhausted. "Whoa, there!" and the brutes slow down carefully, being carried half-way around backward before the apparatus comes to a standstill. Nellie is a stout Newfoundland and Rover a black hound. They were trained in a short time without a bit of trouble, it is said, and they seem to like the work about as well as professional pedestrians do theirs. It would be a neat problem to calculate how many miles Rover and Nellie travel in six days.—*Baltimore News*.

What in the name of goodness do the following words signify? "Modoc"—what is a "modoc?" "Gonoph"—what is a "gonoph?" "American cooky-rooster"—what is an "American cooky-rooster?" All these frightfully difficult terms required definition by Mr. Justice Stephen in *Ware v. Knifton*, in which case the plaintiff sued for certain money and a fur coat which had been "borrowed for two years." Knifton and certain other professionals decided that as Ware had called him a "modoc," a "gonoph," and an "American cooky-rooster," he, Knifton, was legally right in refusing to return either money or coat until plaintiff apologized. The defining of these words was evidently too much for Mr. Justice Stephen; his lordship meanly walked round the difficulty, and decided that whatever these words mean, they did not legally affect any financial arrangements between the parties.—*Gibson's Law Notes*.

# The Albany Law Journal.

ALBANY, JUNE 23, 1888.

## CURRENT TOPICS.

THE *Holland* case, which was printed in full in this journal last week, is a very interesting one, and especially important as the latest word on the subject of charitable trusts from our Court of Appeals. And yet we have a strong impression that it is too technical, and that impression has been strengthened by an able criticism of the opinion in the *Central Law Journal*. We are inclined to agree with that writer, that the trust should not be allowed to fail because no particular church was specified as the beneficiary, and that the executor may or should be compelled to make a selection, and that "any Roman catholic church, competent by law to hold such property, might well, as the possible legatee, ask by petition to be made a party to the suit, and that the executor be compelled to designate the church to which the legacy should be paid." Of course the designation might not fall on the petitioning party, but any such church would have the right to institute the proceeding. The trust in question is no more indefinite or uncertain than many others which have recently been enforced in the courts of this country. Stress is laid in the opinion on the fact that the church is not limited to some particular locality, and concedes, in effect, that if it had been so ordered, it would have been effectual. But a trust for any catholic church in the city of New York would have involved the necessity of selection, and this would have been no more dangerous or objectionable than a general field of choice. By consulting 36 ALBANY LAW JOURNAL, 113, and note at 115, it will be seen that by the weight of recent authority this trust is supportable. The Massachusetts cases are especially liberal, as for example: "To assist, relieve and benefit poor and necessitous persons, and to assist and co-operate with any such charitable, benevolent, religious, literary and scientific societies, as shall appear to the trustees best to deserve," etc., was held valid. So "to the Methodist Episcopal Church, South," for foreign missions, was recently held valid in Kentucky. So in Maine, of a bequest to the town of Skowhegan, for the worthy and unfortunate poor," etc. On the other hand, in Wisconsin, "to the poor in the city of Green Bay" was recently held void. This was put partly on the ground that no trustee was named. But what is an executor for? A trust should never be allowed to fail for such a reason. On the ground of uncertainty in the beneficiaries that trust would anywhere else have been sustained, as in Connecticut, where one for "worthy, deserving, poor, white, American, protestant, Democratic widows and orphans in B.," was held valid. There has

been too much slavery to learning and to technicality in the construction and effectuation of trusts, and we are glad to see the courts adopting a more liberal rule. A little less book-learning and a little more saving common sense would be desirable. Why should not a testator have power to entrust a discretion which he himself might lawfully exercise? Especially should this be so when the discretion may not be exercised in many years, and when the trustee may be a much better judge of the situation than the testator can be at the time of the execution of the will. We fully agree with the *Journal's* concluding remarks as follows: "Contrary to our usual custom, we have considered this case in this department of the *Journal*, not merely because we regard the conclusion of the court as incorrect, but to protest against the inveterate habit of all of our courts in making a great mystery of cases of this description. No sooner is a will, involving a question of charitable uses propounded, than points of law arise like 'quills upon the fretful porcupine,' and the subject becomes as critical to handle as that formidable animal himself. The statute of 43 Eliz. is at once invoked, and all other like statutes, older and younger; precedents innumerable are cited *pro* and *con*, and the case is involved in impenetrable darkness. And yet nine times out of ten the real questions are easily soluble by the application of a few well known maxims of the secular law, which in every other connection are universally accepted, such as a sane man may, by deed or will, do any thing lawful with his own; that is certain which can be made certain; that a trust shall not fail for the want of a trustee, and the like. We think that if in any one branch of the law codification is more desirable than in any other, it is this special branch, and that the declaratory statute should establish a simple system, upon which trusts of this character should be construed."

The disadvantages of a bad temper are illustrated in *Pullman's Palace Car Co. v. Ehrman*, Mississippi Supreme Court, April 16, 1888, where the plaintiff, while on a car which was both an eating and sleeping-car, ordered his berth to be made up; the porter replied that it would be done as soon as he had furnished two lunches previously ordered; and after an angry dispute plaintiff went into a forward car and sat up all night, though the berth was made up for him. *Held*, that he was not entitled to damages. The court said: "It is manifest that no wrong was done the appellee of which he can justly complain, and whatever unpleasantness he encountered appears to have been brought about as the direct and natural result of his own conduct. He had no right to have his bed made instantly, as demanded, under the circumstances, and as it was made ready in good time, and he chose not to use it, as he might, he can blame no one but himself for the discomfort of sitting up all night. The rudeness complained of in the altercation with the servants of the appellant sprang naturally from the manner and language of the appellee, and furnish



an apt illustration of Solomon's proverb, 'An angry man stirreth up strife.' And yet we have some sympathy with that man, whom an impudent and grasping porter was trying to "beat for a quarter."

As to the time necessary to form an intent to take life, Lacombe, J., in charging the jury in *United States v. King*, 34 Fed. Rep. 302, said: "As to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a life-time pass in a few minutes before their mental vision. Rear-Admiral Sir Francis Beaufort was once nearly drowned. During the brief period of apparent unconsciousness after he sank for the third time his mind reviewed every event of his past life. His account of his experience, quoted in Miss Martineau's Biographical Sketches, is very interesting. 'The course of those thoughts,' he says, 'I can even now in a great measure retrace. The event which had just taken place; the awkwardness which produced it; the bustle it must have occasioned; the effect it would have on a most affectionate father; the manner in which he would disclose it to the rest of the family; and a thousand other circumstances minutely associated with home—were the first series of reflections that occurred. They took then a wider range; our last cruise; a former voyage and shipwreck; my school, the progress I had made there, and the time I had misspent; and even all my boyish pursuits and adventures. Thus traveling backward, every past incident of my life seemed to glance across my recollection in retrograde succession; not however in mere outline, as here stated, but the picture filled up with every minute and collateral feature. In short, the whole period of my existence seemed to be placed before me in a kind of panoramic review, and each act of it seemed to be accompanied by a consciousness of right or wrong, or by some reflection on its cause or its consequences. Indeed many trifling events, which had been long forgotten, then crowded into my imagination, and with the character of recent familiarity.' If this mental action continued until he was fully restored to consciousness the time consumed was about twenty minutes. Admiral Beaufort however was always convinced that it lasted only during submersion; if so, all these events swept before his mental vision in the space of two minutes. Thought is sometimes referred to as the very symbol of swiftness.

'Haste me to know 't, that I, with wings as swift  
As meditation, or the thoughts of love,  
May sweep to my revenge.'

—*Hamlet: Act I., Scene 5.*

There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is

thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice. Malice, in the old definitions, is spoken of as express or implied. That again is a distinction which is a delusion and a snare. Practically, jurymen never deal with express malice. There is no express evidence of malice given to them. Malice, as I have told you, is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time."

Mr. W. E. Bullock, of New York, utters a rousing pamphlet on "Reckless Driving and its Punishment," with especial reference to that city. He sets forth an appalling array of recent instances of accidents from this source, many of them accompanied by circumstances of great aggravation. He says, and very truly, that "the only persons on foot who are reasonably safe in the crowded streets of New York city are the police, and even they are not safe unless in uniform," and he instances an express-driver who whipped and drove over patrolman Devett, out of uniform, for stopping his horse and demanding his name. There have been a number of recent convictions for reckless driving in the city, but Mr. Bullock points out that under the Penal Code there is no adequate punishment for such negligence unless it results in death. This certainly should be remedied. He also criticises severely, but not too severely, the decisions in *Barker v. Savage*, 45 N. Y. 191, and in *Belton v. Baxter*, 54 id. 245, and regards them as in a measure overruled by *Murphy v. Orr*, 96 id. 14. He calls on the district attorney to "cause the street-car drivers Christine Hanus, who ran over and killed Arthur Rogers on May 18th, and William Martin, who ran over and killed the boy Mills on May 26th, and Jacob Gibe, the driver of the brewery wagon, who ran over and killed the boy Hills on June 4th, to be indicted for manslaughter." It is a well known fact that the drivers in the city rarely make the smallest allowance, or abatement of speed, or change of direction for pedestrians; that they are frequently drunken or brutal, or even malicious, and that they regard themselves as having a superior right of way to which the hapless footman must yield. If Mr. Fellows, instead of lobbying out at St. Louis on behalf of his admirer, Mr. Cleveland, would attend to his business, and prosecute a few of these miscreants, it would be well. We like the ring of the following from Judge Gildersleeve on sentencing one of these fellows: "This reckless driving in the streets of New York must be stopped. You drivers of wagons and trucks think that you own the streets. \* \* \* Some day we will have some of you indicted for manslaughter, and possibly for murder. \* \* \* You are sentenced to three months in the penitentiary." For ourselves, we give warning that if any of these reckless, malicious devils ever drives over us, we will make him wish that he had been born a dog.

## NOTES OF CASES.

**I**N *St. Louis, I. M. & S. Ry. Co. v. Weekly*, Arkansas Supreme Court, April 14, 1888, an action against a railroad company for the death of a jack while being shipped over its road, the evidence showed that a tramp, with a stick in his hand, was found in the car with the jacks; that soon after being removed from the car by the conductor, he said, in the latter's presence: "If it had not been for lopping them mules over the head I would have froze." Afterward the jack was found lying dead in the car with blood running out of its mouth and nose. *Held*, that the declaration of the tramp, not being part of the *res gesta*, was inadmissible in evidence.

In *Shivory v. Streeper*, Florida Supreme Court, March 8, 1888, it was held that a livery-stable in a thickly settled part of a city is not a nuisance *per se*. The court said: "A careful examination of the authorities satisfies us that though in the language of High on Injunctions, section 772, 'the law is settled that when a business, although lawful in itself, becomes obnoxious to neighboring dwellings, and renders their enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odors, noxious gases, or otherwise, the carrying on of such business is a nuisance which equity will restrain,' yet this restraining power will not be exercised in the first instance if there are not facts, other than mere opinion, to establish the nuisance, except in cases where the business is in itself *prima facie* a nuisance, as the keeping of a slaughter-pen, or other thing necessarily offensive. And we think this does not contravene the rule of Blackstone cited by appellants' counsel, that if one does an 'act, in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act where it will be less offensive.' Bl. Com., bk. 3218. While this is true, it is not to be inferred that a court of equity will necessarily interpose in the matter. \* \* \* Counsel for appellants argue the case as if a livery-stable, closely adjoining a hotel, cannot be otherwise regarded than as *prima facie* a nuisance. We do not find this view in accordance with the authorities. *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45; *Burditt v. Svenson*, 17 Tex. 489; 67 Am. Dec. 665; *Shiras v. Olinger*, 50 Iowa, 571; S. C., 33 Am. Rep. 138; *Dargan v. Waddell*, 9 Ired. 244; *Keiser v. Lovett*, 85 Ind. 240; S. C., 44 Am. Rep. 10—in all of which the contrary view is held. The only case we find different is that of *Coker v. Birge*, 9 Ga. 425, and 10 id. 336. But this case is virtually overruled in *Harrison v. Brooks*, 20 Ga. 537, in which the court held the true rule to be 'that injunctions will only be granted to restrain nuisances in cases of absolute necessity, in which the evil sought to be prevented is not only probable but certain and inevitable; and that it will be less disposed to interfere where the apprehended

mischief is to follow from such establishments and erections as to have a tendency to promote the public inconvenience.' A hotel proprietor sought to enjoin the building of a livery-stable within fifty-four feet of the hotel, just as in *Coker v. Birge* it was sought to enjoin a similar building within sixty-five feet of the hotel; but the court, notwithstanding the previous decisions in the latter case, dissolved the injunction which had been granted by the lower court, giving the rule above quoted as the basis of its action. It will be found that the cases in which livery-stables have been held to be nuisances, either in equity or at law, are cases where the proofs established the fact; in some instances the court withholding their final decision till the fact could be tested by actual experience. \* \* \* It is not to be understood that this conclusion involves a decision that the stable may not become a nuisance. The complaint as to noise from the stamping of horses; if the wooden floor is taken out, as the answer states will be done, is removed; and there remains only the question, whether from noisome smells or other discomforts produced by the use of the stable, there will arise a case for the interposition of equity. While it is easy to anticipate disagreeable results, it cannot be said, as a matter of fact, that these will necessarily follow to the extent of a nuisance. Considering the improved methods of the day the dealing with various offensive appurtenances in and about dwelling-houses and hotels, so that little discomfort is experienced, it is not unreasonable to suppose that proper appliances in the management of a livery-stable may produce similar good results." See note, 32 Am. Rep. 141.

In *State, ex rel. Stateler, v. Reis*, Minnesota Supreme Court, May 1, 1888, it was held that street sprinkling is a "local improvement" within the meaning of the Constitution, for which an assessment may be levied upon the property fronting on the street in proportion to its lineal feet frontage, without regard to its cash valuation. The court said: "The relator's main contention is that street sprinkling is not an 'improvement' within the meaning of this section of the Constitution because it lacks the element of permanence; that its results are transient; that to constitute an improvement there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed and permanently enhance the value of the property. But if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt every few years. When a pavement or sidewalk has worn out, the fu-

ture value of the property is not enhanced by it any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city. If it does this—rendering the property more attractive and comfortable, and hence more valuable for use—then it is an improvement. That the regular and systematic sprinkling of a street has this effect upon the property fronting on it is a matter of common knowledge. This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of any thing is increased, its excellence enhanced, or the like;' or 'an amelioration of the condition of property affected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.' Of course, the word is to be construed according to the subject-matter. In a lease or deed, or in a statute for the protection of the occupants of land under color of title, and the like, it may have a special or restricted meaning. In some such cases it may refer exclusively to a certain kind of improvements, such as structures erected on the land which will remain after the occupant who erected them has vacated the premises, and the benefit of which will inure to his successor. But that the word is used in this section in the broader sense to which we have referred is evident from a consideration not only of the subject-matter being treated of, but also of the law of taxation by special assessments in the absence of any constitutional provision on the subject, and of the causes which led to the adoption of this section in its present form. In the absence of any constitutional prohibition the power of taxation by special assessments is undoubted. Such taxes are levied on the assumption that a portion of the community is to be specially benefited in the enhancement of property peculiarly situated as regards the contemplated expenditure of public money. This is the underlying idea of all such assessments. No decision has ever attempted to enumerate the purposes for which special assessments might be levied, for the obvious reason that it is impossible to do so. In the absence of constitutional restriction the only limitations upon the power of the Legislature to authorize the levy of a special assessment are—first, it must be levied for a public purpose, for the power of taxation can be exercised for none other;

and second, the property on which it is assessed must be peculiarly and specially benefited by the work for which it is levied; third, that it must be apportioned according to some reasonable rule upon the basis of benefits, ascertained or implied, resulting to the property assessed. Inasmuch as these benefits may not be, and usually are not distributed in proportion to the cash value of the property assessed, therefore in accordance with the underlying idea of all such assessments, it was usually apportioned either upon the basis of benefits as ascertained by commissioners, or other such body, or according to some definite standard fixed upon by the Legislature itself; as for example, according to street frontage in the case of street improvements, the benefits of which might be fairly presumed to diffuse themselves along the line of the street in a degree bearing some proportion to frontage. The authorities are united that in the absence of a constitutional provision requiring some other method of apportionment, either of these might be adopted. That street sprinkling is a public purpose is unquestionable. That property fronting on the sprinkled street receives an exceptional local benefit from it, is we think, sufficiently apparent from what has been already said. Therefore there can be no doubt that in the absence of any thing in the Constitution to the contrary, the Legislature would have the right to authorize an assessment for street sprinkling, to be apportioned according to frontage on the street."

**THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS AND PERJURIES—PAPER READ BEFORE THE FORTNIGHTLY CLUB OF ROCHESTER, N. Y., BY MARTIN W. COOKE.**

I INTEND to treat of those provisions of the statute of frauds which relate to the validity of contracts for the sale of personal property, but before proceeding with the consideration of them, I will indicate what is meant by the "Statute of Frauds and Perjuries." It was apparent to the forefathers of our English cousins not only that litigation arising out of contracts of various kinds was increasing, but that in spite of the rules of evidence in force, the wisdom of the judges and the honesty of juries, fraudulent practices were upheld by perjury and subornation of perjury, and that the courts were made the instruments of wrong by the successful employment of false testimony. The necessity became apparent that some provision should be made to prevent such efforts or to place impediments in the way of their success. English law has always discovered an abhorrence of fraud, deceit and artifice, and it prescribed severe punishments for indulgence in these objects of hatred. The punishments prescribed and the consequences visited upon the wrong-doer did not prove effectual; and in the development of the safeguards against fraud and perjury, the wit and wisdom of the English judges and legislators were taxed to create preventives and to remove the temptation to resort to them by making the way to their success more thorny and difficult. The problem was to determine how to impose such formalities or requirements upon the transfers of property so as to prevent dishonest practices, and yet at the same time avoid the creation of hindrances to

fair transactions and honest claims. The prevalence of a desire to accomplish this end, and the great wisdom and marvellous ingenuity of the authors of this statute, are revealed and illustrated by the enactment we are about to consider. The aim of the statute is better indicated in its recital than by its title. It is entitled "Statute of Frauds and Perjuries," but its recital opens with these words: "For the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and the subornation of perjury, be it enacted," etc.

The most important parts of the statute relate to contracts. Certain specified contracts it required to be evidenced by writing, signed by the parties to be charged, and in case they were not, the statute declared that no action could be brought upon them. The growing complexity of society, the multiplied opportunities of fraud, and the increased number of transfers of property, rendered the provisions for punishment futile as a preventive; and the courts were becoming more and more powerless to eliminate the subtleties which the chance of gain inspired, and which unscrupulous litigants employed. Hence the Legislature enacted that no action could be brought upon certain contracts unless they were evidenced by writing formally executed. These contracts were: 1st, any special promise by an executor or administrator to answer damages out of his own estate; 2d, any special promise to answer for the debt, default or miscarriage of another person; 3d, any agreement made upon consideration of marriage; 4th, any contract of sale of lands, tenements or hereditaments, or any interest in or concerning them; 5th, any agreement that is not to be performed within one year from the making thereof.

When we consider that previous to this enactment any of these contracts might have been the subject of litigation without the formalities now required to evidence them, it does not seem strange that fraud and perjury flourished, or that their purposes were rendered practicable.

It may be admitted that perjury did not hie away from the earth when this barrier to its success was interposed, but it cannot be denied that its occupation was interrupted in this particular field where it had flourished, and where it would have continued to flourish but for the sagacity of the men who conceived this statute. There was another class of contracts in respect to which similar provisions were demanded, to-wit, contracts of sale of personal property. It was an audacious mind that ventured to recommend the enactment of a statute which should impose legal formalities upon the contract of sale of personal property as a condition to its validity. The transactions affected were made by millions every day, and under an almost infinite variety of circumstances and conditions; and to originate a statute which should not hamper these transactions, yet which would protect the parties to them against the machinations of perjury, would almost seem to demand omniscience. To enact that they should be evidenced by writings, signed by the parties to be charged, would have been so irrational that the enactment would have defeated itself, and would have been disregarded or repealed. Inasmuch as I intend to treat of this particular provision, I will give the entire section in respect to sale of goods, etc. It is known as section 17 of the English Statute, and reads as follows: "No contract for the sale of any goods, wares and merchandises, for the price of ten pound sterling or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or (2) give something in earnest to bind the bargain, or in part payment; or (3) some note or memorandum in writing of the said bargain be made, and signed by

the parties to be charged by such contract, or their agents, thereto lawfully authorized."

It will be seen that no such contract is required to be in writing, but without declaring illegal such a contract not evidenced by writing, it does require that one of several simple acts must be done and proved to sustain an action on a contract of sale of goods, where the price was ten pounds or more, when it is not in writing. Of these I shall speak further on.

The authorship of the Statute of Frauds and Perjuries is unknown. Strange as it may seem, the greatest statute in conservative jurisprudence that was ever enacted by any law-making power comes down to us coupled with no jurist's or legislator's name. It was enacted during the reign of Charles II. It became a law in the year 1677. It was supposed to have been written by Sir Mathew Hale, but we have the opinion of Lord Mansfield that it was not drawn by him, although as he admits, some of the ideas of that great judge were engrafted into it, ideas or suggestions taken from his notes. Lord Hale left his notes on various legal subjects to the library of Lincoln's Inn, and they became a valuable source of knowledge for subsequent writers. He believed in the reduction of the principles of law to definite and certain statements or rules, and were he living in our day he would doubtless be arrayed on the side of codification. His History of the Common Law furnished the data for a respectable code. Blackstone was greatly indebted to him in the preparation of his Commentaries. Lord Nottingham introduced the bill in the House of Lords, but he laid no claim to the authorship, and without indicating any thing upon the subject, he says the statute received many additions and suggestions from judges and civilians. Lord Chief Baron Gilbert says that this statute was prepared by Lord Hale and Sir Lionel Jenkins. It was not enacted until after the death of the chief justice. He died in 1676, the year before it was passed. In the form in which it appeared it was doubtless the product of the united wisdom of many. Such an innovation hardly would have been enacted without consultation with many judges and lawyers. It is safe to attribute much of it to the lord chief justice, who presided while it was in the process of development. It is to his credit that one of the arguments against the proposition that hedrew it is founded on its inaccuracies and literary defects.

The conspicuous wisdom manifested by this enactment did not fail to be recognized by our forefathers, when as the States of the United States were founded, they began making laws for the government of their own people and courts. In this State we adopted the common law of England, and it became and is the law of this State, except as modified by positive enactment. Very early in its existence the statute of frauds was passed. In respect to the sales of personal property it was worded differently, but it is substantially the same as the English statute. It reads as follows: "Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more shall be void unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money." The provisions for validating the contract by giving something in earnest is not restrained, and it specifies chattels, things in action, etc., requires the writing to be subscribed instead of signed, and requires part payment at the time of the buying.

It will be noticed that the English statute limits its application to sales when the price is ten pounds or upward. In regard to sales of less magnitude it has

no effect whatever. This limitation would seem to be intended to remove the burdens imposed by the statute from a great number of transactions, and evidently was so limited as not to affect small transactions, but by the fixing of the limit at ten pounds, in view of the declared aim of the statute, it is implied that to the minds of the English lawgivers the temptation to fraud and perjury was the possible gain in a sale involving a price of ten pounds or more.

The treatment of this limitation by the different States of the Union when they came to enact similar provisions in respect to sales of personal property, furnishes a curious subject of investigation. In some of the States it would seem to indicate a reverent attitude toward the mother country's statute, or a belief that there was some mysterious wisdom wrapped up in the limitation to ten pounds, and in others there was a breaking away from the limitation seemingly without any rational ground for the adoption of another standard. To understand the reason for the variation in the amounts of the limitation in some States, it is necessary to note the difference in the value of what was recognized as a shilling.

In the older States there was a wide difference in the recognized value of what was called the shilling. The English shilling in New York was worth about twenty-two cents. The recognized shilling was one-eighth of the Spanish dollar, or twelve and one-half cents. So the English shilling was worth nearly double the recognized shilling in New York. The pound consisted of twenty shillings, and measured in New York shillings was about \$2.50, the English shilling being about twice the value of a York shilling, and there being 200 English shillings in ten pounds, it required 400 York shillings, or \$50, to represent the limitation of ten pounds. The dollar being six shillings in New Hampshire, and ten pounds in England being 200 shillings, it would seem that the New Hampshire Yankees measured the shillings by their standard, and so made the limit \$33, or one-sixth of 200 of their shillings. In New York the statute begins to affect these contracts when the price is \$50. In Alabama the limit is \$200; in Arkansas, \$30; in California, \$200; in Connecticut, \$35; in Delaware the provisions of the statute are peculiar, but the limit is \$25. This is the smallest sum fixed by any State. It was doubtless thought to be sufficiently large considering the size of the State. Rhode Island it seems was not large enough to warrant any such law at all. Possibly it was supposed that every transaction of the magnitude of ten pounds would be known by the whole State, and so by the courts. Georgia followed the English statute literally. Florida fixed no limit, and applied the regulations to all contracts of sale, no matter what the price was. Illinois passed no similar statute. Iowa makes no limitation, Maine says \$30 is the measure, and so do Missouri and New Jersey. Vermont compromised on \$40.

Thus we see that England and most of the United States, with a view professedly to prevent the successful use of the courts to further the ends of fraud by means of perjury in respect to the contract of sale of personal property, solemnly declared to their citizens that in all their transactions of this character they must take the precaution to have one of these acts done, or they shall be deprived of the benefits of the courts to enforce the obligations.

It is not surprising that such an enactment, avowedly made in anticipation of the resort to perjury, and with a view to embarrass its operations, should have created such a prejudice among traders that insisting on its requirement came to be regarded as an insult. This feeling prevails now, and many a dealer is deterred from exacting part payment or part delivery to bind the bargain, by reason of the seeming implica-

tion which insisting upon these formalities carries with it.

We have considered only the avowed object of the statute. It is not the less calculated to inform, educate and warn the honest trader how he may, by simple means, avoid in his dealings, mistakes and misunderstandings in respect to the reality of the meeting of the minds of the parties to such contracts. No doubt the cases where one of the parties honestly believes that there was an agreement with the other, and the other knows that he never intended to make the agreement, are as numerous as those where the party insisting on the reality of a contract knows that he is urging an unjust claim.

It will be observed that this statute does not forbid the making or completion of contracts of sale of goods when the price is ten pounds or more without these specified formalities. Its aim is not to interfere in any way with the transactions themselves. In fine, there is no mandatory element in the statute affecting the parties. The command is addressed to, and is intended to affect, only the courts or the judges whose determinations constitute the action of the courts.

The direct avowal of the statute is that the parties to such contracts are under temptation, and are liable to deceive and employ false testimony for the purposes of gain in respect to such contracts and the implication in respect to the courts is that they are incompetent to eliminate the false testimony in respect to them. This statute impliedly says all parties are liable to swear falsely where their interests are affected and there is little chance of detection of the crime. Many litigants, and not a few lawyers, in their wrath, have justly charged judges with incompetency, but in this statute the courts are impliedly charged with fallibility. We do not need the declaration of a statute to establish this. The defeated party in nearly every case alleges error of the trial judge, and too frequently the higher court records that the court below has erred, and reverses its judgments. In respect to facts, the court is your true Spencerian. It believes nothing and accepts nothing as true unless it can be known and established by evidence. If tradition may be trusted, it is cautious about asserting knowledge even of itself, and ventures only to assert what it thinks on the subject. One of its traditional ventures in this respect is in the hypothetical declaration, "If the court knows herself, and she thinks she does." In respect to the law, the common-law court was the oracle. It declared the law often oracularly, but its decision was in fact the law, or a part of it, and by these declarations the great body of the common law is manifested and recorded.

Theoretically the common law, in all its glory and perfection, has an ideal existence as it were, in a mysterious collection housed in an invisible habitation, admission to which is allowed only to the priests of the law—the judges. Litigants crowd about the sacred shrine, and clamor for a revelation of the mysteries. The judges hear their cry, retire to the shrine—*curia advisari vult*—and returning, dole out to the suffering ones treasures of wisdom they claim to have gathered from within. With these fragments, thus eagerly and expensively sought and obtained, the tangible, visible structure of the common law is erected. The store of wisdom is inexhaustible, and its genuine deliverances are infallible. The robed priests however are human, and they do not always deliver the oracles truly. One of the questions agitated to-day is whether we shall continue to submit to the rule of this priesthood or storm the shrine and lay out and declare its secrets so that "he who runs may read," and make these priests interpreters instead of revealers. The enactment we are considering was a

sortie on the judges. It called these judges to order, and commanded them to direct their action according to the declared will of the law-making power. Defendants thereafter appealed to Caesar, when they were brought to court upon unjust claims in respect to these contracts and the dread of this appeal deterred the perjurer from his attempts, and so spared litigation and its evils.

The judges fretted under the restraint thus imposed and influenced by jealousy (unconsciously of course), of the power thus invading their domain, they sought by explanation and interpretation to modify and limit the force and effect of the law. With some justice, they claimed that there was obscurity in the command—patent ambiguity—and circumstances arose in respect to which the law was invoked which created what is known as latent ambiguity. The struggle has gone on, and is still rife, and the conflict seems irrepressible. The will of the law-making power is couched in eighty-six words. The utterances of the judges in deciding upon the meaning of the eighty-six words would fill a very large volume, deciding hundreds of cases, and what is the result? Two of the keenest critics and law-writers of the day, Sir Fitz-James Stephens and Frederick Pollock, have undertaken the task of redrawing this section of the statute as explained or re-enacted by the courts. Their work appears in the first article in volume 1, number 1, of the new *Law Quarterly Review*, published in London. After using every possible effort to compress the result of the cases into the shortest possible compass, they have found it necessary to expand the eighty-six words into fourteen articles or propositions, and Sir Fitz-James speaks of his own work as follows: "And now having cooked my dish with all possible care, I can only recommend that it should be thrown out of the window, the 17th section should be repealed, and the cases upon it consigned to oblivion."

With all respect to the learned commentator, who has now donned the robes of judicial office, we except to his conclusions. In a note, he says he wrote the article and said recommendations before he became a judge, so we may not charge him with judicial prejudice against the statute. We will compromise with him, and reluctantly let his dish go out of the window, but will not agree that the 17th section follow.

The evils he speaks of, many of them, resulted from the fact that the persons whose decisions were attempted to be controlled by the law were the interpreters of the meaning of the law itself; and because the judges have created all these rules, shown by the cases in deciding upon the meaning of the law, he argues that the law itself is irrational, and should be repealed. May it not be that the interpretations are irrational? I tell my servant to bring me some wood to kindle my fire. He retires, and begins to interpret and speculate as to the meaning of my command (and I assume he has the right to interpret), and through his speculations as to my meaning, says to himself: "A wood is a collection of trees—a forest in fact." He remembers that Shakespeare, the lawyer-poet, by implication, decides that Burnham Wood did come to Dunsinane. He duly considers this case (*Macbeth v. Duncan*), and finally concludes that I could not have known what I was talking about, and interprets that whereas I said in effect, bring me a forest, I meant something else with which to kindle my fire, and he brings me a bellows. Our friend Sir Fitz-James thereupon might say I was obscure, and that I should revoke my order, but not criticise my wise servant. Sir Fitz-James is horrified by the fact that the statute enables and tempts a party to a verbal agreement to break his word with impunity, because it provides that if his agreement has not been evidenced as the statute requires he cannot be com-

pelled to keep it. The same reasoning would apply to an agreement for the sale of a farm, or to any agreement required to be in writing, and to the provisions as to such contracts Sir Fitz-James gives his commendation. The main object of the statute he seems to overlook, to-wit, that it is designed and calculated to prevent the imposition of responsibility upon a party for a contract he never made. Rather than have it possible and easy to do this through perjury, it is better to suffer the inconvenience of allowing, or even tempting, a party to an action to break his word, or resist the attempt to make him keep it by process of law. It is far better to suffer a wrong in a particular case than to permit a general possibility of wrong. I submit that this aversion to the statute results from an improper comprehension of it.

The writer says: "The special peculiarity of the 17th section is that it is, in the nature of things, impossible that it should have any operation except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud in breaking his word. In some cases no doubt this may protect an honest man against perjury," etc. This is a narrow view, and if of any force as applied to the 17th section, it is of more force when applied to the other sections. The statute is directed against the plaintiff or the party asserting the contract; not against the defendant or party resisting. It is the perjury and subornation of perjury on the part of the party holding the affirmative that the statute would fetter. It is true that the statute assumes the contract to exist, but that is only for the purpose of stating the law as to its proof. The statute might have said any attempt to assert and enforce such a contract shall be regarded as ineffectual in law unless it involves and is accompanied by proof of the acts required. It is evident that these writers, for they both assume the responsibility of the indictment against this section, have failed to bear in mind the nature of the contract affected and the evils it seeks to remedy.

I will quote from the article to illustrate this. He says: "If one wishes to know what were the terms of a verbal contract, the best possible evidence would be that of the persons who made it or of the bystanders who heard what was said." How could this have been written if the writer did not suppose that the statute condemns the proof of the terms of the contract by oral testimony? The statute does nothing of the kind. It contemplates the proof of them (the terms) by words. Its aim is to demand certain proof, not of the terms, but of the reality of the alleged contract. The statute is concerned about the inquiry: "Have the parties agreed?" not with the question, "What have they agreed to do?" nor with the question, "Have they done what they agreed to do?" There are no terms if there is no agreement. There may be a contract without expression of the terms or conditions which may be left to be implied, such as price, time of payment, etc. There is a natural protection against perjury as to unreasonable terms, and as to the performance of them, and courts and juries can take care of disputes as to these questions; but to decide whether or not the two minds have met upon an agreement upon any terms, experience has taught that it is not safe to leave this to the courts and juries to decide from the evidence of the mere words of the parties. The law says, "Give us a sign"—some simple act, like the part payment or part delivery or earnest, which act is inconsistent with the absence of the contemporaneous determination of both the minds of the seller and the buyer that the one will sell and the other will buy, and the courts may be trusted to find out the truth as to the terms by any proper evidence of them.

In respect to the nature of the acts required, I shall speak hereafter. The other difficulty of this remark of Sir Fitz-James is that it begs the question unless the proof of the words by the parties or the by-standers is to prove the reality of an agreement. If it means they furnish the best proof of the terms of the agreement (assuming that the meeting of the minds, as it is called, exists), we agree with the statement.

Sir Fitz-James asks this question: "Can any human being assign any reason whatever why a contract of marine insurance should be allowed to be less formal than a contract for the sale of goods?" If this means to ask whether there is any reason why the existence of a contract of marine insurance may be more safely left to be proved by the mere words of the parties than a contract of sale, we say yes. But assuming that I am right, it does not prove anything in favor of the statute, nor would it prove anything against it if I am wrong. It does not show that the law-making power has committed an absurdity in one case by showing that it might or might not have enacted wisely in another.

Again Sir Fitz-James says: "How far the provisions of the statute of frauds are commonly known to men of business, I do not know. I should suppose that the common impression about them would be to the effect that a contract for the sale of goods of the value of ten pounds or upward must, in order to be valid, be in writing." I venture to say that men of business understand the provisions of the statute better than some judges seem to, if the indictment of Sir Fitz-James against the courts for the 178 cases he speaks of, interpreting this statute, and so making it necessary to expand these eighty-six words into fourteen articles, to redraw the statute, is well founded. There is not one business man in a hundred who, upon having the question raised while a bargain is in progress as to how the parties may bind it so as to answer the requirements of the statute, would not intelligently and correctly answer it. The buyer would say at once, here is something in earnest or in part payment, and he wouldn't think of leaving it with his words alone; he would see to it that the money or thing in earnest was delivered, and the receipt of it assented to by the seller; or the seller would answer by his action and hand over to the buyer some part or all of the goods, and see to it that he consented to the receipt, or if convenient, the parties would make a memorandum of the bargain and sign it. It is one of the presumptions of the law to which judges often resort that every litigant is presumed to know the law, and yet this presumption libels one or the other of the litigants coming into court upon a dispute as to the law. Under it one or the other is charged with asserting as law what he is presumed to know is not law. This maxim does not apply to the judges themselves any more than the other maxim, "*Ignorantia legis non excusat*." I have heard of an instance where the court of last resort struggled with a case for weeks in attempting to harmonize the views of the judges upon the law, and finally the decision turned upon the application of the principle that the party defendant or plaintiff was presumed to know the law.

Sir Fitz-James says again: "This section is obscure," and says its obscurity lies mainly in the use of four very common expressions—"contract for the sale of good," "goods," "note or memorandum of the bargain," and "signed." He admits that it may appear singular to say that the expression, "contract for the sale of goods" is obscure, but insists that it is true, and adds: "The long series of cases summed up in the first article of our digest proves it." The obscurity, one might infer, is not in the words, but in the minds, of the judges making the decisions. Even the

word "goods" has puzzled the brains of the court, and because it has done so it is said to be obscure.

Again Sir Fitz-James says: "The hesitation in the minds of the authors (of the statute) appears to me to have been due to the want of a perfectly distinct conception of a contract, and of the difference between a written contract and written evidence of a verbal contract."

When a man is charging another with obscurity, he ought to see to it that he himself is clear. He speaks here of a written contract and a verbal contract. Strictly there is no such thing. He means written evidence of a contract and a contract evidenced by spoken words. The contract is the same whether it is evidenced in one way or the other. Assume A. and B. make a contract evidenced by spoken words, which are simply vibrations of the air enabling one mind to communicate with the other, the inter-communication enables them to agree or contract with each other. The spoken words being proved, another mind may determine from them what the two contracting minds know by the same evidence. The spoken words are not the contract, the writing is not the contract. The words have vanished, but the contract remains. Two deaf and dumb persons may make a contract with each other; and when made, when once the minds of the two persons are united upon the agreement, it exists and can be enforced. One party cannot destroy it without a new, mutual, mental operation. An idiot or an insane person cannot make a contract with another. He may speak the words or sign a writing as well as another, but the law says that he cannot make a contract because he has not the mental capacity.

Why is it unsafe to leave these contracts to be evidenced only by the mere words of the parties? It is enough to answer that experience has shown this. But the very nature of the contract shows that it is unsafe, so long as we have human judges and human juries, and litigants are governed by selfish motives and think more of their pockets than they do of their consciences.

The necessity of such provisions in respect to the contract of sale does not arise simply from the fact that men are wicked and will commit perjury for gain, nor from the fallibility of courts, but from the peculiar difficulty attending the establishment of the essential fact in such cases, that is the contemporaneous determination of the two minds—the one to sell and the other to buy. The temptation arises from the fact that perjury is likely to succeed if the contract can be established by proof of the mere uttered words of the parties and detection of the crime, or proof of it is more difficult when it is employed to prove the agreement in this manner, and so after all it is the nature of the contract to be proved which gives occasion for the peculiar provisions. The fact to be established in relation to the contract is the mutual intention or determination of two minds. Each one knows whether or not he has decided to buy or sell, but neither can know the determination of the other, which is essential, except by evidence. Each one must know his own mind and determine the question—the one that he will buy and the other that he will sell. These two determinations must exist at the same time, and each must be informed of the determination of the other. The moment the relation is once created, the responsibility attaches to each for the performance of the contract. Each may be mistaken as to the determination of the other. A buyer and seller may dicker for a day, and yet the oral evidence of the meeting of the two minds upon a contract may depend upon the speaking or not speaking of a single word, and the tone or manner of its utterance may make all the difference between evidencing the



making and the not making of a contract. The not making of such a contract is just as probable as the making of it. It is just as likely that the parties disagree as that they agree. This is not the case with the contract of marriage nor with the contract of insurance which may be proved by the mere words of the parties. The proof of the exact words of a conversation from recollection alone is ordinarily an impossibility, and it is as likely as not that the proof of the existence of the contract may depend upon the exact words as the substance of the talk; but if the negotiation ends with the act of the buyer paying a part or the whole of the money to the seller, and he consents to its receipt, such act shows at once that the two minds have actually agreed upon a contract although its terms may be misunderstood; and the performance of this act proves to a certainty that each party recognizes the attitude of the other in respect to the reality of their agreement; or if a negotiation has taken place, and the buyer takes from the seller a part of the goods with the seller's consent, this act, being inconsistent with the non-existence of the meeting of their minds upon some agreement, shows that they have agreed, although it throws no light upon the terms or conditions.

But it may be urged that the perjurer may attempt to prove one of these acts and so carry out his purpose. The answer is that in such a case he has to deal with a different fact to prove. It is not the fact of the meeting of the two minds; it is the reality or non-existence of an act. A jury can deal with a witness who undertakes to swear falsely as to such a thing, and there is a natural protection to the other party in the situation and surroundings of the act. It is all the difference between a witness proving the fact that two persons unfurled a flag from a certain flag-station on a certain day, by testifying to his knowledge of it, and his undertaking to prove the fact that they agreed to unfurl the flag, by swearing to the conversation between them, from which conversation the fact of agreement is to be inferred, which fact involves the operations of two minds. In the one case he testifies to a fact he knows from observation, in the other he is testifying to the words of the parties, from which not only the operation of two minds is to be inferred, but that their determinations were contemporaneous, and that each mind was at the same time cognizant of the determination of the other. The reason for the enactment then is found in the nature of the contract, and in the fact that in nearly every case it is as likely not to be made as to be made. In respect to the proof of such essential fact, the words of the parties unaccompanied by any act indicative of the reality of the agreement, are unreliable, because they are liable to lead to wrong conclusions in respect to the essential fact to be proved, and inasmuch as they are unreliable, it is dangerous to depend upon them as proof, and so it is dangerous to rely upon the testimony of witnesses in respect to the words.

It was to be expected that such an enactment would work hardship in some cases. Any law designed for general application to a multiplicity of acts necessarily would. The laws of nature do. They are inflexible, and an inflexible rule of law sometimes does work injustice in its application and enforcement. This is in the very nature of things; but it does not militate against the wisdom of its enactment or its enforcement, because being for a general good, it is better that it create hardship in particular cases than that the general wrong which it is designed to prevent should prevail.

The fact that this statute has met with such a fate in its interpretation by judges has been urged as an argument against any attempt to reduce the common law to certain statements, it being urged that the ex-

perience furnished by this enactment reveals the impossibility of so framing the statutes or Code as to meet the demand. This seems plausible; but upon reflection we find that the confusion arises not from the obscurity of the statute, but from the attempts to bend the law to meet the particular cases in hand, and that such decisions, aimed to prevent injustice in particular cases, create precedents for similar cases, and the effect is to explain away and modify the enactment so as to render it uncertain as to its general application. In this way this simple statute of eighty-six words has been so modified and explained as to render it necessary to expand it into a volume in re-drawing it so as to apply to the explanations. Is this the fault of the law or the result of disobedience to its provisions? Sir Fitz James says if the cases decided under this statute had all been decided the other way, it would have affected the immediate parties to the suit only. This statement would seem to indict not the statute but the court for disregarding the general provisions for the sake of particular cases. Another great judge admitted that it would have been far better if the courts had decided every case by the application of the words of the statute rather than attempt to modify or explain away the statute by creating new rules and so precedents for further diversions from its plain terms. A statute cannot be general in its provisions and be safely subject to modifications to meet particular cases. The common law judges cannot safely be allowed to apply principles of equity to specific enactments. It strikes us the argument furnished is that the courts themselves need regulating by statutory enactment to prevent the practical creation of new law or repeal of the written law by their decisions.

Equity was devised to take care of particular cases where the common law, by reason of the generality of its provisions, would work injustice. This works well enough in dealing with the common law, but when a statute says thou shalt or thou shalt not, the courts must obey it "though the heavens fall." It may be that provisions could be added to enable the courts to take care that justice shall not be defeated by means of the statute in particular cases. I will not espouse either side of the question here. The argument against an attempt to codify completely the common law is the impossibility of doing it, and the fact that to do it demands omniscience. To state and enact its settled principles or principles which ought to be settled within certain limits seems to be practicable and desirable.

#### ACCEPTANCE AND RECEIPT.

It seems to me that the most difficult part of the section under consideration to apply (judging by the experience of the courts) has been the clause in regard to acceptance and receipt. I submit that this clause is the only one about which there is any reason for doubt as to the meaning, or in respect to which there is any difficulty in application to any case if we can only let it hurt when it must hurt. In justification of the wisdom of the statute, I propose to attempt to show how this clause should be interpreted and how enforced or applied to any conceivable case which can arise under it, and to so apply it that in every case the jury may determine the disposed questions of fact and the court determine the law. According to the practice the application of the statute to the evidence has been to raise a mixed question of law and fact so that it could not be settled by a verdict. Now, assuming that this statute is designed and calculated to demand proof of the reality of the meeting of the minds of the parties by certain acts rather than require any specified proof of the terms of the contract or the performance of it, how can the facts in issue be

relegated to the province of the jury where they belong?

The clause, "unless the buyer shall accept and receive part of such goods" demands proof that some act has been performed after the bargain, which, in effect, transfers a part of the goods from the control or dominion of the seller to the control or dominion of the buyer and that both parties have assented to such act.

The object of this clause is to require such proof of the existence or reality of the contract as will be an impediment to fraud, perjury and mistake. It requires the proof of facts, which, being established, themselves prove the existence of a contract of sale between the parties.

The object of the statute is accomplished by the proof of an act performed after the bargain and assented to by the parties, which act and consent are confirmatory of the fact that they have agreed upon a contract. The question, in regard to which the statute is concerned as we have stated, is: "Have the parties agreed?" not "what have they agreed to do?" nor "have they done what they agreed to do?" The statute impliedly impeaches only the oral proof of the fact that the parties have made a contract, and it is this fact which it requires to be proved by something more than the words of the parties in making the bargain.

Perjury, fraud, etc., are likely to succeed in proving the existence of a contract or the fact that the minds of the parties have met, if the proof is left to words merely; but they are not likely by such proof to establish unreasonable terms or conditions, nor to succeed in proving the performance of an act and the assent thereto of the parties. The terms, the act and the assent to such an act stand as any facts to be proved by oral testimony, while the meeting of the minds of the parties upon their mutual mental assent to an agreement, unconnected with acts, does not.

To prove the contract effectually, there must be shown something more than the mere words of the parties in making the bargain, but the participation in and assent to the acts by the parties required by the statute may be established by their declarations. The courts have so held.

The decisions under this clause cannot be reconciled, and there seems to be much confusion from the different interpretations of the word "accept." In many of the cases cited there is not a clear and distinct understanding of the word "accept" as used in the statute.

In *Marvin v. Wallis*, 6 F. & B. 726, Judge Earl says: "I believe that the party who inserted the word in the statute had no idea what he meant by 'acceptance.'" He says in another case that the words "accept and receive" in the statute are absurd.

Judge Crompton says that he doubts whether there is any distinction between "accept" and "receive."

Cookburn, C. B., in same case, in the opinion, says these terms are equivalent.

In a case arising under this clause Lord Campbell, C. J., said: "I shall rejoice when it (this statute) is gone. In my opinion it does much more harm than good. It promotes fraud rather than prevents it."

In a case arising under this statute in our State, E. Darwin Smith, J., in his dissenting opinion, said: "The statute of frauds was designed to prevent frauds and perjuries. Instead of fulfilling its office, it has doubtless been the most prolific cause of fraud and perjury of any statute ever enacted."

Bronson, J., in an early case reported in this State, said: "Chancellor Kent, at the time he wrote his commentaries, thought that the statute of frauds had not been explained at a less expense than a million of pounds." This was many years ago, and it seems the explanations, like Tennyson's brook, go on and will

"go on forever." Another English judge says (in an early case) that the statute seems to have been passed for the buyer alone. Many other illustrations could be made of like effect.

The real difficulty arises from the modifications of the statute by decisions, and litigants and perjurors are forever seeking to keep up the tampering with the plain terms of the statute to meet the particular case at hand. Whenever we begin to depart from the plain terms properly interpreted for general effect, the trouble begins. If the courts will go back to the statute and simply interpret its language without regard to the hardship of the case in hand, we shall have the law as it was intended to be. "Hard cases," as has been said, always tend to the making of "bad law," and the temptation has been too strong for the judges in respect to this statute.

This confusion and trouble can be accounted for in part from the fact that it has been supposed that these predicates, "accept" and "receive" with "buyer" for their subject, require something more or different to be done by the buyer after the void bargain than they require to be done by the seller.

This notion has been entertained to a large extent (and without attention called distinctly to the fact) that the word "accept" contemplated a determination by the buyer that the goods received were satisfactory, and that the proofs must evidence this determination; as if the statute required an act which should show the complete performance of the contract by the seller, and in such a manner that the buyer is concluded by such performance, instead of an act which should show that the parties made a contract and are concluded in regard to its existence or reality.

The case of *Morton v. Tibbets*, 15 Ad. & El. (N. S.) 428, clearly establishes "that there may be an acceptance and receipt of the goods by a purchaser within the statute of frauds, although he has no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract."

The truth is that neither party can make the void bargain valid, while either may insist that it remain invalid. It is neither more difficult nor easier for one to procure and establish its validity or reality than for the other. The proof of the same acts and assents is required of each. The goods being in the control of the seller, no part of them can be changed from his control to that of the buyer without the assent of the seller; and the statute requires that the buyer shall not only receive (and so evidence the assent of the seller) but accept a part of the goods, and so evidence his assent to the act by which he acquires the control of them. Either predicate, with "buyer" for its subject, might require an act, but would demand necessarily the assent of but one party. Both predicates are used for the purpose of demanding proof of the assent of both to the act.

The word "part" in the statute excludes the idea that the acceptance is to be of goods (in whole or in part) as satisfactory. This is shown in *Morton v. Tibbets*, *supra*, p. 434. Take a sale of a pile of lumber. If the buyer accepts and receives one piece (it may be the best or the poorest piece) the statute is satisfied. If the statute were concerned about the performance of the contract, why should it suffer it to be proved by part payment?

In a late case in the Court of Appeals, *Calkins v. Hellman*, 47 N. Y. 449, 452, the court says in opinion, Rapallo, J.: "No act of the vendor alone in performance of a contract of a sale, void by the statute of frauds, can give validity to such contract." This is true, and it might have been added, no act of the buyer alone can give validity to such a contract. The

statute does not leave it with the buyer alone to determine that the void bargain shall be valid. It is equally in the power of either to keep it invalid, but neither alone can make it valid. In case of part payment, the seller accepts and receives part of the price; and in case of part delivery, the buyer accepts and receives part of the goods. The words "accept" and "receive" with seller for a subject would appropriately describe the act of part payment.

In the case of *Cross v. O'Donnell*, *supra*, the court says (opinion by Earl, J.): "A purchaser may accept without receiving, and he may receive without accepting."

The practical difficulty with cases involving an interpretation and application of this clause of the statute, the clause relating to the acceptance and receipt of part of the goods, is that the questions of fact and of law by the practice have not been so separated that the facts could be determined by the jury independently of the questions of law. The proofs having been made, the defendant would raise the question that they do not satisfy the requirements of the statute, and upon a decision one way or the other of this question, the defeated party may appeal; and if the case were of sufficient moment, the parties may carry it to the highest court, and so every case of sufficient magnitude arising under this clause may need to be decided by and could be carried to the court of last resort. I propose to suggest a method by which the questions of fact may be relegated to the jury and the questions of law so separated that they can be considered upon a settled state of the facts, settled by the verdict of a jury. To accomplish this I propose that the court, in a case arising under this clause, should submit to the jury three distinct questions of fact. First. The court should ask the jury to find whether the party asserting the contract has proved to their satisfaction that the oral bargain was made. The common law requires this, and the statute does not dispense with it. In nearly every case where this statute is invoked as a defense, the party resisting the claim admits the oral bargain of record and alleges its invalidity on the ground of no acceptance and receipt. If the jury answer this question in the negative that ends the case. If in the affirmative, they must pass to a second question of fact. Does the evidence establish that any act was done after the bargain by the seller himself or by his authorized agent, by which he has placed any part of the goods within the dominion or power to control of the buyer; or that any act has been done after the bargain by the buyer or his authorized agent by which he has assumed the dominion or control of any part of the goods?

In determining whether or not such act by either party has been done, there may be considered the situations of the parties, the character of the goods, the nature of the acts and all the circumstances attending it. If the jury answer this question in the negative, that ends the case; but if they find that one of these acts was done, they must pass to another question, to-wit: Does the evidence establish that both parties assented to such act?

The assent of the party doing the act may be inferred from the act itself, and the assent to the act of the other party may be established by his declarations, conduct or acts subsequent to the bargain. The clause of the statute under consideration contemplates and demands answers to each of these three inquiries. The question of law under submission would not be whether the proofs satisfy the requirements of the statute, but whether there was any evidence tending to support either question of fact submitted or whether the findings as to any of the questions submitted was against the evidence or the weight of evidence. I venture to suggest that every well-decided case can be tested by these rules or questions, and that

an examination of any such case would show that if it had been submitted to the jury to determine the three questions of facts separately, that the only questions for review in respect to this statute that could have been raised would have been whether there was any evidence to support the finding as to the particular finding disputed or whether the finding was against the evidence or weight of evidence.

The following cases decided by the New York Court of Appeals illustrate this position. In *Shindler v. Houston*, 1 N. Y. 261, there was no evidence of an act done by either party. *Gray v. Davis*, 10 id. 285, arose out of a sale of stock of goods in a store. The act was done by the clerk of the buyer, who took the keys of the store containing the goods sold for the buyer thus assuming control of the goods. The assent thereto of the buyer was evidenced by the act, he having directed the clerk to take the keys. The assent of the seller to this act was evidenced by his declarations and conduct. In *Rogers v. Phillips*, 40 id. 519, the void bargain itself provided that the coal should be delivered aboard some boat. The act that was performed by the sellers was not directed nor in any way assented to by the buyers after the bargain. If the buyers after the bargain had given specific directions to load the coal upon the boat upon which it was loaded and the seller had performed it, the decision would have been the other way.

In *Marsh v. Rouse*, 44 N. Y. 643, there was no evidence of any act done by either party by which the control or dominion of any part of the goods was changed. The buyers gave directions that the act be done, but it was not done by any one.

In *Cross v. O'Donnell*, 44 N. Y. 661, the act was done by the seller. The buyer directed the act to be done—the directions were continued and not withdrawn before the act was performed.

In *Caulkins v. Hellman*, 47 N. Y. 452, there was an act done by the sellers, but no evidence that the buyers ever assented thereto. If the buyers in that case, with knowledge of the acts done, had assented thereto, the decision would have been different.

In *Stone v. Browning*, 51 N. Y. 211, the sellers undertook to perform an act which should place the goods under the dominion of the buyers, but the buyers would not and did not assent thereto.

In the case of *Hawley v. Keeler*, 53 N. Y. 119, the question decided was under the clause of part payment, but the opinion intimates a rule in regard to acceptance and receipt nearly the same as herein suggested.

In *Allis v. Reed*, 45 N. Y. 142, the sellers, after the void bargain, without delivering to buyers, sold the goods to third parties by direction of the buyers. The General Term put its decision on the ground that this showed acceptance and receipt. The Court of Appeals, without denying this ground, decided the case under clause of part payment. The evidence warranted an affirmative finding to each of the questions we have suggested.

It seems that in each of the above cited cases the jury might have disposed of the questions of fact under such a submission to them as suggested, and that the questions for the court on appeal would have been whether there was any evidence in support of the findings of fact submitted or whether any of the findings were against the evidence or weight of evidence.

#### GOVERNOR—MINISTERIAL DUTIES—CONTROL BY MANDAMUS.

KANSAS SUPREME COURT, FEB. 11, 1888.

MARTIN V. INGHAM; STATE V. MARTIN.

Where purely ministerial duties are by statute imposed upon the governor, and such duties are only such as might be

devolved upon any other officer or agent, the performance of such duties may be controlled by *mandamus* or injunction.

Where a petition for an injunction to restrain the governor from acting upon the return and report of the census taker, in proceedings instituted for the organization of a new county, alleges great fraud on the part of the census taker and others, but does not allege that the fraud was ever brought to the attention of the governor, or that he refused an investigation of the same under the statutes, such petition does not state facts sufficient to authorize an injunction.

**ERROR** to District Court, Shawnee county; John Guthrie, Judge. Original proceeding in *mandamus*. Action brought by Charles K. Ingham, a tax payer and elector of the unorganized county of Grant, against John A. Martin, governor, to enjoin him from the performance of certain acts in the organization of such county. At the hearing before the judge at chambers a temporary injunction was granted, and the defendant brings error. Also an application by George Getty, county attorney of Hamilton county, for an original writ in *mandamus* to compel the governor to act upon the return and report of Thomas J. Jackson, census taker for the unorganized county of Grant.

S. B. Bradford, Atty.-Gen., L. J. Webb and E. A. Austin, for governor.

Waters, Chase & Tillotson, for Ingham, defendant in error.

George Getty, Co. Atty., E. A. Austin and L. J. Webb, for County Attorney Getty.

**VALENTINE, J.** This was an action brought in the District Court of Shawnee county by Charles K. Ingham, a citizen, resident tax payer, and elector of the unorganized county of Grant, against John A. Martin, governor of the State of Kansas, to perpetually enjoin defendant from the performance of certain acts in the organization of such county. The facts as set forth in the plaintiff's petition, are sworn to by him, and a large number of affidavits of other persons in support of such facts are filed with the petition as exhibits thereto. The petition and the exhibits show substantially and in detail the following facts: On or about May 9, 1887, in pursuance of the statutes for the organization of new counties (Gen. Stat. 1868, chap. 24, p. 249 *et seq.*; Laws 1872, chap. 106; Comp. Laws 1885, chap. 24, par. 1400-1412; Laws 1886, chap. 90; Laws 1887, chap. 128), and upon proper preliminary proceedings had, the defendant, as governor, appointed Thomas J. Jackson as the census taker, the register of the votes of the electors for the temporary location of the county seat, and the assessor for the said unorganized county of Grant. Immediately afterward Jackson qualified by taking the prescribed oath of office, and proceeded to Grant county, where he did certain work, and afterward, and about August 25, 1887, made his report to the governor. He went into the county of Grant in a state of intoxication, and remained there in a maudlin condition for two weeks, during which time he was incapable of doing any kind of business properly. Upon his entering into the county he fraudulently, corruptly and for pay entered into an arrangement and conspiracy with certain parties to speculate upon the temporary organization of the county by the use of their influence and office. Pursuant to said arrangement the overture was first made to persons interested in the town of Cincinnati, and it being refused, it was then made to persons interested in the town of Ulysses, and accepted. After this arrangement had been made Jackson began work. He then moved to Ulysses. He enumerated the names of sixty fictitious persons, and counted

them in favor of Ulysses for county seat. He excluded a large number of qualified voters from having their preferences recorded for county seat. This number was sufficiently large to materially affect the result. A large number of voters did vote for Cincinnati for county seat, and he corruptly changed their votes, and reported them as voting for Ulysses. He announced the voting closed by proclamation of the sheriff, and then took votes by night for Ulysses. He took and recorded a large number of votes for Ulysses of persons who pretended to live upon certain described lands, who did not reside there, and whose names and habitations are unknown. He took the votes of a large number of other persons, and recorded them for Ulysses, who were not voters. A large number of voters voting in favor of Ulysses were procured by bribery. Frauds of various kinds were perpetrated during the enumeration, with his knowledge and consent. He was, and continued to be, drunk, indecent, and disgusting. His examinations were carried on in a lascivious and disgraceful manner. He travestied the oath to persons enrolled, and performed many other acts of like nature and character as the above. The petition of the plaintiff also alleges as follows: "The plaintiff further states that the defendant, John A. Martin, governor, threatens to, and will at once, consider and act upon the said report of the census taker, and will find therefrom that there are at least 2,500 actual *bona fide* inhabitants of the said unorganized county of Grant; that 500 of them are householders; and that there is at least \$150,000 worth of property in excess of legal exemptions, exclusive of railroad property, of which not less than \$75,000 worth is real estate; and will appoint three persons commissioners of said county one to act as county clerk, and one to act as sheriff; and will designate and declare the town of Ulysses, as the place chosen by the greater number of legal voters, to be the temporary county seat of said county of Grant, unless he shall be restrained and prohibited from so doing by the order and injunctions of this court."

The plaintiff also asked for a temporary injunction. Before any hearing was had however the governor signed the following stipulation: "(1) I desire that the court shall thoroughly examine into all questions of fraud, partiality, drunkenness, bribery, or unfair dealings on the part of the enumerator. (2) I expressly waive any objection as to the capacity of the present plain to bring suit, and at no stage in the proceedings shall this question be suggested by myself. (3) I do not waive however my right to dispute the authority of the court to inquire into these matters. JOHN A. MARTIN, defendant." Afterward, and upon the foregoing petition and affidavits, and upon the plaintiff's applications for a temporary injunction, a hearing was had before the judge of the District Court at chambers, and upon such hearing the judge granted the temporary injunction, and to reverse this order, granting the temporary injunction, the defendant, as plaintiff in error, brings the case to this court.

It is claimed in this court, and was also claimed in the court below that the courts of Kansas have no jurisdiction to hear and determine any case like the one at bar. Indeed it is claimed that the courts of Kansas have no jurisdiction to hear and determine any controversy that brings into question any act or acts of any member of the executive department of the State, and in Kansas all the State officers are members of the executive department. In Kansas, as elsewhere, there are three great branches or divisions of civil power, which with some exceptions, are to be exercised by three separate departments: the legislative or the law-making power, the judicial or the law-construing power, and the executive or law-en-

forcing power. With some exceptions, the legislative power is vested in the Legislature, the judicial power is vested in the courts, and the executive power is vested in an executive department. In Kansas, under the Constitution, the executive department is constituted as follows: "Section 1. The executive department shall consist of a governor, lieutenant governor, secretary of State, auditor, treasurer, attorney-general, and superintendent of public instruction." Const., art. 1, § 1. The governor however is at the head of the executive department, for section 3 of the same article of the Constitution also provides as follows: "Sec. 3. The supreme executive power of the State shall be vested in a governor, who shall see that the laws are faithfully executed." It is generally supposed that in a republican government all men are subject to the laws, and to the due administration of them, and that no man, nor any class of men, is exempt. There is no express provision in the Constitution, nor in any statute, exempting any member of the executive department, chief or otherwise, from being sued in any of the courts of Kansas, or in any action coming within the jurisdiction of any particular court, civil or criminal, upon contract or upon tort, in *quo warranto*, *habeas corpus*, *mandamus*, or injunction; or from being liable to any process or writ properly issued by any court, as subpoenas, summonses, attachments, and other writs or process; and if any one of such officers is exempt from all kinds of suits in the courts, and from all kinds of process issued by the courts, it must be because of some hidden or occult implication of the Constitution or the statutes, or from some inherent and insuperable barriers founded in the structure of the government itself, and not from the express provisions of the Constitution or the statutes. So far as the present case is concerned however, which is injunction, and another case which is also before us, and which we are also considering, which is *mandamus*, it is only necessary for us to consider whether the governor, without reference to the other members of the executive department, is subject to the action of *mandamus* and injunction, or not. But in order to properly consider these questions it is necessary that we should consider many other questions. It might be proper here to state, that so far as the express terms of the Constitution and the statutes are concerned, the governor is no more exempt from *mandamus* or injunction than he is from any other action or proceeding in any of the courts, or than he is from any process, civil or criminal, issued by the courts. We believe that only four cases can be found in the reports of the Supreme Court of Kansas in which it has been sought by a judicial determination to control any of the acts of the governor.

The first was the case of *State v. Robinson*, 1 Kans. 18. That was an application for a writ of *mandamus* to compel the board of State canvassers to canvass certain election returns. It does not appear that any question of jurisdiction was raised or thought of in that case, but the court decided the case upon its merits, and refused the writ.

The second was the case of *In re Cunningham*, 14 Kans. 416, in which an application was made for a writ of *mandamus* to compel the governor, Thomas A. Osborn, to issue a patent for certain lands. It was understood at the time that the governor was willing to issue the patent if the Supreme Court said that it was his duty to do so, and the only question presented to the court, or decided by it, was whether such was his duty or not. The court held that it was not his duty, and refused the application.

The third case was that of *State v. St. John*, 21 Kans. 591. In that case an alternative writ of *mandamus* was allowed. At first the defendant's counsel filed an answer disputing the jurisdiction of the court, but

afterward the governor, by his counsel, expressly waived all question of jurisdiction, and the governor himself also personally desired that the court should hear and determine the case without reference to any question of jurisdiction, stating that he would obey the decision of the court, whatever it might be. The court heard and determined the case, and awarded a peremptory writ of *mandamus*; but no such writ was ever issued, as the governor immediately proceeded to act in accordance with the decision of the court, which rendered the writ unnecessary.

The fourth case was the case of *Wilson v. Price-Raid Aud. Com.*, 31 Kans. 257. That case was a supposed appeal from the auditing commission to the Supreme Court. No question of jurisdiction was raised, but the court itself, for inherent defects and want of merits in the case, dismissed the same.

There are a number of cases in which other State officers than the governor have been sued in the courts of Kansas. Two of such cases are the cases of *State v. Robinson*, above cited, and *Wilson v. Price-Raid Aud. Com.*, above cited. The other cases are as follows: In the case of *State v. Lawrence*, 3 Kans. 95, an application for a writ of *mandamus* was made to compel the defendant, as secretary of State, to issue a certificate of election to the relator. The question of the jurisdiction of the court to grant the same was raised, but the court decided in favor of its jurisdiction, and awarded a peremptory writ of *mandamus*.

In the case of *State v. Board, etc.*, 4 Kans. 261, which board consisted of the State superintendent of public instruction, the secretary of State, and the attorney-general, no question of jurisdiction was raised, and the court decided the case upon its merits, and refused to grant the writ of *mandamus* prayed for.

In the case of *State v. Barker*, 4 Kans. 379, no question of jurisdiction was raised, and the court decided the case upon its merits, and awarded a peremptory writ of *mandamus* to compel the secretary of State to deliver to the relator copies of the recently-enacted laws for the purpose that he might publish the same for the State. The case of *State v. Barker*, 4 Kans. 435, is similar to the case last cited, except that in this case it was held that the relator was not entitled to copies of the laws, and the writ of *mandamus* was refused.

In the case of *State v. Anderson*, 5 Kans. 90, an injunction was prayed for against the State treasurer, and the case was decided upon its merits, and it was held that upon the facts the plaintiff was not entitled to the injunction.

In the case of *Graham v. Horton*, 6 Kans. 343, an injunction was allowed in favor of Horton and against the State treasurer. In the case of *State v. Thoman*, 10 Kans. 191, a peremptory writ of *mandamus* was allowed against the auditor. The case of *Prouty v. Stover*, 11 Kans. 235, was tried upon its merits, without any question of jurisdiction being raised, and the writ of *mandamus* prayed for was refused. The case of *Martin v. Francis*, 13 Kans. 220, was decided upon its merits, without any question being raised with respect to the jurisdiction of the court, and the writ of *mandamus* prayed for was refused. In the case of *Francis v. Railroad Co.*, 19 Kans. 303, an injunction was allowed by the District Court against the State treasurer, and the Supreme Court heard the case upon its merits, without reference to any question of jurisdiction, and decided that upon the facts of the case the railroad company, which was the plaintiff below, was not entitled to such injunction. In the case of *State v. Francis*, 23 Kans. 495, a peremptory writ of *mandamus* was allowed against the treasurer. In the case of *Cran v. Francis*, 24 Kans. 750, *mandamus* against the treasurer was in effect sustained. In the case of *State v. Francis*, 26 Kans. 724, injunction against the State treasurer was sustained. In the case

of *Railroad Co. v. Howe*, 32 Kans. 737, injunction against the State treasurer was also sustained.

It would seem that the question as to whether the courts of Kansas may control any of the acts of the governor or not is still an open one. The question however whether the courts of Kansas may control any of the acts of the other members of the executive department or not, would seem, from the general practice of the bench and bar, and from the actual decisions of the courts, to have been settled in the affirmative. Of course this general practice and these decisions, with relation to the other members of the executive department, do not necessarily control with reference to the governor, for there is some room, under sections 1 and 3 of article 1 of the Constitution above quoted, for a distinction to be made between the acts of the governor and the acts of the other members of the executive department; for while the executive department consists of the governor, lieutenant-governor, secretary of State, auditor, treasurer, attorney-general, and superintendent of public instruction, yet the governor is the supreme head thereof.

In the other States there is a great conflict of authority as to whether any of the acts of the governor may be subject to judicial control or not. Upon the affirmative of this question the following, among other cases, are cited: *Railroad Co. v. Moore* (Mandamus), 36 Ala. 371; *Middleton v. Low* (Mandamus), 30 Cal. 596; *Harpending v. Haight* (Mandamus), 39 id. 189; *Governor v. Nelson* (Mandamus), 6 Ind. 496; *Baker v. Kirk* (Mandamus), 83 id. 517; *Gray v. State* (Mandamus), 72 id. 567; *MaGruder v. Swann* (Mandamus), 25 Md. 173; *Groome v. Gwinn* (Mandamus), 43 id. 572; *Chamberlain v. Sibley* (Mandamus), 4 Minn. 309 (Gil. 228); *Chumaseo v. Potts* (Mandamus), 2 Mon. 242; *Wall v. Blasdel* (Mandamus), 4 Nev. 241; *Cotton v. Ellis* (Mandamus), 7 Jones (N. C.), 545; *State v. Chase* (Mandamus), 5 Ohio St. 528.

A vast number of cases might be cited where the courts have held that the official acts of the members of the executive department other than the governor may be controlled by judicial determination. Upon the negative of the above question the following cases are cited: *Hawkins v. Governor* (Mandamus), 1 Ark. 570; *State v. Drew* (Mandamus), 17 Fla. 67; *Low v. Towns* (Mandamus), 8 Ga. 300; *People v. Bissell* (Mandamus), 19 Ill. 229; *People v. Yates* (Mandamus), 40 id. 126; *People v. Cullom* (Mandamus), 100 id. 472; *State v. Warmouth* (Mandamus), 23 La. Ann. 1; *Dennet v. Governor* (Mandamus), 32 Me. 508; *People v. Governor* (Mandamus), 29 Mich. 320; *Rice v. Austin* (Mandamus), 19 Minn. 103 (Gil. 74); *Railroad Co. v. De Graff* (Mandamus), 27 Minn. 1; *Railroad Co. v. Lowry* (Mandamus), 61 Miss. 102; *State v. Governor* (Mandamus), 39 Mo. 389; *State v. Governor* (Mandamus), 25 N. J. Law, 331; *Hartranft's Appeal* (Contempt), 85 Penn. St. 433; *Mauran v. Smith* (Mandamus), 8 R. I. 192; *Turnpike Co. v. Brown* (Mandamus), 8 Baxt. 490.

There are other cases cited which hold that none of the acts of any of the officers belonging to the executive department can be controlled by the courts, among which cases are the following: *People v. Hatch* (Mandamus), 33 Ill. 9; *State v. Deslonde* (Mandamus), 27 La. Ann. 71; *State v. Dike* (Mandamus), 20 Minn. 363 (Gil. 314); *State v. Whitcomb* (Mandamus), 23 Minn. 506; *Secombe v. Kittelson* (Injunction), 20 id. 555; *Railroad Co. v. Randolph* (Mandamus), 24 Tex. 317; *Bledsoe v. Railroad Co.* (Mandamus), 40 id. 557; *Railway Co. v. Gross* (Mandamus), 47 id. 423; *Chalk v. Darden* (Mandamus), id. 438.

The principal ground upon which these last-cited cases were decided is that the officers against whom the court was asked to entertain jurisdiction were members of the executive department, the same as the governor, though not at the head as he is, and

therefore that as the acts of the governor, in their opinion, could not be controlled by the courts because he is a member of the executive department, neither can the acts of any other officer of the executive department be so controlled. This same kind of reasoning however is used by the Supreme Court of California to prove that the acts of the governor in some instances may be controlled by the courts. *Harpending v. Haight*, 39 Cal. 189. In this case it is said in substance that if it be conceded that the governor, because he is the chief of the executive department, may for that reason be allowed to enjoy an absolute immunity from all judicial process, even when his duty in the given instance is only ministerial, and in a case where a citizen has a vested right to have such duty performed, then the same exemption from judicial process may be set up by any one of the other officers of the executive department. But it is held in that case that the other members of the executive department could not effectively interpose any such exemption, and therefore that the governor could not. It would therefore seem from two classes of decisions that the courts must hold, either that the courts may control some of the official acts of all the members of the executive department, including the governor, or that they cannot control any of the official acts of any one of such officers. In this State it has already been held that some of the official acts of some of the members of the executive department may be controlled by the courts, and therefore if the above reasoning is sound, it would follow that some of the official acts of the governor might also be controlled by the courts. It would be proper here to say that no court ever attempts, by either injunction or mandamus, or by any other action or proceeding, to control legislative, judicial, executive or political discretion; and never indeed attempts to control any pure legislative, judicial or executive act of any kind, nor pure discretion of any kind, except when a superior court, on appeal, reviews a decision of an inferior court; and courts generally do not interfere by injunction or mandamus where another plain and adequate remedy exists. The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature strictly ministerial, and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Hence many of the above-cited cases, wherein it is said that the acts of executive officers of the State could not, in the particular instance under consideration, be controlled by the courts, are not in conflict with those decisions which hold otherwise; for many of such cases were decided upon the theory that the court was asked to control executive or political action, or discretion of some kind. If we should deduct all the cases decided upon the theory that the court was asked to control executive, political, or discretionary action, and not consider any of the dicta of such cases, and thereby leave only such cases as necessary included a decision (not dictum), and decided that the courts could not in any case control any act to be performed by the governor, the weight of judicial authority would probably be that the courts may control any mere ministerial act to be performed by the governor.

The decisions holding that the courts cannot control any of the acts of the governor are based upon many different kinds of reasons. Some of such decisions, like the one in the case of *Hawkins v. Governor*, 1 Ark. 570, and the one in the case of *State v. Governor*, 25 N. J. Law, 331, are based upon the theory that all

duties imposed upon the governor by the Constitution are strictly and exclusively executive and political, and not ministerial, and therefore that the courts cannot interfere with the performance or non-performance by the governor of such duties.

There are other decisions, like the one in the case of *Turnpike Co. v. Brown*, 8 Baxt. 406, and the one in the case of *State v. Drew*, 17 Fla. 67, which extend this principle, and hold that all duties imposed upon the governor by either the Constitution or the statutes must necessarily be executive or political, and not merely ministerial, and this upon the theory that the mere act of conferring duties upon the governor, whatever their inherent natures or essences may be, renders them executive or political. It is said that when they are conferred upon the governor instead of upon some inferior officer, they are so conferred, because in the opinion of the law-making power, founded presumptively upon sufficient reasons, the duties themselves, properly and peculiarly, if not necessarily, belong to the executive department, and that they are conferred upon the governor because of his superior judgment, discretion, sense of responsibility and fitness; and therefore it is claimed that these duties must necessarily be executive or political, and not merely ministerial, whatever they may be in their inherent and essential characteristics. If this were true when the duties are conferred upon the chief of the executive department, why would it not also be true when such duties are conferred upon any other member of the executive department? Is not any particular power substantially the same wherever it may be placed? Judicial power in the hands of a justice of the peace is substantially the same as it is when placed in the hands of a Supreme Court. It may be admitted however that with respect to some duties, and even with respect to some ministerial duties, a transformation might take place if such duties were transferred from an inferior officer and placed in the hands of the highest executive officer; for some ministerial duties embody within their confines slight elements of judgment and discretion; but can this be true with respect to all ministerial duties? Suppose that such duties in their very natures and essences are nothing more than the purest of ministerial duties, with no elements of judgment or discretion in them, and not in any manner connected with any legislative, judicial, or executive duty, and are such duties only as could be conferred upon any other citizen of the State of Kansas; then why should they be considered as being transformed into executive or political duties by being conferred upon the governor? Would they not still be ministerial duties? The conferring of pure ministerial duties, like the above mentioned, upon the courts or the judges of courts, never transforms them into judicial duties; and although *mandamus* will not lie to review or control judicial determination or discretion, yet it will lie to control any pure ministerial act of the courts or the judges thereof. *Duffitt v. Croeter*, 80 Kans. 160; High Extr. Rem., § 280 et seq.

Many years ago Chief Justice Marshall, in the case of *Marbury v. Madison*, 1 Cranch, 137, said: "It is not by the office of the person to whom the writ is directed but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined." And such is the rule in all cases, unless the courts are required to make an exception in favor of the governor. In all other cases it is not the rank or character of the individual officer, but the nature of the thing to be done, which governs. No other officer is above the law, and every other officer, to whatever department he may belong, may be compelled to perform a pure ministerial duty. The objection oftentimes urged against the courts' exercising control over

any of the acts of the governor is that the three departments of government, the legislative, the judicial and the executive, are separate and distinct, and that each is equal to, co-ordinate with, and wholly independent of the other.

Now it is true, with some exceptions, that the Legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other or independent of each other, or that one of them may not in some instances control one of the others. The most of the jurisdiction possessed by the courts depends entirely upon the acts of the Legislature, and the entire procedure of the courts, civil and criminal, is prescribed by the Legislature. Nearly all the duties of the governor are imposed upon him by the Legislature. The Legislature may also impeach the governor or any other State or judicial officer mentioned in the Constitution. The courts may construe all the acts of the Legislature, whether such acts have been signed by the governor or not, and may determine whether they are in contravention of the Constitution or not, and if believed to be in contravention of the Constitution, may hold them void. The courts may also determine that a supposed member of the Legislature is not a member at all, because he represents no district; and may also determine that the Legislature cannot consist of more than a certain number of members. *Prouty v. Sloer*, 11 Kans. 235; *State v. Tomlinson*, 20 id. 692; *State v. Francis*, 26 id. 724. The courts may also pass upon the validity of the acts of the governor. *State v. Ford Co.*, 12 Kans. 441. It is also believed that the courts have the power to require the governor to attend a trial as a witness, and if so, then have they not the further power to imprison him for contempt if he disobeys? And if so, would not the courts then interfere with his ability to perform his executive duties? In such a case the State might have to rely upon the lieutenant-governor. No act of the Legislature can become a law unless it is presented to the governor for his signature and approval. The governor may also convene the Legislature whenever he chooses. Also the Legislature and the courts are able to perform their respective duties unmolested, because of the known power of the governor to call out the militia to aid and protect them in doing so, if necessary. It will be seen from the foregoing that the different departments of the government are not independent of each other. The power last mentioned however is also invoked as an argument against the courts' attempting to control any act or acts of the governor. It is said that if the governor opposes the order or judgment of the court, it cannot be enforced; for it is said that he has the entire control of the militia. But are the courts to anticipate that the governor may not perform his duties? Should not the courts rather presume, that when a controversy is determined by the courts—the only tribunals authorized by the Constitution or the statutes to construe the laws, and to determine controversies by way of judicial determination—the governor, as the chief executive officer of the State, would see that such determination would be carried into full effect? Such would be his duty, and no one should suppose that he would fail to perform his duty, when his duty is made manifest by a judicial determination of the courts. No department should ever cease to perform its functions for fear that some other department might render its acts nugatory, or for fear that its acts might in some manner affect the conduct or status of some other department. Each department ought to do what is right within its own sphere, and presume that the other departments



would do the same. The Legislature is not bound to refrain from passing laws affecting the duties of the executive department, whether the governor approves them or not. The Legislature may pass laws over the governor's veto, and this for the government of the executive department, and the Legislature is not bound to anticipate that the governor might refuse to enforce such laws. Each department should scrupulously perform the duties peculiarly intrusted to its own department, without reference to how the same might affect the other departments. Besides if this argument from the governor's control of the militia were carried to its full extent, it would prevent any court from ever issuing any subpoena, or any other writ or process, to the governor, or from ever arresting him, or ordering his arrest for any assault and battery, or for any thing else, because the governor might in any such case refuse to obey the writ or the order of the court, and might call on the militia to assist him in his resistance.

Perhaps we should say something further with respect to the claim that the three great branches of the government, the legislative, the judicial and the executive, are co-equal and co-ordinate, and that one cannot control or direct the others. This may be true to some extent, and yet as we have already seen, it is not true in many cases. For the purpose of passing laws the Legislature is supreme, and the other departments must obey. For the purpose of construing the laws, and of determining controversies, the courts are supreme, and the other departments must obey. And for the purpose of ultimately enforcing the laws the executive department is supreme, and the other departments must obey. But the executive department can enforce the statutory laws only as the Legislature has enacted them, and where the courts have construed the laws (statutory or constitutional), in the determination of controversies, the executive department can enforce them only as thus construed, and is bound to see that the laws as thus construed, and the judgments and orders the courts rendered or made in the determination of controversies are respected and obeyed. And will not the executive department do it? Will it refuse in any instance? It will thus be seen that while each of the different departments of the government is superior to the others in some respects, yet that each is inferior to the others in other respects, and it is always difficult to compare things which are wholly unlike each other or to call them equal. Each department in its own sphere is supreme. But each outside of its own sphere is weak and must obey. It will be readily admitted that the courts cannot control any executive acts of the governor, or any executive power conferred upon him. But may they not control ministerial power wherever placed? Is not ministerial power always inferior to judicial power, and subject to judicial control? The recipient of ministerial power exercises no judgment, no discretion, but is simply bound to obey the law under a given state of facts, and to construe this law, and to ascertain these facts, are peculiarly within the province of the courts. If an applicant for relief on the ground of the refusal to exercise, or the wrongful exercise of ministerial power by the governor, has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer, for injuries or loss in person or to his property.

In the case of *Marbury v. Madison*, 1 Cranch, 137, Chief Justice Marshall uses the following language: "The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws whenever he receives an injury. One

of the first duties of government is to afford that protection." And further on in the same case (page 61), after stating that the courts cannot control executive discretion, the great chief justice uses the following language: "But when the Legislature proceeds to impose on that officer (the secretary of State of the United States) other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts—he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

In the case of *Railroad Co. v. Moore*, 36 Ala. 382, the following language is used: "All this is but the result of the just and wholesome principle that no public functionary, whatever his official rank, is above the law, or will be permitted to violate its express command with impunity. While therefore it is true that in regard to many of the duties which belong to his office, the governor has from the very nature of his authority a discretion which the courts cannot control, yet in reference to mere ministerial duties imposed upon him by statute, which might have been devolved on another officer if the Legislature had seen fit, and on the performance of which some specific private right depends, he may be made amenable to the compulsory process of the proper court by *mandamus*."

In the case of *Ferguson v. Earl of Kinnoull*, 9 Clark & F. 200, Lord Brougham used the following language: "But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, everybody, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey." Of course we should always presume that the governor intends to do his duty, but he may be mistaken as to the law, or he may not be sufficiently advised as to the facts upon which the applicant for relief found, his rights thereto, and there is no way prescribed by law by which issues can be made up and tried before the governor, as issues are made up and tried before the courts. The courts are created for the express purpose of trying controversies, while the other departments and ministerial officers are not. It is also claimed that if the courts may control the ministerial acts of the governor, and may also determine which are ministerial acts and which not, then that the courts may determine every thing, and obtain complete control over the entire executive department, including the governor. It must be remembered however that all controversies must be determined somewhere, and that the courts are the only tribunals created by the Constitution and the laws for the special purpose of construing the Constitution and the laws, and of determining controversies between parties; and the power to determine whether a given power is a purely ministerial power or not, and whether an applicant for relief in any particular case has a right to such relief, under the law creating such power, or not, comes peculiarly within the province of the courts. And a determination in such a case is purely judicial, and is one of the things for which courts were created, and they could not refuse their aid in such cases without so far wholly abandoning their duties and abdicating their jurisdiction. As to the question whether the courts may control the ministerial acts of the governor, many of the cases cited for the purpose of showing that they cannot are not applicable, for no such question was involved in the facts of such cases. For instance: In the case of *Railroad Co. v. Lowry*, 61 Miss. 102, a writ of *mandamus* was prayed for only as against the State treasurer, and no relief of any kind was sought as against the governor.

In the case of *Low v. Towns*, 8 Ga. 372, the following

language is used: "If as has already been remarked, it was competent for the Legislature to impose this ministerial duty, of issuing a commission to a clerk, on the executive officer of the government, wholly independent of, and in addition to the other functions devolved upon that officer by the Constitution, why may he not, when the performance of this ministerial act, so required by law, is essential to the completion and enjoyment of individual rights, be considered, *quoad hoc*, not as an executive, but as a merely ministerial officer, and therefore liable to be directed and compelled to perform the act by *mandamus*? Viewed as strictly a legal question, we cannot offer any satisfactory reason why he should not, according to the general principles of the law." The writ of *mandamus* asked for in that case was refused because of the want of the necessary facts to entitle the relator to it.

In the case of *Sutherland v. Governor*, 29 Mich. 320, 322, 324, an application was made for a writ of *mandamus* to compel the governor to issue a certain certificate when he should be satisfied that certain work had been done in conformity with the law. In that case the following language is used in the opinion of the court: "If we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion, the present is certainly not among them, for here by the law he is required to judge on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer or department."

In the case of *Hartranft's Appeal*, 85 Penn. St. 433, it was sought to compel the governor to disclose State secrets belonging only to the political department of the government.

In the case of *State v. Governor*, 25 N. J. Law, 331, 343, 344, 348, a writ of *mandamus* was asked for to compel the governor to issue a commission, to the relator, but there was no showing made that the relator had ever demanded such commission, or that the governor had ever refused the same, and the court held "that the applicant, upon the facts disclosed, is not entitled to the relief sought for," and also held that the court was "asked to direct the commission to be issued in direct conflict with the plain requirements of the act," which of course could not be done.

In the case of *Mauran v. Smith*, 8 R. I. 192, 222, it was rightly held that whether the court had jurisdiction over any act of the governor or not, still that upon the facts of that case, the relator was not entitled to the relief sought.

These cases are given merely as illustrations of the inapplicability of many of the cases cited to show the courts have no jurisdiction to control a ministerial act to be performed by the governor. On the other side, what is said in the case of *Chamberlain v. Sibley*, 4 Minn. 309 (Gil. 228), as to the power of the courts to control ministerial acts of the governor, is only *dictum*. Upon the whole however if all the cases cited, except such as necessarily included the question whether the courts may in any case control the ministerial acts of the governor, be excluded, and if only such cases as include the above question be considered, then not only reason, but the weight of authority, we think, will be found in favor of the affirmative of the question. And certainly, as to all the executive officers, except the governor, the great weight of authority, State and Federal, is in favor of the theory that ministerial acts to be performed by an executive officer may be controlled by the judiciary. If we are correct in our conclusions, then we have jurisdiction to hear and determine the present case upon its merits. We have jurisdiction to determine whether the acts of the governor sought to be controlled in the present instance are ministerial acts, or acts of some

other kind or character, and we have jurisdiction to determine whether the facts of the present case authorize the relief sought.

We are really however considering two cases. The first presents to us the question whether the judge of the District Court at chambers erred or not in granting a preliminary or temporary injunction, an injunction *pendente lite*. The other case is *mandamus*, brought originally in this court, and it is submitted to us upon a motion to quash the alternative writ, and the question presented is whether the alternative writ states facts sufficient to constitute a cause of action in *mandamus*, and within the jurisdiction of this court. It will therefore be seen, that after deciding that we have jurisdiction of such cases, any further decision in either case will only be a decision of a preliminary or interlocutory character. After deciding that we have jurisdiction, then the remaining questions to be determined are whether the acts of the governor, in the organization of new counties, are ministerial or not, and whether the facts stated in either case are sufficient to authorize the relief sought.

In the case of *State v. Commissioners*, 12 Kans. 441, 445, decided at the January term of this court in 1874, it was held that the acts of the governor in the organization of new counties, under the statutes as they then existed, were ministerial. Since that time the statutes have been materially changed in several particulars. The following provisions are new, and they are now in force: "Sec. 3. That whenever the governor may have any reason to believe that said memorial, affidavits in the census enumeration or petition, or any of the proceedings required in section one of this act, are incorrect, fraudulent or untrue, he is authorized and required to delay, or refuse to issue his proclamation, and to institute an investigation by sending three disinterested householders of this State into such unorganized county, to ascertain the truth or falsity of such petition, memorial, census or affidavits, and to order the attorney-general to commence proceedings in the name of the State against any person or persons who may be guilty of violating any of the provisions of this act, or of any and all persons who may conspire together to fraudulently organize any county under this act." Laws 1876, chap. 63, § 3; Comp. Laws, 1885, par. 1402. "The census taker shall register upon said duplicate schedules, opposite the name of each legal voter, his election for temporary location of county-seat, which shall be taken by the governor as the definite expression of said voter, unless there shall be evidence before him that said list has been tampered with and changed." Laws 1887, chap. 128, § 1.

Now while many of the duties imposed upon the governor in the organization of new counties, and possibly all of them except certain ones prescribed by the new provisions above quoted, are still ministerial, yet some of those duties prescribed by the new provisions are certainly not ministerial. Some of them relate to the investigation of supposed frauds, and precisely that kind of frauds which we are now asked to investigate in the injunction case, and clearly such duties are not ministerial. Hence as some of the duties imposed upon the governor in the organization of new counties are ministerial, and some of them not, and as the courts will not by *mandamus* or injunction control any of the acts of the officers except such as are purely ministerial, and will not control even those when any other plain or adequate remedy exists, it follows that it must be shown clearly and conclusively in the particular case, that the acts of the governor sought to be controlled are not only pure ministerial acts, but also that no other plain and adequate remedy exists. Also as we have already stated, all

presumptions are in favor of the good faith and honesty of the governor. It will not only be presumed that he has in the past performed honestly and faithfully all his duties, but it will also be presumed that he will in the future honestly and faithfully perform the same; and these presumptions will continue until it is clearly, conclusively and affirmatively shown otherwise; and in favor of the chief executive officer of the State, these presumptions should be considered as of the strongest character; indeed, much stronger than any kindred presumptions in favor of inferior officers. These new provisions will not only affect the action of the governor in many cases, but may also affect the action of the courts in particular cases. Whenever in the organization of new counties the governor delays to act upon the return or report of the census taker, it must be presumed that some complaint or notice of fraud or illegality has been brought to the attention of the governor, and that he delays action for the purpose that an investigation may be had; and that the courts should not, by *mandamus* or otherwise, require the governor to act until it is affirmatively alleged and shown that no sufficient reason exists for such delay. No allegation of this kind is to be found in the alternative writ of *mandamus* in the present *mandamus* case, and hence the alternative writ is defective and insufficient. Also when the governor is about to act upon the return or report of the census taker, it must be presumed that no complaint or notice of fraud, or other illegality worthy of attention, has been brought to the attention of the governor; and before the courts should attempt the governor from acting upon such return or report it should be affirmatively alleged and shown that a complaint of fraud or other illegality worthy of notice had been actually brought to the attention of the governor, and that he then disregarded and ignored such complaint. Also as a general rule, all persons in cases of fraud or other illegality, in the organization of new counties, have a plain and adequate remedy by resorting to the investigation provided for in said section 3, above quoted. If complaints of fraud or illegality have been made, an investigation may be had at once under that section, and in the investigation that ensues all parties have a plain and adequate remedy.

In the present *mandamus* case no allegation is made that no complaints of fraud or illegality were brought to the attention of the governor, or that the governor is not delaying for the purpose that an investigation may be had; hence for this reason the alternative writ is insufficient. In the injunction case no allegation is made that any fraud or illegality or even irregularity of any kind has ever been brought to the attention of the governor, or that he would fail to regard the same if it were brought to his attention; hence the petition for the injunction is insufficient for that reason. If the fraud and other irregularities alleged in the petition in the injunction case had been brought to the attention of the governor, and he had been asked to inaugurate an investigation of the same under said section 3, he would undoubtedly have done so. At least it must be so presumed in the absence of allegations and proof to the contrary. Before parties can resort to the courts for a *mandamus* of an injunction they must exhaust their other remedies, provided their other remedies are plain and adequate. This the plaintiffs, in the two cases which we are now considering, have failed to do. They have wholly ignored a plain and adequate remedy.

The motion to quash the alternative writ of *mandamus* will be sustained, and the order of the judge of the court below, granting a temporary injunction, will be reversed.

All the justices concurring.

## NEW YORK COURT OF APPEALS ABSTRACT.

**CONVERSION — PLEADING — ANSWER — PARTIAL DEFENSES.**—Where, in an action for damages for conversion of a note and mortgage, defendant pleaded that they were barred by limitation, without stating that the facts were relied on merely as a partial defense, or in mitigation of damages, as required by the Code of Civil Procedure of New York, § 508, the court must assume that they were intended as a complete defense. *Matthews v. Beach*, 58 *Sandf.* 256; 38 *N. Y.* 173. Applying that test, the answer is insufficient. It merely affects the amount of damages to be recovered, by tending to reduce the value of the securities converted. It confesses but does not avoid. It admits the cause of action and questions only its extent and amount, and is not a bar to a recovery. It is bad therefore as a defense, and the Special Term was right in so holding. It is not denied that the facts alleged if admissible at all, may nevertheless be put in evidence for the purpose of affecting or reducing the value of the securities. *Booth v. Powers*, 56 *N. Y.* 22. So far as the question of pleading is concerned, they are admissible under the denial of the answer. The plaintiff must prove the value of the articles converted as the basis of his recovery, and what he may prove, the defendants, denying, may disprove. The plaintiff averred the value of the note to be \$300 and the accrued interest at twelve per cent. The defendants deny that allegation and aver that the same had no value, and also deny the alleged conversion. While the allegations of value and no value may perhaps not make a technical issue, because needless, yet under the denial of the answer, which puts in issue plaintiff's whole cause of action, the defendants have a right to prove any facts which affect the value of the securities and possibly to an amount which would reduce the recovery to merely nominal damages; and so, as a question of pleading, and although the seventh defense be stricken out, may prove the law of Kansas, and show the difficulty and uncertainty of collection. *Knapp v. Roche*, 94 *N. Y.* 333. So much the plaintiff concedes. Precisely what useful purpose was served by interposing this demurrer it is therefore difficult to see; but the question is raised and must be correctly decided. The argument of the General Term appears to be that the facts pleaded might induce the jury to find that the securities converted were absolutely valueless, and so the defense becomes a complete one. It would be more correct to say that the damages would become merely nominal, although the conversion would remain and the wrong itself be undefended. An answer does not bar a cause of action, and so constitute a defense, when it affects merely the measure of damages. April 24, 1888. *Thompson v. Halbert*. Opinion by Finch, J.

**CRIMINAL LAW — EVIDENCE — CONFESSIONS — MURDER — SUFFICIENCY OF EVIDENCE — PREMEDITATION — VAGRANCY — EVIDENCE — OPINION — MICROSCOPICAL OBSERVATION.**—(1) A confession made to an officer in charge of defendant, who accused him of a crime and persuaded him that there was sufficient evidence to convict, and that if he confessed he might possibly escape with a lighter punishment, is admissible under the Code of Criminal Procedure of New York, § 395, providing that a confession may be given in evidence "unless made under the influence of fear, produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor;" (2) The finding of the dead body of a person murdered, with the unmistakable marks of a murder committed, is sufficient additional proof to warrant the conviction of a defendant on his own confession under the Code of Criminal Procedure of New York, § 395, providing that the confession of a defend-

ant shall not be sufficient to warrant his conviction "without additional proof that the crime charged has been committed." (3) Where one in the heat of passion strikes another, and supposing the blow to have been fatal, proceeds to conceal the body, but the person struck revives and is then deliberately strangled for the purpose of escape and concealment, such facts show a "deliberate and premeditated design," sufficient to warrant a conviction for murder in the first degree. (4) Where one on trial for murder comes within the description of the Acts of New York, 1885, chap. 490, § 2, which defines as tramps "persons who rove about from place to place, begging, and all vagrants living without visible means of support, who stroll over the country without lawful occasion," there being no dispute as to the facts, it is no error for the court to say that he is a tramp, although the offense was committed within a month after he became sixteen years of age, and such act excepts from its application persons under sixteen years of age. (5) Under the Acts of New York, 1885, chap. 490, § 4, providing that "any tramp who shall enter any building against the will of any owner or occupant thereof, under such circumstances as shall not amount to burglary, \* \* \* or shall threaten to do any injury to any person or to the real or personal property of another when such offense is not now punishable by imprisonment in the State prison, shall be deemed guilty of felony," where it appears on a trial for murder that defendant entered a house without permission or invitation from the occupant, and when ordered to depart, remained against the consent of such occupant, barring her exit from the house, and laying his hand upon her shoulder, and seizing her by the arm, the jury are warranted in finding that there was a threatened personal injury, and that defendant was engaged in the commission of a felony when the homicide was committed. (6) One not an expert may be permitted to testify as to whether or not a stain which he has examined under the microscope is blood, there being no attempt to distinguish between human blood and that of an animal. *People v. Gonzalez*, 35 N. Y. 61; *Greenfield v. People*, 85 id. 82. The first of these cases discusses the question fully and establishes the rule. That the observation of the witnesses was aided by a microscope only strengthened the minuteness and care of their observation. If the effort had been to distinguish between human blood and that of some animal the question would have been one of science, and have required the application of very great skill and knowledge. May 4, 1888. *People v. Deacons*. Opinion by Finch, J.

#### UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW.—IMPOSING LIABILITY OF RAILROAD FOR INJURIES TO SERVANT.—An act of Kansas, 1874, providing that every railroad company shall be liable to its employees for all damages occasioned by the negligence of its agents or by any mismanagement of its engineers or other employees, does not deprive a company of its property without due process of law, nor deny it equal protection of the laws, and is not in conflict with the Federal Constitution. The liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the State may not prescribe liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is

found in the statute books of every State. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1864 is presented to us in this case, is whether it is in conflict with clauses of the fourteenth amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow-servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the Legislature we have no doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the object sought to be obtained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers are instances of this kind. Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara Co. v. Railroad Co.*, 118 U. S. 384; *Milling Co. v. Pennsylvania*, ante, 737. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are

without distinction made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufacturing. See *Railway Co. v. Humes*, 115 U. S. 512, 523; *Barbier v. Connolly*, 113 id. 27; *Soon Hing v. Crowley*, 113 id. 703. April 23, 1888. *Missouri Pac. Ry. Co. v. Mackey*. Opinion by Field, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CARRIERS—LIABILITY FOR LOSS OF BAGGAGE—JEWELRY—KNOWLEDGE OF AGENT.**—Where, in an action against a railroad company to recover the value of a trunk and contents, which were stolen from the company, it was shown that it was the trunk of a jewelry salesman, containing his stock in trade; that the agent who checked it knew of the fact; and that plaintiff made no effort at concealment; held, the company was liable as for loss of ordinary baggage. *Railroad Co. v. Fraloff*, 100 U. S. 27. U. S. Cir. Ct., W. D. Miss., Jan. 16, 1888. *Jacobs v. Tutt*. Opinion by Thayer, J.

**CHARITIES—UNCERTAINTY IN BEQUEST.**—A testator bequeathed a portion of his estate "to the poor of the city of Green Bay." There were no city paupers nor a poor fund in the city of Green Bay at the time of the testator's death. Held, that the bequest was void for uncertainty. We may now apply intelligently these principles to this bequest: (1) According to authority the legal effect of this bequest was to vest in the "poor of the city of Green Bay" at the death of the testator. Here is the first uncertainty, for it is very questionable whether the testator so intended. The first year after the death of the testator, in which this fund if possible should have been enjoyed by the poor of Green Bay, has long since passed. Who were the poor entitled to this charity at the death of the testator? Who shall determine? It may be that they are poor no longer and do not need it. (2) Several classes of poor persons may come within the definition and meaning of the language. It may mean that class of the poor known as "paupers." Mr. Webster defines the word "pauper" as "a poor person, especially one so indigent as to depend on charity for maintenance, or one supported by some public provision." He defines the word "poor" as "destitute of property; wanting in material riches or goods; needy; indigent; necessitous, denoting extreme want." "It is applied to persons who are not entirely destitute of property, but who are not rich." (In law:) "So completely destitute of property as to be entitled to maintenance from the public." Bouvier defines "pauper" as "one so poor that he must be supported at public expense." The words "pauper" and "poor" have nearly the same meaning, and they both embrace several classes. Did the testator intend that this fund should go directly to such poor persons of the city of Green Bay as were provided for already by the county of Brown, and in addition to such public support? If so, would it in such a case be a charitable bequest? If it was intended to relieve the county of that burden, either wholly or partially, would it not be still less a charity? And yet the testator may have so intended. Who shall say? But besides this class of the poor, who are actually supported by the public according to law, there are most probably a very large number of equally poor persons who never applied for such support and suffer great destitution rather than do so, through pride or shame or other natural feeling. Was not this the worthy, deserving class of poor intended to take this bequest, either exclusively or with those

already supported by the poor fund? There was another class not supported by the county, but relieved from time to time by private charity. One of the above definitions of the poor is "persons who are not entirely destitute of property, but who are not rich; such as a poor man or woman; poor people." There may yet be another class who may well be called poor. They have barely an absolutely necessary support, but nothing beyond it. They never have any of the common comforts of life. They are truly objects of charity, and yet cannot apply for public support. All these several and various classes may come within the terms of the will. It is impossible for the court to determine to which of these classes, or whether to all of them, the testator intended his bequest should go. It is a vested bequest, and the will appoints no trustee or almoner to distribute his bounty or determine the persons entitled to it. The uncertainty and utter vagueness of this bequest is apparent. Of the two strongest cases cited by the learned counsel for the appellant he says in his brief: "The court in *Howard v. Peace Soc.*, 49 Me. 286, and in *Heuser v. Harris*, 42 Ill. 436, uphold bequests of this nature, where no trustees were appointed by the will, yet they came to opposite conclusions as to where the fund should go—whether to those receiving aid or to the poor generally." This is an admission of the utter uncertainty of the will in this respect. The court of course could not agree upon the question, for there is no certain criterion upon which an opinion could be founded. The many cases cited in the cases in this court, above referred to, need not be repeated here, or any re-examination of them made. It is sufficient that the case of *Heiss v. Murphey*, *supra*, decides this case also. Wis. Sup. Ct., Jan. 31, 1888. *In re Hoffen's Estate*. Opinion by Orton, J.

**INSURANCE—CONDITION—RESISTANCE TO LAWFUL AUTHORITY.**—A clause in a fire insurance policy providing that the company shall not be liable for "damage by fire which shall happen or arise \* \* \* by any person or persons engaged or concerned in notorious resistance to the authority of magistrates, or to any other lawful authority" following other clauses relieving the company from liability when the fire shall happen by invasion, foreign enemy, insurrection or civil commotion, does not free the company from liability for a fire caused by four or five convicts while attempting to escape from prison, an attempt easily quelled by the guards, although exaggerated accounts of the matter caused great excitement in the neighborhood, as the notorious resistance to authority mentioned in the policy, construed in connection with the other clauses, refers to acts engaged in by many persons, and widely known at the time, and not to those of a few persons, the results of which become notorious. We are not aware of, and counsel, with their uniform diligence, have been unable to discover any case in which a clause has been construed and applied which exempts the insurers from loss "by fire which shall happen or arise \* \* \* by any person or persons in notorious resistance to the authority of magistrates, or to any other lawful authority." This clause is a part of the printed portion of the policy, and it is clear it was not specially designed for this particular policy, but for general use, and it is in this light we must understand and treat it. The term "magistrates" is evidently used in the general sense of a public civil officer. When these four or five convicts went to the lower room, and there, by their actions and threats, put the guard or time-keeper and foreman in their power, they were in resistance to lawful authority of the prison, and it may be conceded to "lawful authority" within the meaning of the policy. But this is not enough to relieve the insurers; the fire must happen by a person or persons in notori-

ous resistance of the constituted authorities. It cannot be that the notoriety indicated means that which arises and flows from the results alone of the incendiary act. Should a person resist the efforts of an officer to arrest him, and in doing so set fire to a building, and thereby destroy the same and one or more human beings, and the whole affair, by reason of the enormity of the consequences, becomes a matter well known, it could not be fairly said that the insurers, undersuch a clause, would be relieved from the payment of the loss. Such a construction would make the notoriety which follows as an incident the criterion, whereas the policy clearly means that there is existing and going on a notorious resistance to the authorities. The evidence of the organization of a company of men on the outside of the walls of the prison, as a prudential measure, is therefore of little or no consequence. But it is urged that the instruction is faulty in this: that it requires the resistance to be of too great a magnitude in point of seriousness and the number of persons engaged in it. Webster defines "notorious" as "generally known and talked of by the public; universally believed to be true; manifest to the world," etc. Thus we speak of one as a notorious thief. The word has a defined signification in describing that adverse possession upon which one may found a claim to land. The possession must be open, or visible and notorious. As said in *Armstrong v. Morrill*, 14 Wall. 145, "secret possession will not do as publicity and notoriety are necessary as evidence of notice, and to put those claiming an adverse interest upon inquiry." In these and like cases the idea of a number of persons engaged in the act is wanting, it is true. But this contract must be construed as a whole. As said in *Barton v. Insurance Co.*, 42 Mo. 158: "With respect to the rules of construction in policies of insurance, except in cases relating to warranties, it is the duty of the court to adopt the construction that in their judgment shall best correspond with the real intention of the parties." Again when a clause stands with others, its sense may be gathered from those which immediately precede and follow it. *Harper v. Insurance Co.*, 19 Mo. 506. The clause here in question is preceded by others which relieve the company from payment of the loss when the fire shall happen by any invasion, foreign enemy, insurrection, or civil commotion, lawful military power, usurped power, or by any person or persons engaged in a riot. The class notion prevailing in these cases is that there is an unusual and extraordinary state of affairs, a state of affairs in which, and for the time being, the usually constituted civil authorities are overpowered and inadequate to successfully contend with the existing emergency. All this is true in respect to the clause, "notorious resistance to lawful authority." It was never in the mind or contemplation of the insured or insurers that the company should be relieved from payment of the loss when the fire should happen during those occasions of resistance to the authorities which usually well regulated governments are at all times prepared to overcome, even though well or publicly known. Had such been intended different language would have been used. Such a construction would make the most trivial disobedience to the commands of an officer, if seen or heard by a multitude of people, a case of notorious resistance. The expression must be understood in a more general sense—the sense before stated. Mo. Sup. Ct., Feb. 6, 1888. *Straus v. Imperial Fire Ins. Co.* Opinion by Black, J.

#### OUR NEW YORK LETTER.

THE Spook trial is ended. The well-known partnership heretofore existing between Alcibades, Plato

and Michael Angelo has been dissolved by decree of the court. An accounting will take place before a Master in Chancery, who has established headquarters at the Island for that purpose. The verdict of the jury has caused a panic in the Spirito-Portrait business, with a likelihood of a corner in metaphysical ghosts. The probability is that the corner will be about eight by four with sundry bars of iron across and in front thereof, in which the great jobber in Spook options will be left entirely to reflection and the association with "the council of ten," if "the council" is disposed to still share the changed condition in which Ann O'Della will be found. This woman has cut a figure in the history of criminal enterprises of this city without precedent, and furnishes an example that should be instructive, and that certainly is interesting to those who will study it as an incident in the life of this great city. How a woman with her scanty intellectual equipment could have induced a lawyer of the standing of Luther R. Marsh to repose such perfect confidence in her monstrous pretensions is beyond the comprehension of the ordinary non-spirito citizen.

Quite an interesting paper has been recently read by my friend Dr. Matthew D. Field, a nephew of David Dudley Field, before the Medico-Legal Society, whose specialty, nervous diseases, brings him into the field of investigation where the followers of the Dies DeBar philosophy are found grazing very close to the mud of vulgar superstition. Dr. Field concludes that the man who can seriously believe that he talks with and greets the departed in a materialized form, thereby proves himself to be *non compos mentis*. It seems that it would not take an argument of the alienist to demonstrate this proposition. Occasionally we find an intellect whose outer walls are assailed and begin to totter, receiving as its first invader the "Spirito-Hungry Joe" idea. Judge Edmonds was another melancholy instance of surrender to these vulgar swindlers, and now comes the mortifying entanglement of Luther R. Marsh, who has always stood until now for every thing that was vigorous and progressive in intellectual development. It is to be noted that in all the instances where women prey upon the community through the instrumentality of some new fad like the mind cure, Christian healing or spiritualism, that they never forget that they are females and couple with their cunning all the effect that the conditions of sex can bring to bear upon the victim; in other words, when the intellect begins to weaken and has been conquered, the morals of the victim are almost sure to capitulate. It is to be hoped that the recent disinfection of this Dies DeBar rottenness may put a stop to the monstrous pretensions of numerous men and women making a good living by imposing upon the incredulity of their fellow men. The courts, both of this country and England, are coming to regard the claims of this class of swindlers as very empty and entitled to brief consideration. They have, like the notorious Howe, also a "female defendant," worked a certain Mrs. Lyon up to the belief that what the world needed, and what the female Howe needed particularly, was a settlement of a large sum of money which the deceased husband of the Lyoness had left. It will be remembered that the Lyoness acted responsive to the alleged wish of the deceased husband, and promptly settled upon the female Howe the bulk of her estate. When it was suggested to the Lyoness that the female Howe might possibly have worked a shrewd and cunning game at her expense, she growled her grievances into the ear of a British jury, and they promptly returned a verdict which caused the female jackal to surrender the bone that she had filched from its rightful owner.

Abraham has also had considerable difficulty explaining to the juries that have sat on his case under

the indictment for assault with intent to kill why his plea should not be disregarded. The loss to society of a life or to an individual of a fortune by the act of one claiming to act under supernatural influence can never be sustained, however profoundly the author may believe in the divine or other origin of the command under which the act was perpetrated. Of course I know that this *obiter* may be reversed or set aside by the Court of Appeal, or the "council of ten," but until information reaches me to that effect, I shall expect this dictum to stand as the law in connection with cases that are on all fours with the people against Abraham.

I was somewhat criticised for having ventured to refer to Mr. Dos Passos in a previous communication in a manner which was not considered kindly in its tone or just to that gentleman. It affords me pleasure at this time to bear witness to the shrewd lawyer-like manner in which Mr. Dos Passos directed the Diss DeBar case. The way in which he decimated the council of ten, took Diogenes by the throat and left Hannibal on the field deadlier than he ever was before, was a source of gratification to his friends and must have caused him to visibly throb with pride.

There is one lawyer in the district attorney's office of whom most agreeable things might have been spoken and good things are expected. He is Mr. McKenzie Semple, who has figured in the most recent important work of the office. He has practiced at the Chicago and the St. Louis bar, and now seems to have found his proper mooring with us here. His reputation in the cities where he has previously been known was of the highest. His ability is unquestioned and his integrity unassailable. If Mr. Semple could have been placed at the head of his department, there would not have been any complaint as to capacity or performance of duties.

The conditions necessary for success in this city are peculiar and distinctive. A man who has attained only moderate success in his profession in a provincial city or country town, even where the measure of success as compared with the possibility of the situation has been fair, can come to New York with what the street boy would call the "catch-on" quality, and make a great success in his profession. At the same time a well but unevenly-equipped lawyer may make a failure here by reason of the absence of this quality, *sine qua non*, go elsewhere and attain the greatest success possible in a provincial town. The most recent example of this kind recalled is Hon. Daniel Dougherty, who has sprung into almost immediate conspicuousness, although he had remained in the City of Brotherly Love so many years, to be sure the well-known, only and original proprietor of the silver tongue, but nevertheless not a conspicuously successful lawyer. Now it is entirely otherwise, although he demonstrated at the recent convention in St. Louis that the silver tongue was still doing business at the old stand.

There is probably no city in the world where a dishonest lawyer can keep afloat longer than in this city. The standard of professional integrity required does not seem as high as it should be, nor does our Bar Association or our General Term seem to insist upon a standard which should prevail in order to make the bar pure and high-toned. The arrest and conviction of Dunn, the attorney who was counsel for the thief who stole some \$80,000 from the Manhattan Bank last year, must have furnished an example of the extreme character of employment possible for the dishonest lawyer in this city. Here is an instance of a man retained soon after the theft of a large sum of money, and whose advice when the question of settlement with the bank comes up is against settlement, for the reason that a less sum of money can probably be

made to serve the purpose of the first one named. State's prison is the natural home of such a man. Our criminal bar is lamentably weak in great advocates with any pretense to personal character. One of the most prominent of them, I am informed, is a ticket-of-leave man. From personal experience I know he does not pay his personal debts, nor the counsel that he employs in other cities, as I happen to know in connection with a recent case. I believe there is an opportunity here for a young man of marked ability in that direction, who can bring into his practice good character and high professional instincts. I hope this will not lead all the young lawyers of St. Lawrence and Rensselaer counties to come down here, as there are several hundred coming in every year on the mistaken idea that each one is the particular one I have referred to. Most of our criminal lawyers in this city after a while seem to become tainted with the atmosphere of crime which they so persistently breathe; their associations become bad, their morals depraved, and loss of character follows, and collapse ends the story.

The Kerr trial was an opportunity furnished to Justice Patterson to demonstrate beyond peradventure that he is a judge of a kind a recent correspondent of yours said was very scarce in these parts. Those of us who have been before him in civil matters knew that he was careful, quick and accurate in applying the principles of commercial law, but the Kerr trial has demonstrated that he possesses the qualities which your correspondent believes will round him out as one of the great trial judges of the day. He is one of our judges who when off the bench does not forget that he was once one of us, and that he continues to be a gentleman after he gets to be a judge. Certain it is that he has come to be one of our most popular judges in the short time that he has sat on the bench. Henceforth it is probable that he and Judge Barrett will be the pair between whom honors will be easy in connection with criminal *nisi prius*.

The summer odor and languor now pervades our courts. "Over to the October term," is a most familiar phrase in every court-room. Judges and counsel alike begin to long for the breather by the sea or in the hills. The client is told that "the case is not likely to be reached before fall," growls, and when the echo of his growl has hardly died away, he is most likely to receive a line calling for a moderate refresher, for the lawyer must live and pay cash during the summer vacation in the same comfort and with the same regularity that should distinguish a member of our profession throughout the entire year.

DEMOT ENMOT.

#### PORTRAIT OF CHARLES O'CONOR PRESENTED TO THE STATE BAR ASSOCIATION.

THE recent presentation of a portrait of Charles O'Connor to the State Bar Association is a valuable and interesting addition to the many portraits of American jurists to be seen in its rooms. It is placed opposite the portrait of Nicholas Hill. There is a strong contrast in the features of these great lawyers, but there is no little resemblance in their characteristics and careers at the bar. Of both it may be said that "their learning was so diversified and extensive that it is difficult to determine in what branches of the profession they most excelled, and still more difficult to determine in what, if any, they were deficient." Their triumphs in the forum were equally great, and they never lost their love of their profession. Of them it may well be said, the lawyer was never lost in the politician. But perhaps



Mr. O'Connor was greatest as an advocate. In this sphere he had no superior, no equal. He was self-reliant and courageous. When a case took a sudden, unexpected turn, and defeat seemed inevitable, he often turned defeat into victory. "He seemed to speak, to stand seized of a case, *per mi et per tout*, in entirety. So that if it failed on one hypothesis, it yet survived and succeeded upon another. In capacity for rapid absorption of a case, arrangement of facts in their proper relations, and in the application of the law to the facts, he exhibited surpassing ability." This was exhibited in the trial of the Forest divorce case, which resulted in a triumph for him seldom equalled at the bar. On the argument of that case in the Court of Appeals Mr. O'Connor exhibited his surpassing ability in those contests of the bar in which purely legal questions are involved.

A single glance at his fine, shapely, magnificent development of head, as seen in his portrait, exhibits a rare and fortunate union of many of the highest intellectual and moral qualities.

In looking at Mr. Hill's portrait, he stands before us as he was in the past: not large in stature, but erect and graceful; and by the painter's art we see the noble head, fine classic nose, and, most effective of all, the dark, deep set eyes. And we can easily think how he appeared when before the Court of Appeals, compelling the attention and enlightening the minds of its learned and illustrious judges. His thoughts and sentences were alike simple, strong, used effectively and convincingly, not by delighting the imagination and exciting the fancy, but by the use of reason, logic and learning he carried conviction. He was ornate only on the strongest requirement.

Mr. Hill's voice added largely to the force of his language. It was distinct, clear and precise. Though his utterance was somewhat rapid, it was toned into clear emphasis, giving his arguments perfect finish and great force. He concentrated all his mental powers upon his profession. He held in utter contempt the platitudes, the association, the artful hollow pretensions and heartless devices so necessary for political success. He felt that the popularity of the politician is as doubtful as the winds; that one day he receives the loud plaudits of the multitude, and the next he is hurried to political crucifixion.

Mr. Hill's capacity for labor was unequalled. During the sessions of the Court of Appeals, he was constantly in his seat at its bar from the opening to the close of the term, concerned in nearly three-fourths of the causes on the calendar. He was often engaged in the argument of cases during the entire day, and at night retiring to his study to remain there until after midnight, apparently as unwearied when the last page was turned, the last precedent reviewed, the last note made, as when he began his labors in the morning. During vacation he was in his office during day, often remaining there far into the night. Thus he prepared those unequalled briefs, in many of which an immense number of cases were cited, thoroughly studied, laboriously and successfully analyzed.

What profitable examples of professional excellence are to be found in the study of the character and careers of men like O'Connor and Hill. Even their form and features, as preserved to us by the skill of the painter, have a salutary influence upon the members of the profession which their lives and careers so richly adorned.

The members of the New York State Bar Association are profoundly grateful to the distinguished donors of the elegant portrait of O'Connor, whose professional excellences they believe in no sense inferior to those of the great lawyers who are commemorated in Westminster Hall.

L. B. PROCTOR.

## CORRESPONDENCE.

### RELIEF FOR THE COURT OF APPEALS.

*Editor of the Albany Law Journal:*

Let me suggest a way out of the trouble in regard to the Court of Appeals.

Let the present remain the highest court; but create a court with five judges to hear only appeals relating to practice and all actions founded on contracts expressed or implied which do not involve more than \$10,000 or \$5,000.

Then all other appeals from General Terms would go to the present Court of Appeals.

It seems to me it would give a fair division of the business and never cause a conflict in decisions.

This court should be called "The State General Term."

Do It.

[We say, Don't.—Ed.]

## NEW BOOKS AND NEW EDITIONS.

### STIMSON'S AMERICAN STATUTE LAW—FIRST SUPPLEMENT.

"Containing the repeals, amendments and additions made in all the States and Territories by the annual laws of 1886 and 1887, and presenting the law as in force January 1, 1888." This is the first annual supplement to the great work published by Charles C. Soule of Boston. It professes to give in one hundred and twenty-two pages memoranda of the changes indicated in the quotation made above from the title-page. It is arranged in sections corresponding to those in the original work. The plan will evidently work well enough until the supplements become numerous, and then the cure is to be found in a new edition.

### WANDELL'S LAW OF INNS, HOTELS AND BOARDING HOUSES.

This is a useful manual—so far as it goes. It embraces chapters on sleeping cars and the Civil Damage Act. Such a manual should be exhaustive, but this does not cite *Cook v. Kane*, 13 Oreg. 482; S. C., 57 Am. Rep. 28, on the innkeeper's lien on goods of third persons; nor *Rubenstein v. Cruikshanks*, 54 Mich. 199; S. C., 52 Am. Rep. 806, on his liability for a drunken peddler's goods, nor *Spring v. Hager* (Mass.), 36 Alb. Law Jour. 448, on liability for goods stolen—failure to bolt door; nor *O'Brien v. Vaill* (Fla.), 35 Alb. Law Jour. 318, on liability for baggage left behind by guest; nor *Fisher v. Kelsey* (U. S. Sup. Ct.), 35 Alb. Law Jour. 404, on liability for guest's merchandise for sale; nor *Walker v. Midland Ry. Co.* (House of Lords), 55 L. T. Rep. (N. S.) 489; 35 Alb. Law Jour. 31, on duty to guard an elevator opening. But we desist. There are quite a number of misprints. The stanza from Shenstone on the title-page is touching, but incorrectly quoted. Williamson & Higbie, Rochester, N. Y.

### HALL'S TREATISE ON PATENT ESTATE.

This is a manual of two hundred and forty 12 mo. pages on the nature, conditions and limitations of interest in letters patent, by Thos. B. Hall of Cleveland, Ohio, published by Ingham, Clarke & Co. of Cleveland. It looks convenient, but the phraseology is sometimes queer and affected.

## COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday, June 19, 1888:

Judgment reversed, new trial granted, costs to abide event.—A. A. Wilson, appellant, v. S. Gregor Doran and others, respondents.—Order of General Term affirmed with costs.—Benjamin G. Weaver and another, respondents and appellants, v. City of Rochester, appellant and respondent.—Appeal dismissed with costs.—Eliza T. Bryson, as trustee, etc., respondent, v. Edward F. James and others, appellants.—Order affirmed, with leave to answer within twenty days upon payment of costs.—Frank Walton, respondent, v. E. Frank Coe, appellant.—Order affirmed with costs.—In re Petition of Ernest L. Dawson.—Order affirmed with costs.—In re Application of Rochester, H. & L. R. Co., respondents, v. Frances G. Babcock and another, appellants.—Order affirmed with costs.—R. H. & L. R. Co., respondent, v. N. Y., L. E. & W. R. Co., appellant.—Order affirmed with costs.—People, appellants, v. Thomas P. Walsh, etc., and another, respondents.—Judgment and conviction of murder in the first degree affirmed.—People, respondents, v. Charles Johnson, the Waterloo jailer murderer.—Judgment affirmed with costs.—Merritt C. Herington, appellant, v. Village of Lansingburgh, respondent.—Judgment of General and Special Terms and order striking out defendant's answer reversed.—Charles J. Bennett, respondent, v. Leeds Manufacturing Company, appellant.—Judgments in both actions affirmed, with costs of the appeal to the respondents.—John Wood and another, executors, etc., respondents, v. William H. Ludlow, executor, etc., appellant.—Motion for a new undertaking granted, and Wm. F. Parks is ordered to file a new undertaking in appeal herelu, with sufficient sureties, to be approved by the court, and to serve a copy thereof with respect to the original undertaking within twenty days after service of a copy of this order, with costs.—Wm. F. Parks, respondent, v. Joseph Munroe, appellant.—Judgment affirmed with costs.—Francis E. Cole, appellant, v. Jay M. Cole, respondent.

## NOTES.

Recently we called attention to an important circular raising the question whether marriages celebrated by a "sham" clergyman—believed by the parties to be in holy orders—are valid. Our own opinion is clearly that they are. The doubt arises from the decisions of the House of Lords in the well-known cases of *Reg. v. Mills* (10 Cl. & Fin. 534; 8 Jur. 717,) and *Beamish v. Beamish* (5 L. T. Rep. (N. S.) 97; 9 H. of L. Cas. 274), where it was held in effect, that by the common law of England (and of course excepting marriage by the registrar, etc.), the presence of a priest, or since the Reformation, of a deacon, was essential to marriage. It is important to notice that in the case of *Reg. v. Mills*, the House was equally divided, Lords Brougham, Denman and Campbell being in favor of the marriage, which was performed by a Presbyterian minister, and the decision being against its validity on account of the rule *Semper presumitur pro negante*. This case was followed in *Beamish v. Beamish*, where it was also decided that a clergyman cannot perform the marriage ceremony for himself. But notwithstanding these decisions, we say that the rule does not apply to a case where the parties *bona fide* believed that the person solemnizing the marriage was a clergyman. In *Reg. v. Mills* Lord Campbell (10 Cl. & F. 784,) touches on the subject, and says: "Mr. Pemberton admitted at the bar, as he was bound to do,

that the marriage would be valid. Lord Stowell repeatedly expressed an opinion to this effect; and it turns out that in the instance of a *pseudo* parson, who about twenty years ago officiated as curate of St. Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no act of Parliament passed to give validity to the marriages which he had solemnized, which could only have arisen from the government of the day being convinced, after the best advice, that in themselves they were valid." Mr. Pemberton was the counsel who argued against the validity of the marriage. Lord Campbell goes on to say that the idea that parties so married should find that they were living in a state of concubinage, and that their children are bastards, "is a supposition so monstrous that no one has ventured to lay down for law a doctrine which would lead to such consequences" (p. 785). The Lord Chancellor who decided against the marriage in *Reg. v. Mills* yet appears to have considered marriage by a sham clergyman valid (p. 860); and Lord Cottenham, who also held the marriage in *Reg. v. Mills* void, said: "It was urged that marriages were good when the person officiating was not in orders, though pretending and believed to be so. This I apprehend depends upon a very different principle. The court in such a case would not, I conceive, permit the title to orders to be inquired into" (p. 906). It will be seen then that the above case of *Reg. v. Mills* does not cover the case of the sham clergyman, but rather expressly excludes it from its scope. And it is not in the least likely that the principle of *Reg. v. Mills* will be extended. The Supreme Court of Bombay refused to follow it in 1849: *MacLean v. Christall*, 7 Notes of Cases App. p. 17. It should be remembered that by the ancient canon law, which is the foundation of our English marriage law (*Proctor v. Proctor*, 2 Hag. Consist. 300), the presence of a priest was not essential to a valid marriage, which was indeed considered to be a sacrament without such intervention; and the principle laid down in *Reg. v. Mills* is contrary to many high authorities and possibly founded on an erroneous view of English history. Of course marriage by a pretended clergyman is not invalidated by 4 Geo. 4, ch. 76, § 22, as that only affects cases where the parties have "knowingly and wilfully" married contrary to the statute.—*London Law Times*.

A county justice of the peace in Southern Illinois has lately rendered a legal decision which is worthy of the days of Salem witches. It appears that a wealthy farmer has chanced to say to an acquaintance that he wished he owned a fine well belonging to another farmer in the vicinity. "I am a water-wizard," said the man to whom the wish was expressed. "Give me \$10," he continued, "and I will lead the stream of water from your neighbor's well into yours." The farmer agreeing to pay that sum, the self-styled water-wizard went to work. With a forked twig cut from a peach tree, held in his hand after the most approved manner of rural magicians, he walked back and forth from one well to the other for several times, dug a few shovelfuls of earth from his employer's well, and then declared his task accomplished. He received the promised fee and went his way. The well from that time on contained more water than it had ever done before, probably because the wizard's shovel had improved it. The owner of the other well however, getting wind of the matter, and choosing to believe that his well had been ruined, brought suit against his covetous neighbor. The evidence in the case was solemnly heard by the nearest petty magistrate who, without hesitation, awarded substantial damages to the plaintiff.—*America*.

# The Albany Law Journal.

ALBANY, JUNE 30, 1888.

## CURRENT TOPICS.

WE had believed, until we opened the current number of the *American Law Review*, that Mr. Courtland Parker, of New Jersey, was the unique optimist who possessed copyright and patent in the notion that the common law is reasonably certain, and that the system is not susceptible of improvement. But either he assigned an interest or else he was an original joint-owner with Judge Cooley, who publishes in the *Review* his address to the Georgia Bar Association, on "The Uncertainty of the Law," in which he demonstrates to his own satisfaction the proposition that the law is *not* uncertain. It is rather amusing that the learned judge should have selected this topic for the particular meridian of Georgia, where the people, a quarter of a century ago, found the common law so uncertain that they codified it, and have been living under a code ever since. Whether this was forgetfulness or reproach on the part of the writer we do not know. The key-note of the discourse is this: the law *must* be certain, for otherwise we could not have got along so well as we have done; and who dares deny that we have got along well? The judge thinks the law is by far the most certain thing in the world—more certain "than any thing else, even in physical nature, or in the realm of mind or morals;" more certain than the winds, because there is sometimes a cyclone; more certain than the seasons, because they vary in degrees of heat and cold; more certain than science or theology. He takes up several familiar branches of law and pronounces them certain. The Federal law is certain, he thinks, although he forgets the decisions on the greenback question, and he does make an exception of the Dartmouth College case. As to the family relations, he asks, "has any one been in doubt as to how under the law he might form the relation of marriage?"—evidently overlooking the fact, evidenced by an extract in the last number of this journal, that the law lords of England stood equally divided on the question whether a marriage celebrated by a sham priest was valid, and the fact that on the question of the validity of a marriage *per verba de futuro* with consummation, the House of Lords and the United States Supreme Court stood equally divided in opinion. He pronounces the law certain in respect to the estates of deceased persons. This at a time when the books are full of conflicting decisions about charitable trusts! He has the same opinion about commercial and stock transactions, and real estate holding and transfers. And he sums up as follows: "'With customs we do well,' says the proverb, 'but statutes may undo us;'" and our laws we do not forget are still for the most part customary. The power to legislate, the people of America have discovered, unless carefully restrained and limited, is quite likely to prove a 'power to frame mischief by a law;' and by their Constitutions they give special and careful attention to the necessary restraints. There is no legislative omnipotence in America, nor ever likely to be." We might find a succinct and conclusive answer to all this assertion by shaking in the learned judge's face the volumes of overruled cases, the recent work entitled "The Conflict of Judicial Decision," or even some of his own excellent treatises which have done much to show forth the uncertainty of the law. But few men will be found so bold or so hopeful as this eminent writer. Most men admit that the law is uncertain, and argue that in the nature of things it must be and must continue so. We admit that it is; we believe that it need not continue so. The law is so uncertain, contradictory, obscure and fluctuating, that from the rising of the citizen in the morning till his lying down at night, although he is amenable to law and held to know it, there is not a single transaction of life in regard to which he can be sure of the law. He cannot indorse a note, or hire a house, or insure his house or his life, or engage a servant, or buy a farm, or take a journey by any hired conveyance, or speak of the conduct of his neighbor or a public man, or send a telegram, or ship goods, or deposit a note for collection, or fall on an icy sidewalk, or keep a dog, or fail in business, or make his will, or do any thing else, with any reasonable assurance as to what the law is at the time or may be when the act is called in question. And this fact is what gives employment to seventy thousand lawyers, and causes the publication of one hundred volumes of judicial reports in this country every year, to say nothing of a cloud of text-books. There were doubtless wise men in Noah's time who insisted that the down-pour was only a shower, but they were no more seriously mistaken than the wise men who insist that the law is not uncertain.

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The *Review* has another notable article, which chimes better with our own opinions—"Contingent and Exorbitant Fees," by Professor P. Bliss, an experienced lawyer and a well known and esteemed teacher and writer on law. Mr. Evarts, it is said, being asked what a contingent fee is, replied: "If I don't win your suit I don't get any thing; if I do, you don't." Or "heads I win, tails you lose." That is "about the size of it." Mr. Bliss devotes twelve pages to a temperate and disinterested consideration of this topic, arriving at the conclusion that while there may be, under our laws, some excuse for a deviation in an occasional and exceptional case, the practice and habit of advocating causes on shares is unjust and deleterious. He states and enlarges on the following reasons: First, it encourages litigation. Second, it changes

the relation of counsel to the cause. Third, it degrades the profession. Fourth, it gives undue prominence to the idea of money-making, and diverts attention from professional learning. Fifth, it is inconsistent with the fiduciary relation of attorney and client. Sixth, it results in exorbitant and inequitable charges. We have been a good deal abused and laughed at by the profession for holding and urging these views in times past, and we recommend to those who do not assent to them to read Mr. Bliss' calm treatment of the subject—say in vacation, when there is no money to be made or lost—and see how the contingent fee business strikes somebody else. There is, as Mr. Bliss points out, and as we long ago pointed out, a very simple and practicable remedy for the alleged necessity for the practice in question: give the attorney a lien for counsel fees. If this is not done it is only because lawyers do not want it, and if they do not want it, that is only because they are not satisfied with reasonable counsel fees. One paragraph of Mr. Bliss' paper we especially commend: "But after all, what if we always remain poor? It may be an evil, but it is far from being the greatest one. It may be, it often is, a blessing." It is a noteworthy fact that the greatest lawyers in the history of our country, as well as the most useful and purest men in all history, have died poor. "The love of money is the root of all evil," and yet our professional brethren persist in digging hard for that root.

The *Review* also gives an interesting collection of letters from eminent English jurists, written in answer to an inquiry about the working of the jury system. All the persons addressed speak with unabated respect of the jury in criminal cases. Lord Herschell approves the jury for questions of tort, commercial usage, etc., but not for questions of mixed law and fact. Sir James Hannen speaks warmly in favor of the jury—his "confidence in juries is increased rather than diminished," and praises their impersonality. Sir Charles Edward Pollock thinks that for simple issues or questions of mercantile usage, "a jury is our best and usual tribunal, and is so considered by all." Lord Coleridge says: "Long experience and much reflection have led me to give up the opinion in favor of it which I formerly entertained, and to adopt strongly an opinion adverse to it in civil cases." If he had a question of character or property, he "would far rather run his chance of getting a bad judge to try it than a good jury." Very likely, being a judge himself. Lord Justice Lindley and Sir James Charles Matthews are reported as orally expressing themselves in favor of the twelve.

The *Review* also has an article of several pages examining the subject of a party's right to impeach his own witness, founded on and approving the decision of our Court of Appeals in *Becker v. Koch*, 104 N. Y. 394, in which the opinion was written by

Judge Peckham. The *Review* says: "Prior to his election it was said that the talents of Judge Peckham showed in advocacy rather than in the line of legal scholarship. His decision in this case shows that it is often desirable to bring to the decision of question of procedure the experience of lawyers who have done their strongest work in the courts of *nisi prius*." The *Review* pronounces the opinion of Judge Peckham "a valuable contribution to the law upon this subject."

The *Review* stands us well in hand for subjects of comment this week, and we conclude our comment by drawing attention to the suggestion of a correspondent, that the evils of codification might "be avoided by withholding from its provisions the authority of an absolute command, and by giving them the authority of a judicial decision!" That is to say, a statute which the judges might regard or disregard at pleasure!

#### NOTES OF CASES.

A NOVEL question was decided in *Baber v. Ohio Farmers' Ins. Co.*, Michigan Supreme Court, May 15, 1888, holding that where the agent of an insurance company fills out and signs an application in which the property is declared to be unincumbered, although the assured in her oral application disclosed a mortgage thereon, the company is liable, notwithstanding the provisions of the policy exempting it from liability in case of misrepresentation by agents. The court said: "In the case under consideration the assured had in no manner authorized or permitted the agent to act for her, and his act, as before shown, was the act of the company, in which she had no part or knowledge. Nor was she bound in any way to know it, or to make inquiry in regard to it. We are not referred to any case wherein the policy of insurance contained the precise clause relied upon in the present case, to-wit, that the 'company shall not be bound by any act or statement made to or by the agent or other person, which is not contained in the written application or indorsed on the policy.' The counsel admits that this language is comparatively new in the insurance policies, but claims that his view of the case, and the effect of this clause, is sustained by the following authorities: *Insurance Co. v. Lewis*, 30 Mich. 41; *McIntyre v. Insurance Co.*, 52 id. 188; *Cleaver v. Insurance Co.*, 32 N. W. Rep. 660; *Catoir v. Insurance Co.*, 33 N. J. Law, 487; *Moore v. Insurance Co. (Iowa)*, 34 N. W. Rep. 183; *Chase v. Insurance Co.*, 20 N. Y. 55; *Ehoss v. Insurance Co.*, 67 Cal. 621; *Insurance Co. v. Fletcher*, 117 U. S. 519. In 20 N. Y., *supra*, the application was signed by the assured, and it contained a clause expressly stating that the company should not be bound by any act done or statement made to or by any agent or other person, which was not contained in such application. As the assured signed this ap-

plication, he was presumed to know the contents of it. He was therefore not permitted to show the knowledge of the agent, who examined the premises and wrote up the application, that it was not correct in its statements. 20 N. Y. 55, 56. In *Enos v. Insurance Co.*, *supra*, the policy contained a provision 'that this company shall not be bound by any act or statement which is not contained in the written application or indorsed upon the policy.' It was held that the local agent could not waive any of the provisions of the policy. It does not appear from the report of the case what particular thing or point in the policy was undertaken to be waived, or in what manner, except that such waiver, whatever it may have been, was not written upon the application or the policy. 67 Cal. 622, 623. *Moore v. Insurance Co.*, *supra*, does not touch the point involved here, as will be seen by an examination of the case. The case of *Catoir v. Insurance Co.*, 38 N. J. Law, 487, was one where the policy contained the following clause: 'Agents are not authorized to make contracts for the company, nor to write upon the policy except his signature, when necessary, to the first receipt of premium, nor to waive forfeiture of the same.' A premium was not paid in time, the result of which was to forfeit the policy, unless the plaintiff proved that the company had legally waived the payment as it became due. The plaintiff showed no waiver except that the local agent had orally consented that the plaintiff could pay it afterward, 'when he had it.' The policy was upon the life of plaintiff's wife. Held that the agent could not waive the payment in the face of this provision in the policy. In *Insurance Co. v. Fletcher*, *supra*, the assured signed the application, but it was claimed that he did not know it was to be a part of his policy—that one agent read the questions over, which he answered truthfully, while another agent pretended to write down his answers; that he had no reason to suppose that such answers were taken down differently from those given; that he was asked to sign the paper to identify him as the party for whose benefit the policy was to be issued, and that he signed it without reading it, and did not read his policy when he received it, nor at any time. The answers so written were false, and not as the assured gave them. The application contained an agreement that if any of the answers were false the policy to be issued upon them was void. The court held it was 'his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. \* \* \* If he had read even the printed lines of his application he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was

cognizant of the limitations therein expressed.' *Insurance Co. v. Fletcher*, 117 U. S. 529. It will be seen that the principles laid down in these cases do not reach or govern the case at bar. *Insurance Co. v. Lewis*, 30 Mich. 41, distinguished. \* \* \* The fraud of the agent was not her fraud, nor was she in any respect negligent. The company was negligent, and must suffer, rather than Mrs. Baker, for taking and acting upon an application wholly, signature and all, in the handwriting of an agent, whom it declined in the express provisions of its policies to trust."

A nearly novel question was decided in *People v. Gould*, Michigan Supreme Court, May 11, 1888, holding that no conviction can be had under How. Stat. Mich., § 9283, relating to the offense of seducing and debauching an unmarried woman, after the persons concerned have intermarried, though the man abandons his wife immediately after the ceremony and never cohabits with her. Sherwood, C. J., concurred in the result, on the ground that the woman had not repudiated the marriage as fraudulent. Long, J., said: "The court voluntarily charged the jury, among other matters, as follows: 'On this subject of marriage I charge you that if the marriage (and there is no dispute about that) took place, with the intention on respondent's part at that time to perform in good faith all the duties which the relation of marriage imposed, and which naturally grew out of such relation, then the complaint would not be warranted; but if the marriage was resorted to as a piece of legal trickery to stop the voice of the girl, Kate, and prevent her from being a witness, with the intention, fixed and determined on his mind at that time, not to live with her, nor to assume any of the duties and obligations of the marriage relation, and with the intention to abandon this girl, then the offense would be one against public decency and order, and would not be condoned by such marriage, and would be subject to prosecution.' We do not agree with the learned circuit judge in what he states the law to be, or in the reasons which he gives for so holding. Under this charge the jury were told that the guilt or innocence of the respondent must be made to depend not upon the facts which go to make up the offense charged—the seducing and debauching, and as in this case, the surrender by Kate Morrow of her person to the respondent in reliance upon his promise of marriage—but upon the good faith or want of good faith of the respondent in entering into the marriage relation with her after the offense with which he was charged was committed. It would not be claimed that had the respondent married this girl at any time previous to the complaint being made against him, public policy or public decency would have required his prosecution. But on the other hand, it will be conceded that public morals and public decency would be much better subserved by the marriage of the parties in this class of cases, as well as in bastardy proceedings under the statute, and thus make

legitimate the children begotten by such illicit intercourse, and save, in part at least, the shame and disgrace of the injured female. The statute in other sections provides some punishment for the defense of deserting and abandoning the female after such marriage. The *gravamen* of the offense under the statute under which respondent was convicted is not the mere fact of intercourse. Two elements enter into it, and both must concur and exist at the same time, seduction and debauchery; and if there is no such concurrence the offense would not be complete. Debauchery and carnal intercourse without seduction is no offense under this statute. The offense which this statute is aimed at is the seduction and debauchery accomplished by the promises and blandishments the man brings to his aid in effecting the ruin and disgrace of the female; and where the seduction and debauchery is accomplished by promises of marriage, upon which the female relies, and thus surrenders her person, and gives to the man the brightest jewel in the crown of her womanhood. It is the broken promise which the law will regard as the *gravamen* of the offense. It must therefore be held that where seduction and debauchery is accomplished under promise of marriage, and the promise has been kept and performed, no prosecution can be allowed or conviction had after such marriage; and the question of the good faith or want of good faith upon the part of the man in entering into such marriage cannot enter into the question of his guilt or innocence. The promise has been kept and performed, and it would be against public policy and public decency to permit prosecutions to be carried forward in the courts of justice thereafter. This question came before the courts of Pennsylvania in *Commonwealth v. Richar*, 5 Penn. Law J. 326. In that case Knox, P. J., delivering the opinion of the court, says: 'Can he now be convicted and punished for her seduction before marriage? It is not the carnal connection, even when induced by the solicitation of the man, that is the object of this statutory penalty, but it is the seduction under promise of marriage, which is an offense of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Clearly not, but a false promise, broken and violated after performing its fiendish purpose. The evil which led to the enactment was not that females were seduced, and then made the wives of the seducers, but that after the ends of the seducer were accomplished his victim was abandoned to her disgrace. An objection to this construction is that it places within the power of the seducer a means of escaping the penalty. So be it. This is far better than by a contrary construction to remove the inducement to a faithful adherence to the promise which obtained the consent.' See also 2 Archb. Crim. Pl. & Pr. 1825, tit. 'Seduction.' Prosecutions under similar statutes in New York are prohibited by statute after the marriage of the parties. 3 Rev. Stat. N. Y. (5th ed.) 942. We think this better reasoning than that

of the learned circuit judge before whom this case was tried."

### CRIMINAL LAW—MURDER—IDENTIFICATION OF DECEASED.

NEW YORK COURT OF APPEALS, APRIL 10, 1888.

#### PEOPLE V. PALMER.

Under the Penal Code of New York, § 181, prohibiting a conviction "unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt,"—the accused may be convicted of murder without direct proof of the identity of his victim.

APPEAL from General Term, Supreme Court, Third Department.

Indictment of Frank Palmer for the murder of Peter Bernard, in Clinton county, in 1885, followed by conviction. The General Term reversed the judgment and ordered a new trial, and the people appealed.

R. Corbin, for appellant.

Lucien L. Shedden and John B. Riley, for respondent.

FINCH, J. The prisoner was convicted of murder in the second degree, and that conviction reversed by the General Term because there was no direct evidence which identified the body found as that of the person alleged to have been murdered. From that decision the people appeal. The question is a very grave one, not merely to the prisoner, whose liberty may depend upon the issue, but to the people and the administration of public justice; for if the law be as the General Term have declared it, a murderer may always escape if only he shall so mutilate the body of his victim as to make identification by direct evidence impossible, or shall so effectually conceal it that discovery is delayed until decomposition has taken away the possibility of personal recognition; and it will follow that the tenderness of the Penal Code has opened a door of escape to that brutal courage which can mangle and burn the lifeless body and has put a premium upon and offered a reward for that species of atrocity. This result is said to have been accomplished by section 181, which prohibits a conviction "unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt." In the first clause of this provision the endeavor to state and describe one fact has involved the statement of another, changing a simple into a compound fact and making it possible to apply the requirement of direct proof to the two facts of death and of identity rather than to the one fact of the death alone. That some one is dead is directly proved whenever a dead body is found. Its identity as that of the person alleged to have been killed is a further fact to be next established in the process of investigation. If it be the meaning of the Penal Code that both of these facts, identity as well as death, are to be proved by direct evidence, it establishes a new rule, which never before prevailed, and of which no previous trace can anywhere be found. It has always been the rule, since the time of Lord Hale, that the *corpus delicti* should be proved by direct or at least by certain and unequivocal evidence. But it never was the doctrine of the common law that when the *corpus delicti* had been duly established, the further proof of the identity of the deceased person should be of the

same direct quality and character. And this becomes quite evident from a consideration of the history and philosophy of the rule. By the *corpus delicti*—the body or substance of the offense—has always been meant the existence of a criminal fact. Unless such a fact exists, there is nothing to investigate. Until it is proved, inquiry has no point upon which it can concentrate. Indeed there is nothing to inquire about. But when a criminal fact is discovered, its existence, for the purpose of a judicial investigation, must be established fully, completely, by the most clear and decisive evidence; for otherwise the after-reasoning founded upon it and drawing its force from it, will be dangerous, fallacious and unreliable. As the weakness of the foundation is more and more intensified while the superstructure ascends and the weight grows, so the circumstantial evidence built upon a criminal fact, not certain to have existed, becomes itself weak and indecisive, and more and more so as the suspicions expand and extend. If somebody has been murdered, a motive for a murder becomes a significant fact, rendered more so when identification shows it a motive for the particular murder. But if the death is doubtful, the probative force of a motive dwindles to mere suspicion. In the case of *Ruloff v. People*, 18 N. Y. 179, the doctrine was both illustrated and applied. The death of the prisoner's infant child was not proved, but in its place was put the equivocal fact of a sudden and unexplained disappearance. The evidence might all be true, and yet the child be living and not dead; and if living, every circumstance relied upon became at once fallacious and deceptive. Such circumstances gain their probative force only upon condition that there is a criminal fact which they serve to explain. But the *corpus delicti*—the existence of a criminal fact—may be completely established, and the need of direct proof satisfied before the question of identity is reached. There may be direct proof of a murder, though no one knows the person of the victim. A dead body is found with the skull mashed in upon the brain, under circumstances which exclude any inference of accident or suicide. There we have direct evidence of the death, and cogent and irresistible proof of the violence; the latter the cause and the former the effect; both obvious and certain and establishing the existence of a criminal fact demanding an investigation. These facts proved, the *corpus delicti* is established, although nobody as yet knows, and nobody may ever know, the name or personal identity of the victim. Beyond the death and the violence remain the two inquiries to which the ascertained criminal fact gives rise: who is the slain and who the slayer? the identity of the one and the agency of the other. These may be established by circumstantial evidence which convinces the conscience of the jury, and because a basis has been furnished upon which inferences may stand and presumptions have strength. That I have correctly stated what is meant by the *corpus delicti* requiring direct proof, and that it never did include the identity of the victim, but left that open to indirect or circumstantial evidence, is shown by an unbroken and unvarying concurrence of authority.

Lord Stowell said in *Evans v. Evans*, 2 Hagg. Ecc. 36: "If you have a criminal fact ascertained, you may then take presumptive proof to show who did it, to fix the criminal, having been an actual *corpus delicti*." In *Rez v. Clewes*, 4 Car. & P. 221, the alleged murder was in 1806, and in 1829 bones were found buried under a barn which the prisoner had occupied. The question submitted to the jury was whether these bones were the remains of Hemmings, the person alleged to have been murdered. It was sought to identify the bones by a carpenter's rule and the remnant of a pair of shoes found near, and also by some-

thing remarkable about the teeth. No question of the competency of any of the evidence was at all suggested, but its sufficiency was criticised, and finally left to the determination of the jury, which rendered a verdict of acquittal. In *Wills Circ. Ev.*, p. 213, it is said that direct and positive proof of the identity of the deceased is not required; and the case of *Rez v. Cook* is cited, in which it appeared that a human body had been burned, but enough remained unconsumed to show that it was the body of a male adult, and its further identification was founded upon circumstances, an important part of which was the finding in the possession of the prisoner of numerous articles belonging to the deceased. In *Reg. v. Hopkins*, 8 Car. & P. 591, the identity of the deceased with that of the child alleged to have been murdered failed, not only because of differences in the appearance of the body, but also from differences in the clothing; and the whole inquiry turned upon resemblances, or the want of them. In 2 Best Pres. 730, it is said that "every criminal charge involves two things: First, that an offense has been committed; and second, that the accused is the author or one of the authors of it;" and the learned writer adds: "The identification of the body of the deceased need not be proved by witnesses who, by an actual inspection of the body, recognize it as the body of the person with whose murder the prisoner is charged; but it may be by the same class of proof as is used to identify the prisoner on trial, or any other material facts. \* \* \* Indeed it may be said that any proof that satisfies the jury that the body is that of the deceased is sufficient; as fragments of the clothing identified as similar to that worn by the deceased when last seen alive." Starkie (p. 575) defines the *corpus delicti* as "the fact that the crime has been actually perpetrated;" and Greenleaf (vol. 3, § 181), as "the fact that a murder has been committed;" and adds that the rule requires "unequivocal and certain proof that some one is dead." All these cases and authors hold, without exception, that until a criminal fact has been established, "*antequam de crimine constiterit*," there can be no basis for presumptive proof; but when in a case of murder, that basis has been certainly supplied, the identity of the victim and the agency of the prisoner may be shown by circumstances. So far as I have been able to discover, that rule has always been recognized and applied in this country. A few of the more remarkable cases may be studied to demonstrate its wide prevalence. In *People v. Wilson*, 3 Park. Crim. R. 199, it appeared that a dead body, with marks of violence upon it, had been washed ashore. It was alleged to have been the body of Capt. Palmer, for whose murder the prisoner was being tried. No direct evidence of that identity was or could be given; but the criminal fact of a death by violence having been fully established, the identity of the remains was proved by circumstances. Personal recognition had become impossible, and identity was established by an inference from resemblances. The height of the deceased was shown, an unusual length of face, and a widening of the end of the little finger, to which, in a general way, the body corresponded. But a more important fact was that the captain had imprinted his name upon his arm and leg, and in the same portions of the body found the skin had been cut away, except that on the leg the letter "P" remained visible. A brother-in-law of deceased, who had seen the body, was asked the direct question whose body it was, but the court would not permit an answer, saying that the question was not the ordinary one of personal identity, since the body had been submerged for five months, but was one of an inference from resemblances, which the jury, and not the witness, must draw. The prisoner was convicted. In *Com. v. Webster*, 5 Cush. 295, the



identification stood mainly upon a block of teeth found in the furnace where part of the body was consumed. There was no direct recognition of the body by any one, but the circumstantial evidence was very strong. I do not see how the identification of the false teeth can be deemed direct evidence of the identity of the remains. It was a fact from which that identity could be inferred, and the inference be very strong, but the conclusion would still be an inference. If Dr. Keep, the dentist, after examining the teeth, had been asked the direct question whether the mutilated remains were those of the deceased, he could only have answered in the affirmative as a judgment founded upon a process of reasoning. False teeth are artificial and not natural. They may be worn at one time and omitted at another. They may be lost from the mouth and pass into a stranger's possession. If their identity, as found among the remains, directly identified the body, why did not in the present case the proved identity of the boot found on the foot of the body discovered directly identify that body? Is not the difference rather one of the degree than of the kind of proof? But in both cases I think the evidence was inferential, and cannot justly be regarded as direct. In *Taylor v. State*, 35 Tex. 97, there was no direct proof of the identity of the deceased; but his clothing, hat and papers were identified; and his wagon and team, and even his dog were found in the prisoner's possession. A still more remarkable case was that of *State v. Williams*, 7 Jones (N. C.), 448, where with the bones were found some trifling articles of feminine attire, seemingly insufficient to justify an inference of identity. In all the investigation to which the briefs of counsel have led the way, and which I have independently pursued, I have found no trace of authority for the doctrine said to be established by the Penal Code, save here and there some careless expression which seems to include the identity of the deceased in the *corpus delicti*, and which plainly originated in a tacit assumption of that identity for the purposes of the idea sought to be conveyed.

We come now to the inquiry whether the rule of the common law has in fact been changed by the Penal Code, and we are to approach that inquiry with the presumption that no such change was intended unless the statute is explicit and clear in that direction. 1 Kent Com. (3d ed.) 463; *White v. Wager*, 33 Barb. 260, affirmed, 25 N. Y. 828. I am persuaded that a careful analysis of the section referred to will show that no such change so radical and dangerous was either made or intended, and that the sole scope and purpose of the section was to declare in explicit terms the existing rule of the common law. The language of that section contemplates two independent facts, not three nor four. It speaks of them as "each," and describes them as "the former" and "the latter." One is to be proved by direct evidence; the other, beyond a reasonable doubt. This language is appropriate and precise, if by the one fact is meant the fact of the death of the person alleged to have been killed, however that identity may be shown, and assuming it to have been established; and by the other the guilty agency of the prisoner. But the language becomes quite inappropriate if the meaning is that two facts, the death of the deceased and his identity, are to be established by direct evidence. It is the one fact that is to be thus proved. When the person supposed or alleged to be dead is identified, the fact that such person is actually dead—not merely that he has disappeared and cannot be found—the vital fact of his death must be proved by direct evidence. As the learned district attorney very aptly states it: "Direct proof that somebody is dead becomes direct proof that A. B. is dead when the body is identified as that of A. B." But the meaning and construction of the section becomes plainer when

we observe that if the identity of the deceased is involved in the first fact, treated as a compound fact, and requiring direct proof, it is also embraced in the second fact which is equally a compound fact and which may be proved by indirect evidence. The second clause reads, "the fact of the killing by the defendant as alleged;" not merely a killing, but the killing as alleged—the precise killing with which he stands charged; in the present case, not simply the killing of somebody, but the killing alleged, that of Peter Bernard, the identical person, whatever his name, whose dead body has been found. The killing of that particular person is therefore again a compound fact, made up of violence causing death, and its infliction upon the person of the alleged victim, and none other than he. Under the second clause, by its explicit terms, it may be proved (1) that the prisoner killed Peter Bernard, by circumstantial evidence; for that is the killing alleged, and no other is admissible or referred to. It would seem to follow therefore upon the construction asserted by the defense that the same identification as a limitation upon the death must be proved by direct evidence, but as a limitation upon the killing may be proved by indirect evidence. No such confusion or contradiction was intended or effected. The requirement of the Code goes upon the assumption that the identity of the deceased, either by name or description, has been established in the ordinary way, and then requires that the death of that person, thus identified, shall be directly proved, and the killing by the prisoner of the same person shall be shown beyond a reasonable doubt. These two facts alone are the subject of the legislation, and they are properly referred to as "each," and correctly described as "the former" and "the latter." No purpose to change the settled rule of the common law is disclosed, but simply an intent to declare it as it had long existed. The trial judge therefore was right, and the General Term was in error.

We have read the evidence given carefully. That the body found was that of Peter Bernard was established beyond reasonable doubt. The prisoner was a witness in his own behalf. He shows that he and Bernard were in the locality where the body was found, at about the date of the latter's disappearance. His own declarations show that he had no doubt of the identity of the body found. He explains his possession of a \$20 bill which in some manner he got from Bernard, but the explanation is not at all probable or satisfactory. The evidence of the persons who claim to have seen the deceased after the date of the murder was probably honest, but quite certainly mistaken. He was a total stranger to them, and their comparison was founded on a photograph. In the case of Webster there were five persons who honestly believed that they saw Parkman alive after he had in fact been killed. Upon the whole case we see no sufficient reason to distrust the conclusion which the jury reached.

The judgment of the General Term should be reversed and that of the Oyer and Terminer of Clinton county affirmed.

All concur, except Gray, J., dissenting.

#### SHIP—CONTRACT OF AFFREIGHTMENT— CONFLICT OF LAW—LAW OF THE FLAG AND LEX LOCI CONTRACTUS—SPECIAL EXEMPTION.

CHANCERY DIVISION, FEB. 28, 1898.

RE MISSOURI STEAMSHIP COMPANY LIMITED; MONROE'S CLAIM.\*

A claim was made by an American citizen in the winding-up of a British steamship company for damages for the loss

\*58 L. T. Rep. (N. S.) 377.

of his cattle through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charter-party contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales through the negligence of the master and crew. According to the American law the stipulations were void, but according to English law they were good, and were usually inserted in English bills of lading.

*Held*, that the stipulations were valid, first because the contract was governed by the law of the flag; and secondly, because from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England.

Arthur Cohen, Q. C., and Frederic Thompson, for applicants.

Sir Walter Phillimore and T. G. Carver, for claimant.

CHITTY, J. This is a claim by Mr. Mouroe against the Missouri Steamship Company Limited for damages for loss of his sheep and cattle. Mr. Mouroe is a citizen of the United States, domiciled there. The company is an English company, incorporated according to English law and domiciled in England. The company is in voluntary liquidation. The contracts under which the claim is made were made at Boston, where the company had an agent by whom contracts were entered into on their part. The ship in which the goods were to be carried was a British ship (*The Missouri*), and one of a line of steamships trading regularly between Boston and Liverpool. The contracts were for the carriage of the sheep and cattle from Boston to Liverpool, and they contained express stipulations exempting the ship-owners from liability for loss or damage arising from negligence of the master or crew, and they provided that bills of lading should be given containing stipulations to the same effect. The company's agent had no authority to bind the company by any contract not containing such stipulations as those which were actually inserted. The sheep and cattle were shipped on board at Boston, and bills of lading were given and accepted there in conformity with the contracts. The ship sailed and was stranded on the Welsh coast. It is admitted for the purpose of the present case that the stranding occurred through the negligence of the master and crew. In these circumstances it is clear and is admitted by the claimant's counsel that he is not entitled to recover if the stipulations exempting the ship-owners from liability arising from the negligence of their servants are valid. But it is contended for the claimant that the stipulations are invalid according to the law of the State of Massachusetts, where the contracts were in fact made, and the bills of lading given and accepted. There was no substantial contest before me as to the present state of the law of Massachusetts on the subject. According to that law the stipulations are invalid. The grounds upon which the decisions at present stand are that stipulations by which a common carrier endeavor to exempt himself from the consequences of the negligence of himself or his servants are considered to be extorted by the carrier without any real assent on the part of the person sending the goods, and are void as being contrary to public policy. In *The Brantford City*, 29 Fed. Rep. 373, these principles were held to apply in favor of the shipper at Boston of cattle on board a British vessel for carriage to England, where the facts were substantially the same as those in the present case. The law in the United States on this subject however appears not to be finally settled. The question is apparently pending in the Supreme Court in the case of

the *Montana*, on appeal from the Circuit Court. The Supreme Court has given leave to the appellants to adduce evidence to show what is the English law on the subject. The arguments have been concluded, and the judgment has been reserved. But as after inquiry I am unable to ascertain that some considerable time may not elapse before the judgment is given, and as it is not clear that the judgment will determine the point, I have not thought it right to any longer postpone my decision. Should the judgment of the Supreme Court be in favor of the shipowner on the question of the validity of the stipulation, Mr. Mouroe's claim before me must fail. I proceed then to consider the question on the assumption that according to the law of Massachusetts, the stipulations are void. The question to be determined is whether the law of England or the law of Massachusetts ought to be applied to the stipulations which purport to exempt the shipowners from liability for negligence. For the claimant it is argued that the question, being a question as to the validity of the terms of the contracts, ought to be determined according to the law of the place where the contracts were made. For the shipowners, on the other hand, it is argued that the question ought to be determined according to the law of the country to which the ship belongs. As the stipulations in the contracts and the bills of lading are identical there is no occasion to treat these documents separately. Now the question does not relate to the formal validity of the contracts, and the objection raised by the claimant does not go to the validity in matters of substance of the contract as a whole. So far as relates to all matters of form the contracts are valid according to the law of both countries. So far as relates to all matters of substance the rest of the contracts would, if the stipulations attached had not been inserted, stand valid according to the law of both countries. Further, the stipulations are not impeached on the ground that they are of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the laws of civilized countries. They are impeached solely on the ground that they are void as being disallowed by the law of the place where the contracts were made, which law considers them contrary to its own view of the public policy that ought to prevail within the limits of its own territorial jurisdiction. Although by the law of Massachusetts, in the case of a contract in Massachusetts by a common carrier for the carriage of goods wholly within the territory of the State, such stipulations would be held void, yet I cannot find any sufficient reason for saying that they would also be held to be void in the case of a contract made within the State for the carriage of goods where the performance of the contract was (as in the case before me) to take place mainly outside the State, if it were declared expressly on the face of the contract that for all purposes the contract was to be governed by the law of the country to which the ship belonged, and the law of such country allowed the stipulations to be valid. In other words, I apprehend that the law of Massachusetts would not prohibit the parties to such a contract from contracting expressly with a view to the law of England. See Lord Mansfield's judgment in *Robinson v. Bland*, 2 Burr, pp. 107-8; and Story's *Conflict of Laws* (8th ed.), §§ 230 and 231. The contracts before me do not contain any such express declaration. But I have examined and endeavored to ascertain the precise nature of the objection raised, with this result as it appears to me, that it was within the competence of the parties according to the law of both countries to enter into the contracts. Two cases of high authority were relied upon by the company's counsel in support of their contention: *Lloyd v. Guibert*, 13 L. T. Rep. (N. S.) 602; *L. R. 1 Q. B. 115*; and *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo.

P. C. Cas., Exchequer Chamber (N. S.) 272. The actual decisions in these cases may not precisely govern the present case, but the question is whether the principle upon which these decisions were based does not apply. It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of the circumstances indicating a different intention. Numerous instances of the exception are to be found in the books. A different intention—that is, an intention to be bound by some other law than the law of the place where the contract is made—may be inferred from the subject-matter of the contract and from the surrounding circumstances, so far as they are relevant to determine the character of the contract. See the judgment of Willes, J., in *Lloyd v. Guibert* (*ubi sup.*), pp. 122-123. The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to be the true inference to be drawn. The general principle by which the Court of Exchequer was guided in the solution of the question as to what law ought to prevail was that “the rights of the parties to a contract are to be judged by that law by which they may justly be presumed to have bound themselves” (*Lloyd v. Guibert*, p. 123), and by the steady application of that principle the court arrived at the conclusion that where the contract of affreightment does not provide otherwise, then as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern. In *Lloyd v. Guibert* the ship was a French ship, the contract was made at a Danish West India port (St. Thomas), and the goods were shipped at Hayti to be delivered at Havre, London or Liverpool, at the charterer’s option. The court held that the law of France applied whereby the shipowners, on abandonment of the ship and freight, were exempt from any liability to the owner of the cargo, and rejected the law of Denmark and the various other countries put forward on behalf of the owner of the cargo. In the course of the judgment the various places in which the contract was to be performed were pointed out. See p. 122. But in adopting the French law the court relied on the subject-matter of the contract—the employment of a seagoing vessel for a service the greater and more onerous part of which was to be rendered on the high seas—where, for all purposes of jurisdiction, criminal and civil, with respect to all persons, things and transactions on board, she was as it were a floating island over which France had as absolute, and for all purposes of peace as exclusive a sovereignty as over her dominions on land, and which, even while in a foreign port, was never completely removed from French jurisdiction. See p. 127. These practical considerations formed the main ground of the judgment. The court declined to enter into any question as to the policy of the French law. I have quoted somewhat extensively from this judgment in order to show that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable, and ought to be applied, not merely to questions of construction and the rights incidental to or arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinction founded on the difference of these questions would not rest on substantial grounds, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only—namely, that of the flag—and so to hold is to adopt a simple, natural and consistent rule. See Westlake’s *Private International*

Law (2d ed.), p. 201. In *Lloyd v. Guibert*, *ubi sup.*, there were no express stipulations pointing to the law of one country rather than to the law of some other country. But in the *Pentinsular and Oriental Company v. Bland*, *ubi sup.*, where also it was held that the contract was governed by the law of the flag, there were such stipulations. Turner, L.J., in delivering the judgment of the Privy Council, inquired into the actual intentions of the contracting parties as disclosed on the face of the contract. In that case the contract was made between British subjects in England substantially for safe carriage from Southampton to Mauritius. The performance was to commence in an English vessel in an English port; to be continued in vessels which for this purpose carried their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessel might be in the course of the voyage. Into this contract there was introduced a stipulation professing to limit the liability of the shipowner, which stipulation was valid according to the law of England but invalid according to the law of Mauritius. In discussing the intention of the parties, the Lord Justice asked (in substance) whether it was intended that the stipulation should be construed according to English law (which would give effect to it) or according to French law or some other law (which would give no effect to it). And he held that the actual intention of the parties must be taken clearly to have been to treat the contract as an English contract to be interpreted according to English law and that as there was no rule of general law, or policy setting up a contrary presumption the court below was wrong in not governing itself according to those rules. Now the difference in fact between that case and the present is that in that case the parties were both British subjects, and the contract was made in England, whereas in the present case one only of the parties is English and the contract was made in Boston. But these differences, though proper to be taken into consideration on the general question, have little or no bearing on the question of the intention of the parties to be inferred from the particular stipulations. “In determining a question between contracting parties” (to quote once more from the judgment in *Lloyd v. Guibert*, p. 120), “recourse must first be had to the language of the contract itself, and (force, fraud and mistake apart) the true construction of the language of the contract (*lex contractus*) is the touchstone of legal right.” The circumstance that the stipulations which the claimant asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed, and not to the law of the country which disallowed the stipulations. It is unreasonable to presume that the parties inserted in the contracts stipulations which they intended should be nugatory and void. But on the facts of this case a more limited proposition may be adopted. The loss accrued through the negligence of the shipowners’ servants within the territorial waters, not of Massachusetts, but of Wales—that is, a country where English law prevails. Conceding that it would be possible (without saying that it would be reasonable) to presume that the parties contracted with reference to the law of Massachusetts in respect of any loss by negligence occurring within the territorial waters of that State, it appears to me that it would be unreasonable to presume that they contracted with reference to the law of that State in respect of a loss by negligence occurring outside the limits of the State. I hold that the stipulations are valid—first, on the general ground that the contracts are governed by the law of the flag;

and secondly, on the particular ground that from the special provisions of the contracts themselves it appears that the parties were contracting with a view to the law of England. It is unnecessary to consider any other grounds of defence raised on behalf of the company. I therefore dismiss the claim with costs.

**COPYRIGHT—NEWSPAPER—PROPERTY IN TITLE—IMITATION—INJUNCTION.**

ENGLISH COURT OF APPEAL, JAN. 23, 1888.

**BORTHWICK V. EVENING POST, LIMITED.\***

A newspaper had been published every morning by the plaintiff and his predecessors for about a century, in London, under the name of *The Morning Post*. Some time before the trial of the present action the plaintiff had published later editions of the paper, but still under the same title and it was not suggested that the plaintiff, had any intention of publishing an evening edition under the name of *The Evening Post*. The defendants having commenced to publish a daily evening newspaper in London, at the same price, under the title of *The Evening Post*, the plaintiff commenced an action for an injunction. It was shown that just before and just after the publication of the defendants' paper about twenty persons altogether had applied at *The Morning Post* office for copies of *The Evening Post*. In the advertisements of the latter paper the publishing office was stated to be at 108 Fleet street, whereas *The Morning Post* was published at a large house in Wellington street, Strand. Kay, J., granted a perpetual injunction restraining the defendants from publishing, or selling, or advertising for sale any newspaper of the name of *The Evening Post*, or by any other name calculated to induce the public to believe that such newspaper was an edition of *The Morning Post*, or was owned, edited or written by the owner, editor or staff of that newspaper. Held, on appeal, that there being no injury or damage, or prospect thereof, to the plaintiff, the injunction must be dissolved.

**A**PPPEAL from the Chancery Division. The head-note shows the facts.

*Renshaw, Q. C., E. Everett and Bryan Furrer*, for defendants.

*Marten, Q. C., and Begg*, for plaintiff.

LORD COLERIDGE, C. J. In this case we have been asked by the appellants to reverse a judgment of Kay, J., by which he granted an injunction to restrain them from publishing a paper under the name of "*The Evening Post*, with which is incorporated *The Daily Recorder*." The facts of the case are simple to a degree. Everybody is aware of the existence of *The Morning Post*, an old-established morning paper of high character, which has existed a great many years. It seems that some years ago *The Morning Post* was in the habit of publishing later in the day—sometimes as late as three in the afternoon—a second or third edition of itself, but still always called by the name of the *Morning Post*. It is not suggested in any of the affidavits, nor by counsel, that *The Morning Post* ever did intend, or does intend, to publish a paper called *The Evening Post* in connection with itself, of the same nature, and under the same authority as *The Morning Post* is published. Under these circumstances Kay, J., was asked to grant this injunction, and he granted it. It was not suggested that it came exactly within the authority of any case in which the very name, or a colorable imitation of the name, had been taken by the person against whom the application was made. Under such circumstances there is

plenty of authority—authority founded on the soundest sense—to show that the court would interfere as in a matter of property. There may be property in a name as well as property in any thing else, and any thing like an interference with property in a name would be immediately restrained by the court. Now the defendant company, toward the end of December, 1887, advertised that they were about to publish a paper under the name of *The Evening Post*, and that they incorporated with it *The Daily Recorder*, which is an old paper, and had apparently a large circulation. It is to be observed that in the advertisement of *The Evening Post* the office was stated in large type to be 108 Fleet street, whereas although we have no right to say it is common knowledge, yet most persons who have lived in London for some time are aware that *The Morning Post* is published at a large house in Wellington street, on the front of which house appears the name *Morning Post* in large letters. As many as twenty applications, some before and some since the publication of *The Evening Post* (the exact proportion of the twenty before and since publication is not ascertained) have been made to the office of *The Morning Post* for copies of *The Evening Post*, showing that those twenty persons, if the applications were made by twenty different persons, were under the impression that there was some connection between *The Evening Post* and *The Morning Post*, and that one could be bought at the office of the other. But the case is not put upon that. It is put somewhat in this way: that *The Evening Post* is the natural name for *The Morning Post* if it ever issues an evening edition, and we are asked to assume that anybody who saw *The Evening Post* advertised, if he looked at it carelessly and did not observe where it was published, or inquire where it was published, might not unnaturally come to the conclusion that it was an evening edition of *The Morning Post*, and that being an evening edition of *The Morning Post*, it was issued under the authority of *The Morning Post*, and would be conducted by the same persons as *The Morning Post*, and would represent the general opinion of *The Morning Post*. I do not know whether my learned brothers have—but I have not looked to see what is the political color of the paper, or whether it is the same as *The Morning Post* or not; but it is suggested that it might be conducted in the same way, that it might be inferior, and probably it would be inferior at first to *The Morning Post*, and that persons who took the evening paper under the impression that they were taking something issued by the writers, or editors, or staff of *The Morning Post*, would or might be so annoyed and displeased with what they saw in the former paper that they would discontinue their support of the latter paper, *The Morning Post*, and that therefore persons who had property in *The Morning Post* would be injured. All that no doubt is conceivable, but it seems to me that it is only conceivable; that the damage suggested is not a damage, that so far as I am aware, has ever been made the ground for interference on the part of this court; and if it stood there, there is good reason for saying that what is suggested is not sufficient to justify the interference of the court. But the case is also put, and can only be put, as I think, upon another ground, and that ground is this, that the assumption of the name of *The Evening Post* was intended by the takers of it, and might by reasonable people be supposed to indicate, a connection between the two papers, and that therefore there would be an attempt upon the part of the assumer of the title of *The Evening Post* to trade under the color of *The Morning Post*, and to take advantage of the benefits which the connection might be supposed to give to the new paper; and that as there is no such connection, and as the benefit suggested to be gained would be gained under a mistake and misapprehen-

sion induced by the defendant, that would be a ground for the interference of this court. If that were distinctly made out, and if it were made out clearly, not only that such a thing might happen, but that there was any ground for supposing that it had happened, I am not at all prepared to say this court would not interfere, and would not confirm the judgment appealed from. But what strikes me in the matter is that no evidence is given in this case that (at least as regards *The Morning Post*) any damage has been inflicted. There have been twenty applications, and twenty only, made to *The Morning Post* for copies of *The Evening Post*. From that the court is asked to draw the inference which I have indicated a few sentences back, and which therefore I will not repeat. But it is not suggested, at least there is no evidence given of any kind, that a single copy less of *The Morning Post* has been sold than would have been sold if the defendants had not taken the action they have. Under those circumstances it seems to me that there is not enough in this case to warrant the interference of the court by injunction and that the decision of Kay, J., must be reversed. But I could not for my own part clear my mind of a lurking suspicion that the name, *The Evening Post*, was taken because there was a *Morning Post*, and that although *The Morning Post* has not been hurt, and perhaps *The Morning Post* never will be hurt to the extent of one penny, yet the public and the persons who buy *The Evening Post* may possibly think there is some connection with this old-established paper. At all events I cannot quite feel certain that the assumer of the title did not wish that the public should so think. Under those circumstances, if we reverse the judgment—and I think that the injunction should not be continued—I think there must be no costs.

COTTON, L. J. I agree in that conclusion, and as we differ from Kay, J., I must state my reasons for differing from him. In his judgment, and in argument, a good many cases were referred to by him and cited to us. In my opinion, in cases like this, and especially cases arising under the circumstances before us, cases are of no use when once we have got the true principle on which the court ought to act. That very clearly appears from *Hogg v. Kirby*, 8 Ves. 225, which was referred to by Mr. Marten. There the publication was stopped of a work put forward by the defendant at the instance of the plaintiff, who was the publisher of another work, and Lord Eldon says the question is this: whether there is a representation that the work of the defendant is the same as the work of the plaintiff. The language of Lord Eldon is: "I shall state the question to be, not whether this work is the same, but in a question between these two parties, whether the defendant has not represented it to be the same." Now I will state the question here a little more favorably for the plaintiff, because it is not only whether the defendants have represented their paper to be the same, but whether the public would not understand it to be a paper or edition of the plaintiffs'; not that it is the same as *The Morning Post*, but that it was issued by the owners or proprietors of *The Morning Post*, and connected with *The Morning Post* in such a way as to damage or prejudice the owners of *The Morning Post*. That, I think, is the question we have to consider; and there is this fact in this particular case, which makes it differ considerably from most of the cases which have come before the court, that these two publications cannot be called competing publications. The one is a morning paper and the other is an evening paper; and although at one time the proprietors of *The Morning Post* did publish later editions of *The Morning Post*, they did not publish any evening paper. They only published

from time to time late editions of the paper entitled *The Morning Post*, but published it later in the day, at the time when the evening papers begin to be issued. But it could not be suggested that any one could, in consequence of the representation contained in the title *The Evening Post*, understand that to be in competition with, or that it would interfere with, the sale of *The Morning Post*. That could hardly be contended. Of course if that had been the case, it would have been much easier to make out that that was the object intended by the defendants, and that damage would result from such a representation, whether intended or not intended; because if one paper is bought for the other, there must at all events be the loss of the sale, which would otherwise take place, of the work of the plaintiff who is complaining. This circumstance is to be taken into consideration in the present case, that these are not competing papers, so that what is complained of is that there is a representation, even if it is not so intended, that this is an evening edition of *The Morning Post*—either an *Evening Post* issued from the office of *The Morning Post*, or that it is an evening paper connected with the publication of *The Morning Post*. Of course this is very unlike the sale of articles such as tea, or any thing else bought by the public, who are taking one particular word as a distinction, and are caught by the similarity in the largest or particular type, or by a similarity in the size or color of the packages; because the representations alleged to be made will be only to those who are going to buy, viz., the reading public, and they will not be people who will only take, so to speak, one catch-look at the paper. They would read it, and they would also be people who would be in a position to form an opinion upon the politics of *The Evening Post*. Therefore they are persons of rather more intelligence, who are not misled by the color or imitation of name as when packets are being sold, such as of tea, soap, or any thing else. Now the argument is this: that the name of *The Evening Post* would be the natural name for *The Morning Post* to take if it published an evening paper. I think that is probable; but then there is no suggestion that *The Morning Post* has really intended to publish an evening paper. We come therefore to this question: Assuming that this paper, or the name (because it is nothing but the name), of *The Evening Post* could be understood by some persons to be connected in some way with *The Morning Post*, can it be said that there is any reasonable prospect of damage or injury to *The Morning Post*? It is only the name that is complained of. The papers are not alike; the get-up is different, and there is nothing in my opinion, except the name of *The Evening Post*, which can be considered as a suggestion that it is connected with *The Morning Post*. In my opinion, in order to justify the court in granting an injunction, we ought to be satisfied that there will probably be injury to the pockets of the plaintiff. That is required in order to justify us in granting an injunction; therefore this is really only a common-law action for representing that the work of the defendants is the work of the plaintiff, and was so connected with the work of the plaintiff as to do the plaintiff some damage by injuring the selling of his work. We are dealing with the case on equitable principles in this way: We are asked to grant an injunction, which although courts of common law now have the power of granting it, is still an equitable remedy, and ought not to be granted unless the court is satisfied that there is probable damage to the plaintiff (not damage already incurred) as the result of the defendants' action. It is alleged that there is a representation that the defendants' work is connected with the work of the plaintiff, and that it will in all probability cause

damage and injury to the plaintiff, but they are not competing works, and to support the plaintiff's case there must be clear evidence that the defendants' work will cause injury to the plaintiff, and will prevent the plaintiff from selling some copies of his work. But the only suggestion which is put forward is this—subject to one which I will mention presently—that parties will be so disgusted at seeing the way in which the editor of *The Morning Post* is supposed to be issuing the evening edition of his paper that people will say we must get rid of *The Morning Post*. But I do not think any body who had read the paper would think that the defendants' paper was issued by some person who prepared and issued *The Morning Post*. Even if they read it, I think they would not come to any such conclusion; and it was an ingenious argument. The suggestion was this, that any one who had heard called out at a railway station, "Terrible accident," or "Frightful foreign news," or any thing of that sort, and saw the evening placard, would buy the paper and then say, "I relied upon *The Morning Post*, being sure that *The Morning Post* would be sure to contain correct intelligence," and finding that the news could not be depended upon, would then give up his *Morning Post*. But that is not the reasonable conclusion. Any one who read the paper would at once see that it was not from the same hand. If it differed in politics they would at once see the difference. They would not imagine that *The Morning Post* advocated one kind of politics in the morning and a different kind in the evening. As regards the news, they would see when they read the paper that it did not come from the same hand, and therefore there is no probability of damage or injury to the proprietors of *The Morning Post* by any mistakes or failures of *The Evening Post* to act as well as *The Morning Post* does for the benefit of the public. There is only a suggestion of possible injury, and I think we ought not to act on that. In order to justify us in granting an injunction we must have evidence to satisfy us that there is reasonable probability, that in fact there will be injury to the party complaining. In my opinion the action ought to be dismissed, and I agree with the lord chief justice that it should be dismissed without costs.

BOWEN, L. J. This seems to me to be a very difficult case, and one very much upon the line; and I am not at all surprised that the proprietors of *The Morning Post* have taken the action which they have taken, or that the learned judge in the court below came to a different conclusion from that at which we arrive. Now what is the question we have to ask ourselves—the test of the law which we have to apply? By placing at the head of their paper the title *Evening Post* the defendants, it is said, have put forth an untruthful representation and an untruthful representation which is calculated to injure the property of *The Morning Post*—the untruthful representation being said to be an implied representation that there was a proprietary connection between the new paper and the old paper. That is the gist of the action. In order to see whether it can be supported, we must ask ourselves the question, is the title, *The Evening Post*, calculated to deceive persons into the belief that it was published by the proprietors of *The Morning Post*, and calculated to injure the business of *The Morning Post*? Unless this complex and double proposition can be answered in the affirmative, the application for an injunction must fail. In order to succeed, *The Morning Post* must make out that the title *Evening Post* is calculated to deceive people into the belief that the paper is published by *The Morning Post*, and in a way which is likely to injure *The Morning Post*. Now first of all, as to the deception: is it calculated to deceive? Twenty

persons have been deceived; I do not lay, I hope, undue stress upon that. Secondly, why has the title *Evening Post* been deliberately adopted by that paper? The world is wide and there are many names. Why was there a persistent resolve to take the title *Evening Post* when *The Evening Courier* or *Evening Gazette* or some other name might have been taken? *The Morning Post* apparently is not about to publish an evening paper; but suppose *The Morning Post* was intending, and did carry out its intention, to publish an evening edition, what name would it be more natural to choose than *The Evening Post*? *The Daily News*, if it published an evening edition, would in all probability call it *The Evening Daily News*, but you cannot suppose that a paper which is called *The Morning Post* would, if it published an evening edition, call itself *The Evening Morning Post*. That would be too absurd. The natural title which *The Morning Post* would take would be *The Evening Post*. Now why has that title been taken? One ought not to hesitate, when one is judging facts as well as law, to draw a sharp line; and I do not hesitate to draw the inference that the title was taken to deceive somebody. But that is not enough. Is it calculated to deceive the public in a way which would injure *The Morning Post*? It may be that it is taken to deceive the public without injuring *The Morning Post*. In my opinion that is exactly what has happened in this case; it has been an attempt to deceive the public, but there has not been shown to be, within any measurable distance any probability of injuring *The Morning Post*. *The Morning Post* is an old-established paper—everybody knows it—its character and politics, and literary position. I am of opinion that this attempt is one which never could touch that position. In the first place *The Evening Post* is not a competing paper, and there arises a broad distinction between this case and almost all the others which have been cited to us. It is not entering into competition. A person does not buy *The Morning Post* the less because he buys *The Evening Post*. When, if at all, is it to be suggested that the injury will be done to *The Morning Post*? We then asked the learned counsel who argued the case for *The Morning Post* how he suggested that a person who bought *The Evening Post* in the evening would be less likely to buy *The Morning Post* in the morning, and as the lord chief justice suggested, would *The Morning Post* take one penny less? The counsel was then driven to this ingenious suggestion, that a person going by railway might buy his *Morning Post* over night. Fancy the portrait of a gentleman standing at a railway book-stall and buying *The Morning Post* over night. It is a suggestion which seems to me most remote and imaginary. It is as unlikely as if you were to have your breakfast over night. The only case in which I can conceive a person having breakfast over night is that he is not likely to have it next morning; and therefore if a person is not likely to be able to purchase a *Morning Post* over night, it is just as likely he might purchase *The Evening Post* the night before. But the hypothesis is that in such a case he cannot buy *The Morning Post* next morning, and if so, where in the injury? It is too remote and fanciful to suppose that any thing of that sort will happen. In the next place, is a person who reads the paper likely to be deceived? He must be an extremely unintelligent person if he thinks that *The Evening Post*, which disclaims all connection with *The Morning Post*, and writes upon different topics and a different style, is connected with *The Morning Post*. The suggestion would explode itself before he got half-way through the first page. I think *The Morning Post* is not likely to be hurt. Still I think a trick has been attempted to be played, and for that reason I think the justice of the case is sufficiently met by dismissing the action without costs (for no in-



jury has been shown as likely to accrue to *The Morning Post* because the persons against whom the action has been brought have been, in my opinion, guilty of a dishonest action.

Appeal allowed, but without costs, and action dismissed without costs.

### UNITED STATES SUPREME COURT ABSTRACT.

**FORGERY—PRINTING THEATRICAL TICKETS.**—A person arrested on complaint of a consular agent for the crime of forgery alleged to have been committed in Mexico is not entitled to be discharged on *habeas corpus* where the undisputed evidence shows that petitioner, knowing of the future engagement of a theatrical company in the city of Mexico, falsely represented himself to be its agent, printed and sold tickets of admittance, and then escaped with the money, as the treaty with Mexico (12 U. S. Stat. at Large, art. 1) provides for the surrender of fugitives if the evidence would justify committal for trial if the crime had been committed in the country where the fugitive was apprehended, and forgery may be committed by printing as well as writing instruments purporting to be the act of another. About the only contest made by the counsel for the prisoner is that these are not forgeries, mainly because they are printed matter, and are not in writing, and because neither the name of Mr. Abbey, nor of any body purporting to be responsible therefor, is found in writing upon them, using the word "writing," as defendant's counsel does, as meaning script or signatures made by the use of a pen. It is therefore contended that these tickets are not forgeries; but the fraudulent intent with which they were issued, the actual loss and deception to the parties who bought them, and the injury to Mr. Abbey and the others concerned, are not controverted. It is said however that this is only a cheat at common law, and it is very strenuously argued that the real meaning of the word "forgery" in this treaty is to be ascertained by the definition of that offense according to the common law of England. The first idea that occurs to the mind in reference to this suggestion is that the common law of England can hardly be said to be the only criterion by which to construe the language of a treaty between Mexico and the United States. The former government cannot be supposed to have had that common law exclusively in mind as governing the true construction of a treaty concluded between itself and this country, neither of which owes any allegiance to England. Another circumstance in connection with this matter is that this court has frequently decided that there are no common-law crimes of the United States. In very few of the States were there common-law crimes remaining as subjects of punishment at the time when this treaty was made. Almost every State in the Union has recast her criminal law by the enactment of statutes in such a mode that the common law is now only appealed to as an aid in the definition of crimes. By the Roman civil law, which perhaps pervades or did pervade the jurisprudence of the larger portion of the civilized nations of the earth at the time of the making of this treaty, forgery was looked upon as one of the subdivisions of the *crimen falsi*, which included forgery, perjury, the alteration of the current coin, dealing with false weights and measures, etc. 1 Bouv. Law Dict. 411. In support of this view it may be noted that the term corresponding to the word "forgery" which is used in the Spanish draft of the treaty is "la falsificación." It certainly does not appear from this that the Mexican authorities intended to be bound in the treaty by any very restricted use of the word "forgery," when

the question concerned an offense of that character committed in Mexico. It is for an offense against Mexican law that the prisoner is held to answer. As he is not now upon final trial, but the only question is whether he has committed an offense for which, according to the treaty, he should be extradited to that country, and there tried, we do not see that this application to set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held to answer in Mexico for the offense charged, that this court is bound to examine with very critical accuracy into the question as to whether or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed, and the final success by which the fraud was perpetrated, are undoubted. But we are not satisfied that the crime of forgery, even at common law, is limited to the production by means of a pen of the resemblance of some man's genuine signature which was produced with a pen. This view of the subject would exclude from the definition of this crime all such instruments as government bonds, bank notes, and other obligations of great value, as well as railroad tickets, where the signature of the officer which makes them binding and effectual is impressed upon them by means of a plate or other device representing his genuine signature. It would also exclude from its definition all such instruments charged as forgeries where the similitude of the signer's name is produced by a plate used by the forger. It can hardly be possible that these are not forgeries within the definition of the common law; and if they are, they show that it is not necessary that the name which appears upon the false instrument shall be placed thereon by means of a pen or by the actual writing of it in script, but that the crime may be committed as effectually if it is done by an engraved plate or type so arranged as to represent or forge the name as made by the actual use of a pen. It is difficult to perceive how the question as to whether the forgery was committed by printing or by stamping or with an engraved plate, or by writing with a pen, can change the nature of the crime charged. Mr. Bishop, in the second volume of his work on Criminal Law, discusses this subject with his usual philosophical acumen. He says: "Sec. 525. Looking at the writing as a representation addressed to the eye, reason teaches us that whether it is made with the pen, with a brush, with printer's type and ink, with any other instrument, or by any other device whatever, whether it is in characters which stand for words or in characters which stand for ideas, in the English language, or in any other language, is quite immaterial, provided the representation conveys to any mind the substance of what the law requires to constitute the writing whereof forgery may be committed. This statement of the doctrine is in broader terms than are to be found in the books, yet there is no decision contrary to what is thus said; and beyond doubt the tribunals will hold the law as thus stated whenever the occasion requires. Sec. 526. Thus Mr. Hammond remarks: 'The question upon this branch of the inquiry remains, whether seals, or rather their impressions, with other similar subjects, are upon a similar footing with writings (here employing the word in its restricted sense); and in all probability it will be found that they are, though no positive authority has sanctioned this notion.'" This author also quotes from the fifth report of the English criminal law commission, made in 1840, p. 69 *et seq.*, in which is found the following language, speaking of forgery: "The offense extends to every writing used for the purpose of authentication, as in case of a will, by which a testator signifies his intentions as to the disposition of his property, or of a certificate by which an officer or other



authorized person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender. The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any article is warranted; and consequently where a party may be deceived and defrauded from having been, by false signs, induced to give credit where none was due." While the views of counsel for the prisoner are unsupported by any well-considered judicial decision, there is high authority for holding the contrary. The great increase in the use of printing for all forms of instruments, such as deeds, bonds, tickets, tokens for the payment of goods, etc., have seemed to demand that where, either by the common law or by statute, such instruments are required to be in writing, the term "writing" should be held to include printing as well as script. In *Henshaw v. Foster*, 9 Pick. 312, reference was made to the provision of the Constitution of the State of Massachusetts which declared that "every member of the House of Representatives shall be chosen by written votes." A party offered his ballot, which was rejected, and he thereupon sued the inspectors of the election for their refusal to receive his vote. They declined to accept it upon the ground that the ballot was printed, and was not therefore "written," within the meaning of the Constitution. The court however in a very well-considered opinion, decided that the printed vote came within the meaning of the law requiring votes to be in writing. In the subsequent case of *Com. v. Ray*, 3 Gray, 441, the defendant was indicted for forgery, and the question was whether the instrument which he presented constituted a forgery at common law. The court said: "It is objected that the crime of forgery cannot be committed by counterfeiting an instrument wholly printed or engraved, and on which there is no written signature personally made by those to be bound. The question is whether the writing, the counterfeiting of which is forgery, may not be wholly made by means of printing or engraving, or must be written by the pen by the party who executes the contract. In the opinion of the court, such an instrument may be the subject of a forgery, when the entire contract, including the signature of the party, has been printed or engraved. The cases of forgery generally are cases of forged handwriting. The course of business and the necessities of greater facilities for dispatch, have introduced to some extent the practice of having contracts and other instruments wholly printed or engraved, even including the name of the party to be bound. \* \* \* It has never been considered any objection to contracts required by the statute of frauds to be in writing that they were printed." Then after speaking of the cases in which a signature made by the pen is necessary to the execution of a contract, the court proceeds: "But if an individual or a corporation do in fact elect to put into circulation contracts or bonds in which the names of the contracting parties are printed or lithographed, as a substitute for being written with the pen, and so intended, the signatures are to all intents and purposes the same as if written. It may be more difficult to establish the fact of their signatures, but if shown the effect is the same. Such being the effect of such form of executing like contracts, it would seem to follow that any counterfeit of it, in the similitude of it, would be making a false writing purporting to be that of another, with the intent to defraud." It was therefore held that in case that although he did not personally aid in the manual operation of engraving or lithographing the spurious instrument, yet it being conceded that it was done by his procuration, the defendant was responsible. That

was the case of a railroad ticket, and the applicability of the decision to the matter now before us is unquestionable. The case of *People v. Rhoner*, 4 Park.Crim. 166, is strikingly like the present one in almost every particular. There the prisoner had been committed by a justice of the peace on a preliminary examination, upon a charge of having in his possession, knowingly, counterfeited notes of the Austrian National Bank, with intent to defraud. He was brought before the Supreme Court in the State of New York by a writ of *habeas corpus*, and the same question which it raised here was there presented. It was said that every part of these bank notes on which the charge was founded, which appeared to be complete and entirely filled up, including the signature of the cashier or director, was evidently a print or impression from an engraved plate. The argument was there pressed, as in this case, that these notes could not be forgeries for that reason, nor could they be the subject of forgery. The whole question was very fully reviewed by Judge Sutherland in his opinion, in which he held that "the word 'instrument' includes not only 'written instruments' and 'writings,' but also engraved or printed instruments, being or purporting to be the act of another; indeed all and every kind of instrument by the forging of which any person may be affected, bound or in any way injured in his person or property. I do not see why an engraved or printed instrument, or an engraved or printed name, affixed to an instrument by a person is not his act, and may not purport to be the act of another." The same principle is reaffirmed by the Supreme Court of Massachusetts in the case of *Wheeler v. Lynde*, 1 Allen, 402. April 14, 1888. *Benson v. McMahon*. Opinion by Miller, J.

#### ABSTRACTS OF VARIOUS RECENT DECISIONS.

**CONTRACT—LEASE OF DISEASED ANIMALS—PUBLIC POLICY.**—Defendant, being sued for failure to return certain ewes leased to him for breeding purposes, alleged in his answer that at the time of the lease plaintiff knew that the sheep were diseased, and caused this defendant ignorantly to drive them along the public roads, against the Penal Code of Texas, arts. 694, 695, forbidding such sheep to be permitted beyond the owner's premises, and that therefore the contract was void. *Held*, that a demurrer to that portion of the answer was properly sustained. That a contract cannot be enforced which has for its purpose the securing of the performance of an act forbidden by the common or statutory law, is well settled; and so, whether the act be one *malum in se* or only *malum prohibitum*. There is nothing in the contract, made the basis of this action, which required the defendant to do any act forbidden by law. It gave to him the right to the use and possession of the ewes for the period of three years, and thus gave him the power by their use to violate a penal law if the sheep were diseased as alleged. So standing, the contract, if it be illegal, it must be because the appellee knew when he made it that the appellant intended to remove the sheep to another range, and in so doing might violate the law. No case has gone to the extent of holding such a contract invalid. The pleadings do not allege that the appellee had knowledge of the fact that the appellant intended to drive the sheep along or upon public roads in taking them from one range to another, but do allege that the appellant was caused or induced so to drive them by the representations made by the appellee to the effect that the sheep were not affected with the contagious and infectious diseases named; i. e., that he was thus induced to do an act which, as to him, in the absence of knowledge that the sheep

were so diseased, would not be penal in its character, which he would not have done had he known the sheep were diseased. Had the answer however alleged that the appellee knew when he made the contract sued upon that the appellant intended to drive the sheep along or upon public roads, even then we are of the opinion that the demurrer would have been properly sustained. The uses to which the parties contemplated the ewes should be put, the breeding of lambs and the growing of wool, were lawful in themselves. The contract gave the appellant the right to them for these or any other lawful uses for the named period; but there is nothing in it tending to show that for the accomplishment of these purposes any act forbidden by law was necessary, contemplated or required by the contract. The manner in which the appellant should carry the sheep from one ranch to another was in no way regulated by the contract which fixed the uses to which the animals were expected to be applied. There is a conflict of authority as to whether a contract is void only when the unlawful use of the subject-matter of it is a part of the agreement, or whether, though this is not so, the known intention of the one party to put to an unlawful use will render it void. The tendency of the decisions in this State has been toward a denial of the invalidity of a contract, on the mere ground that one party to it may have known of an intention on the part of the other to use the subject-matter of the contract for an unlawful purpose. *McKinney v. Andrews*, 41 Tex. 366; *Bishop v. Honey*, 34 id. 252. Be the rule as it may, the mere knowledge of the appellee that the appellant may have intended to drive the sheep on or over public roads would not invalidate the contract when the purpose was to give and limit the uses to which the sheep might be applied, and not to regulate the incidental powers the appellant might use in controlling and caring for them, with a view to make the lawful uses most profitable to himself. *Tex. Sup. Ct., Jan. 17, 1888. Labbe v. Corbett.* Opinion by Stayton, J.

**DEDICATION — SPECIAL PURPOSE — HITCHING SQUARE — ALTERATION.**—Where a square, within the corporate limits of the city of Winchester, dedicated to the public, has been used for the county court-house, jail, clerk's offices and hitching-posts and standing room for the horses and wagons of farmers, and others coming to the court-house from a distance, ever since the formation of the county, in 1743, and prior to the incorporation of the city, such dedication will be held to be for such special purposes and uses only; and an injunction will issue to restrain the city from removing the hitching-posts and pavements and otherwise altering a part of the square. *Va. Sup. Ct. App., Feb. 2, 1888. Board of Sup'rs of Frederick Co. v. City of Winchester.* Opinion by Hinton, J.

**EASEMENT—RESERVATION OF—RIGHTS OF OWNER OF FEE—GATES.**—The grantor of land reserved "to himself, his heirs and assigns, to pass and repass over and upon a strip of land ten feet in width, on the southerly line of above-granted premises, to and from North Court street, with teams and otherwise." *Held*, in an action of tort for the obstruction of the way, that the fee in the land over which the right of way was reserved in the deed, passed to the grantee therein, and that the defendant, as owner thereof, subject to said right of way, had the right to keep up suitable gates across the same at either end, and also to maintain a suitable division fence upon the line between him and the adjoining proprietor. The right of the defendant to erect gates must depend upon the facts and circumstances. The plaintiff's right was to pass and repass from the street to her house lot, over a strip of land ten feet wide belonging to the defend-

ant. The gates were erected at the *termini* of the way—not in the middle of it, as in *Dickinson v. Whiting*, 141 Mass. 414. The passage through them was more than ten feet wide; and the only question in regard to them was whether the defendant had a right to maintain reasonable and suitable gates at the *termini* of the way. *Williams v. Clark*, 140 Mass. 238, was on the construction of an agreement by a railroad corporation to furnish a convenient crossing. The crossing was built by the corporation in 1853, without gates or bars, and was so maintained by it and its successors until 1884. It was held that there was no right to obstruct the crossing by gates or bars. The court says: "While in terms it is not provided that this crossing shall not be obstructed by gates or bars, yet the facts that it was to be 'convenient,' and that the railroad company itself constructed and for many years permitted the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances, such as are shown when one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by him of the premises, here exists. That a crossing obstructed by gates or bars is less convenient to those entitled to use it is fully conceded by the defendant's argument." In *Welch v. Wilcox*, 101 Mass. 162, the owner of two adjoining estates in Charlestown conveyed one to the defendant, with the right to use "the passage-way leading from Lexington street, as now laid out," over the other estate, which he soon after conveyed to the plaintiff, excepting a three-foot passage-way as laid out on the premises. There was no gate in Lexington street, and the passage was open, and remained so for eight years, when the plaintiff erected a gate at the end of it on Lexington street, which narrowed the passage three inches. The defendant removed the gate. The case was submitted on agreed facts, one of which was that the defendant could show that passages of like character in Charlestown were without gates, and the court held that the plaintiff had no right to maintain the gate. The court says: "It does not appear in what manner the way was laid out, but we must infer that it was by some well-marked boundaries, known and recognized by both parties. There was no gate separating the passage-way from the street at the time of these conveyances, and in the opinion of the court, the plaintiff had no right to erect and maintain a gate at the entrance of said passage-way, or to narrow the way as described. If the obstruction in the way had existed at the time of the deed to the defendant, or even if it had been shown that similar passage-ways were usually so closed, the plaintiff's claim would stand on stronger ground, for it may be presumed that the parties to the grant were acquainted with the public usage, and created this easement with reference to those usages." In *Underwood v. Carney*, 1 Cush. 285, the defendant owned the right of way over Morton place, in Boston, subject to a prior right of way of the plaintiff. The defendant erected warehouses on the line of Morton place, obstructing the place with sidewalks, trap-doors, shutters, etc. A ruling that the use made by the defendant of the way was a reasonable use, was sustained, and judgment entered on a verdict ordered for the defendant. The court say that "public usage—the use which others similarly situated make of their land—is evidence of a reasonable use," and that that rule is decisive of the case, "for we are not satisfied that the defendants make any use of the passage-way, or that they have done any acts on their lands adjoining thereto which was not justified by a common and well-established usage." In *Van O'Linda v. Lothrop*, 21 Pick. 232, the action was by the owner of the fee

against the owner of a right of way, for abuse of the right. The case was tried before Mr. Chief Justice Shaw and a jury, and was submitted to the jury under instructions as to what would be a reasonable use of the way. The opinion considers what is a reasonable use of a way depending much on the local situation, and much on general usage. A person over whose land there is a right of way will or will not have a right to maintain gates at the ends of the way, according to circumstances. Upon the facts in this case, we think it does not appear that the plaintiff had not the right; and that it must be taken for the purposes of this case that he had the right. *Mass. Sup. Jud. Ct., Feb. 6, 1888. Short v. Devine.* Opinion by W. Allen, J.

**GIFT—MORTIS CAUSA—EVIDENCE OF DONEE—CORROBORATION.**—F., being in fair health, wrote his wife's name on an envelope, put something into it, and handed it to his wife, saying: "I give you this, it is for you to take care of." The wife put away the envelope in her own custody without knowing what was in it. Some months afterward F., being seriously ill, and knowing that he probably would not recover, asked his wife for the envelope, took out a banker's deposit note for 1000l., wrote his own name on the back of the note, replaced it in the envelope and handed it to his wife, saying: "That will make you all right; be sure and keep it." No one but the wife was present at these interviews, and her evidence as to what passed was uncorroborated by any other evidence. She was not cross-examined. *Held*, that a valid *donatio mortis causa* was sufficiently established, and that the wife was entitled to the money secured by the deposit note. The law is that when an attempt is made to charge a dead person in a matter in which, if he were alive, he might answer the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be first of all in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And then in *re Hodgson*; *Beckett v. Ramsdale* (54 L. T. Rep. (N. S.) 222; 31 Ch. Div. 177), Sir J. Hannen says (31 Ch. Div. 183): "Now it is said on behalf of the defendants that this evidence is not to be accepted by the court, because there is no corroboration of it. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon." In this case there is some slight corroboration, because the envelope has been produced which was indorsed by the testator with the name of his wife. But I do not put it upon that, and I should decide the case in the same way if that envelope had been lost. It is true that the widow's evidence is not corroborated, but she was not cross-examined. It is said her *bona fides* is not disputed, and the best proof of that is that she has never been cross-examined. I have therefore sufficient evidence that a gift of this deposit note was made as a *donatio mortis causa*, and I have authority that such a gift is good at law. Ch. Div., March 3, 1888. 58 L. T. Rep. (N. S.) 12. *Re Farman*; *Farman v. Smith.* Opinion by North, J.

**INJUNCTION—SPECIFIC PERFORMANCE—PERSONAL SERVICES—CONTRACT TO FURNISH PRESS DISPATCHES.**

—The Iron Age Publishing Company, under an alleged contract with the New York Associated Press, claimed the exclusive right for an indefinite period to receive and publish at Birmingham, Alabama, all the Associated Press dispatches gathered and prepared for the press by the New York Company, and transmitted over the lines of the Western Union Telegraph Company. The contract being for personal services, involving continuous labor and care of a particular kind, an injunction will not be granted against the defendants for a breach of the terms of the contract, since specific performance could not be decreed against the complainant. It is unquestionable that the courts of equity will not interfere to affirmatively compel specific executions in cases of this kind, because this is impracticable; the only power of the court being at most to punish the defendant by fine and imprisonment for refusing to obey its mandates. *Clark's case*, 12 Am. Dec. 218, and note 217; *Marble Co. v. Ripley*, 10 Wall. 339; *Pom. Cont.*, § 310; and in many cases the courts have refused to interfere, by injunction or otherwise, to prevent the breach of such contracts, although the remedy by damages at law was not adequate. This was put on the ground that if the court was unable to enforce the affirmative part of a contract, it would refuse to restrain the violation of the negative part of it. The subject has been elaborately discussed, both in England and in this country, chiefly in cases where injunctions have been sought to prevent the breach of agreement made by operatic singers and theatrical performers to sing or perform exclusively for one employer during a given period of time. In the earlier cases in England, commencing with that leading case of *Kemble v. Kean*, 6 Sim. 333, it was held that for the breach of such contract, except in certain cases of partnership, the complaining parties must seek their remedy at law, and that chancery would decline to interfere by injunctive relief. The authority of this case and others following it has however been entirely overthrown, and in the case of *Lumley v. Wagner*, 1 De Gex, M. & G. 604, 13 Eng. Law & Eq. 252, the contrary doctrine was established, and has since been firmly adhered to by the English courts. In that case the defendant agreed to sing at plaintiff's theater, upon certain terms, and for a stipulated time, and during such period to sing nowhere else. She made an engagement during this time to sing at a rival theater, and refused to perform her contract with the plaintiff. Although unable to enforce the contract specifically, the court did not hesitate to interfere by injunction to prevent the violation of the negative stipulation by which the defendant bound herself not to sing anywhere else than at the plaintiff's theater. This case expressly overruled *Kemble v. Kean* and other decisions following it. The principle was soon extended, and like relief granted in cases where the negative promise was not expressed, but implied from the contract of the parties. *Anson Cont.* (3d Amer. ed., 1887), 413, and note 1; 3 *Pom. Eq. Jur.*, § 1245; *Pom. Cont.*, §§ 24, 25, 310, 311. The American courts have generally been disposed to follow the rule declared in *Kemble v. Kean*, and as said by Mr. Pomeroy, they exhibited a strange disinclination to adopt the modern English rule declared in *Lumley v. Wagner*, enforcing the specific performance of such contracts negatively by means of injunction restraining their violation. The American cases are divided however on this subject, with a numerical weight of authority perhaps against the later English rule; but as we apprehend, with a disposition recently to fall into line with the more reasonable doctrine of *Lumley v. Wagner*. We leave this important question open however, as we shall decide the case upon another point, conceding, for the purposes of this case, the right and propriety of exercising such

jurisdiction at the instance of complainant. Injunctions of this character, especially under the American rulings, are granted with great caution by the courts. We cite the following authorities on the subject, all of which we have examined, with many more: *Machine Co. v. Embroidery Co.*, 1 Holmes, 253 (1873); *Hayes v. Willis*, 11 Abb. Pr. (N. S.) 167; *Telegraph Co. v. Railway Co.* (1880), 1 McCrary, 558; *Daly v. Smith*, 49 How. Pr. 150; *Fredericks v. Mayer*, 13 id. 566; *Clark's case*, 12 Am. Dec. 213, note 217; *Casey v. Holmes*, 10 Ala. 776; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Sanquirloo v. Benedetti*, 1 Barb. 315; *Butler v. Galletti*, 21 How. Pr. 465; *De Pol v. Sohlke*, 7 Robt. 280; *De Rivaflinoli v. Corsetti*, 4 Paige, 270; *Ford v. Jermon*, 6 Phila. 6; *Railroad Co. v. Railroad Co.*, 13 Ohio St. 544; 3 Pom. Eq. Jur., §§ 1343, 1344; *Pom. Cont.*, §§ 24, 25, 310, 311; *Anson Cont.* 413; *Hahn v. Concordia Soc.*, 42 Md. 460; *Wat. Spec. Perf.*, § 117 and notes; *Caswell v. Gibbs*, 33 Mich. 331; *Kerr. Inj.* 508; *High Inj.*, §§ 485, 486; *Manufacturing Co. v. Stock-Yard Co.*, 23 N. J. Eq. 161. Ala. Sup. Ct., Jan. 16, 1888. *Iron Age Pub. Co. v. Western Union Tel. Co.* Opinion by Somerville, J.

**JUDGE—DISQUALIFICATION FOR BIAS.**—A magistrate, who was a surgeon, attended a patient professionally for injury caused by an assault. He endeavored to induce his patient not to prosecute for the assault and conveyed to him a message, sent by the person who had committed the assault, offering an apology and suggesting a settlement. A summons was issued for the assault, the magistrate was subpoenaed to give evidence for the prosecution, and a writ of prohibition was obtained to prohibit him from sitting at the hearing. The magistrate moved to set aside the prohibition. *Held*, that the acts of the magistrate did not show that he had such a substantial interest in the result as to make it likely that he would have a bias, and that the fact of his being subpoenaed did not disqualify him from sitting, and therefore the prohibition must be set aside. 20 Q. B. Div. 68. *Queen v. Farrant*.

**MASTER AND SERVANT—NEGLIGENCE—EXTRAORDINARY ACCIDENT—EXPLOSION OF BENZINE IN PAINT.**—A workman was ordered by his employer to paint the inside of a water-tank twelve feet deep. He entered the tank with a lamp and began work. Soon after an explosion occurred in the tank, resulting in the death of the workman. It appeared that the paint used contained a large quantity of benzine; that it was a well-known brand, and had been in use many years; that the employer had used it for ten years, purchasing it in large quantities direct from the factory ready for use. *Held*, that the accident was outside of the range of ordinary experience, and was not due to negligence for which the employer could be held liable. It is not easy to see what more could have been expected from an employer. The general rule requires of the master that he provide materials and implements for the use of his servant such as are ordinarily used by persons in the same business, but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analyses, in order to settle by experiment what remote and possible hazard may be incurred by their use. This rule is recognized in the recent case of *Payne v. Reese*, 100 Penn. St. 301, in which the present chief justice said that the "duty of the master is to provide machinery and materials of an ordinary character." So also in *Crawford v. Stewart*, 19 Wkly. Notes Cas. 418, which was an action to recover damages for injuries resulting from the falling of a scaffolding upon which men were at work, the master was held not liable. The reason is stated by Justice Paxson, with his usual directness, in these words:

"There is no evidence that the men who erected the scaffold were not competent workmen, nor that they were not supplied with suitable materials." The same rule is also stated in *Lewis v. Seyfert*, 20 Wkly. Notes Cas. 148. In the present case the work at which McCormick was employed was not a dangerous one. The place was not one that could be regarded as in any sense dangerous. The materials were those in common use for the purpose for which they were used by the defendant. The work was done under the supervision of a competent painter. The accident, happening under such circumstances, was outside the range of ordinary experience, and one therefore against which the measure of care due from the employer could not protect the servant. To hold otherwise would be to disregard the well-settled law upon the subject, and to make the employer an insurer of the safety of his employee. Penn. Sup. Ct., Jan. 30, 1888. *Allison Manufg Co. v. McCormick*. Opinion by Williams, J.

**MECHANICS' LIENS—LUMBER FOR SCAFFOLDING.**—A material-man who furnishes lumber to be used merely for the purpose of erecting scaffolding for the laying of brick upon a building, though furnished upon the credit of the building, does not thereby acquire a mechanic's lien upon the building, under act of Pennsylvania, June 16, 1836, which declares that every building shall be subject to a lien for debts contracted for "materials furnished for or about the erection or construction of the same." The lumber was neither used nor intended to be used in the construction of the building, and is therefore not within either the letter or spirit of the statute. The mechanics' lien law is a species of class legislation, giving to material-men and others a special remedy, the scope of which should not be necessarily enlarged by a too liberal construction of the act. When lumber or other materials, suitable in kind and quality for a particular building, is furnished to the contractor on its credit, the material-man is not bound to see that it is actually used in the structure. He is entitled to his lien whether the material is so used or not, because the contractor, in providing suitable material for the building, is quasi agent of the owner; but when, as in this case, he knows the material is to be used merely for the purpose of erecting a temporary scaffolding to facilitate the work of the contractors, and it is in fact so used, he has no right to a lien, notwithstanding he may have furnished it on the credit of the building. Such a claim is no more within the purview of the statute than would be one for pick-handles furnished to facilitate the work of excavating foundation for the building. Penn. Sup. Ct., Jan. 3, 1888. *Oppenheimer v. Morrell*. Opinion by Stewell, J.

**PROPERTY—LITERARY IN PLAY—PROTECTION OF.**—The established rule defining the rights of the owner of such property may be stated as follows: Every new and innocent product of mental labor, which has been embodied in writing, or some other material form, while it remains unpublished, is the exclusive property of its author, entitled to the same protection which the law throws around the possession and enjoyment of other kinds of property. Whether the product of such labor consists in literary, dramatic or musical compositions, or designs for works of ornament or utility, planned by the mind of an artist, they are equally inviolable while they remain unpublished, and their owner must exercise the same supreme dominion over them that the owner of any other species of property may exercise over it. *Palmer v. DeWitt*, 47 N. Y. 532. There has been some diversity of opinion as to what would constitute such a dedication of a dramatic or musical composition to public use as would take away the exclusive right of its owner. At one time it was held that while the representation of

a play before an indiscriminate audience did not give the auditors the right to make a copy for reproduction, by taking notes, stenographically or otherwise, yet if a copy could be obtained by mere force of memory, the reproduction of the play by means of a copy thus procured would not constitute an actionable invasion of the owner's rights. This doctrine was first declared, I believe, by Judge Cadwallader, sitting as judge of the Circuit Court of the United States, in *Keene v. Wheatly*, 9 Am. Law Reg. 33, and was subsequently followed by the Supreme Court of Massachusetts in *Keene v. Kimball*, 16 Gray, 545, but it has recently been repudiated by the last-mentioned court in *Tompkins v. Halleck*, 133 Mass. 82. In the case last cited it was decided that the production of a play gives an auditor no right to take a copy by any means whatever for reproduction. The court say: "The ticket of admission is a license to witness the play, but it cannot be treated as a license to a spectator to reproduce the play if he can by memory recollect it." The modern doctrine would seem to be much more consonant with good sense and ordinary notions of justice than that which was first adopted. There seems also to be some contrariety of opinion whether or not a publication by an owner of his composition in a particular form, for a limited purpose, or for use in a particular way, will not operate as a complete abandonment, and make his property public property. There are cases which hold that a donation of such property to the public for one purpose authorizes the public to use it for all purposes. A recent English case (*Boosey v. Fairlie*, 7 Ch. Div. 301) holds otherwise. In this case it appeared that Offenbach, a distinguished musical composer, composed the orchestral score of a comic opera entitled "Vert-Vert," and afterward sold his composition to Boosey, a London publisher. The opera was played in Paris before Offenbach made his sale to Boosey, and it also appeared that before the sale to Boosey two arrangements of the music for use on the piano, one with voices and one without, had been made and published and sold in Paris with Offenbach's consent. Shortly after his purchase, Boosey procured the subject of his purchase to be copyrighted, but did not procure a copyright for either of the piano arrangements. The defendant procured a new orchestration of the music to be made from one of the piano arrangements, and then brought out the opera at the St. James Theater in London. Boosey thereupon brought an action to restrain the defendant from producing the opera. The case, in the first instance, was heard by Vice-Chancellor Bacon, who refused an injunction, and dismissed the bill. On appeal the judgment below was reversed. The Court of Appeal, consisting of Lord Justices Theisiger, James and Baggallay, in pronouncing the judgment of reversal, said: "We are of opinion that a dramatic representation, in which a substantial and material part of the music of Offenbach's opera has been performed, constitutes an infringement on the sole right of performing that music, even though the operatic score may have been obtained by independent labor, bestowed upon the unprotected piano arrangement. There is scarcely any popular opera the score of which is not, within a short time after its first appearance, arranged for the piano; and if by reconversion of the piano arrangement into an operatic score—a task which could be executed by any skilled musician—and performance of that score, the penalties of infringement could be escaped, the protection given to operatic compositions would be almost nugatory." The court also said that the previous cases of *Reade v. Lacy*, 1 Johns. & H. 524, and *Reade v. Conquest*, 11 C. B. (N. S.) 479, had decided the very point in question in conformity with the views which controlled their decision. The judgment

of the Court of Appeal was affirmed by the House of Lords. *Fairlie v. Boosey*, L. R., 4 App. 711. In *Palmer v. DeWitt*, *supra*, the Court of Appeals of New York said: "When a literary work is exhibited for a particular purpose, or to a limited number of persons, it would not be construed as a general gift, or an authority for any purpose of profit or publication by others. An author retains a right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating an intent to dedicate it to the public." This question is an open one in this State, it never before having been presented for judicial consideration in this State. The court is at liberty therefore to adopt such rule respecting it as in its judgment is best calculated to give just protection to a species of property which it is obvious, must increase in value as the people advance in intellectual culture. The rule which I think should be adopted may be stated as follows: That the owner of a dramatic or musical composition may, like the owner of any other kind of property, do with his own as he pleases; he may retain it for his own use and benefit, or he may give it to the public out and out, or he may make a limited or partial dedication of it; and when his act of dedication is of such character as to show unmistakably that he does not intend to abandon all right, but simply to give the public the right to have a limited use of the property, or to use it in a particular way, and to reserve to himself whatever is not plainly given, the public acquire the right to use his property to the extent of his dedication, but nothing more, and any use of it in excess of the extent dedicated is in violation of his reserved rights. To illustrate: If the composer of an orchestral score of an opera arranges his score for use on the piano, either in whole or in part, and then causes his arrangement to be published and sold, he thereby donates his music to the public for use on the piano, but that is the whole extent of his gift. He does not thereby authorize another composer to make a new orchestration of his music, and perform it in public for profit. Such a use of his gift would very likely seem to him to be a piratical abuse of his liberality. The defendant disputes the complainant's right to an injunction. He says, first, that the complainant shows no title to the dialogue or music of "Erminie." This is true as to the music. No title to that is either established by the proofs or alleged in the bill, except so far as a general allegation that the complainant had, by his contract with Paulton, acquired an exclusive right to the operetta called "Erminie," may be regarded as an assertion of title to the music. There is no proof however that Paulton himself composed or arranged the orchestral score of the music, or that he has acquired the title of the person who did. But a title to the dialogue, together with a title to every thing else which constitutes an essential part of the operetta, except the music, is both alleged and proved. The complainant has unquestionably shown a sufficient title to entitle him to protection against a mere wrongdoer. N. J. Ct. Ch., Feb. 7, 1888. *Aronson v. Baker*. Opinion by Van Fleet, V. C.

**NEGLECT—DEATH BY WRONGFUL ACT—WHEN ACTION LIES—AGAINST SHERIFF FOR A KILLING BY DEPUTY.**—The Revised Statutes of Texas (art. 2899) gives a cause of action for death when it is caused (1) "by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence or carelessness of their servants or agents;" and (2) "by the wrongful act, negligence, unskillfulness or default of another." Plaintiff brought an action under this statute against a sheriff and his bondsmen for the death of her husband, who was killed by

a deputy of the sheriff while attempting to escape from arrest. *Held*, that a principal's liability, under this statute, for the acts of his agent, is confined to the class of cases mentioned in the first clause of the section, and that plaintiff had no cause of action against the sheriff. The considerations of natural justice and public policy which have doubtless induced to the enactment of similar laws in other States, do not seem to have led to any very uniform result, either as to the persons to be held liable or as to the beneficiaries of the action. The English statute (9 & 10 Vict., chap. 43), known as "Lord Campbell's Act," contains substantially the language of the second subdivision quoted from our law, but not that of the first; and hence may be fairly intended to have a more comprehensive meaning. The statutes of New York, Vermont, New Jersey, Ohio, Illinois, Indiana, Michigan, Wisconsin, California, Oregon, Missouri, Minnesota, Kansas, Alabama and Mississippi are in this particular substantially the same as the English act. Neither does the North Carolina law vary in substance, though it names steamboat and railroad companies and proprietors. The New Hampshire statute, on the other hand, gives the right of action against the proprietor "of any railroad" for the death of any person not in their employment, but in no other case. The language in that law, "Or by the unfitness, gross negligence, or carelessness of their servants or agents" seems to have been taken from our original act. See Gen. Laws N. H. 1867, p. 529, and Pasch. Dig., art. 15. The Revised Statutes of Connecticut of 1866 (p. 202) gives an action for the death of passengers or persons crossing upon a public highway against railroad companies only, and uses the same language with reference to servants and agents, except that the word "gross" before the word "negligence" is omitted. The Rhode Island act limits the liability to common carriers. The statutes of Arkansas and of Louisiana give the remedy generally against all persons who wrongfully cause the death of another. These enactments show the diverse views of legislators upon this subject, and lead to the conclusion that they are not agreed as to the demands of natural justice in the premises. Since therefore the language of our statute indicates that the Legislature of our State did not mean to make persons responsible for the acts of their agents in these cases, except such as are specified in the first subdivision of the article cited, it is but reasonable to conclude that they intended to render other persons liable only for their own immediate acts. Several States, as we have seen, restrict the liability altogether to common carriers; and our Legislature, as to others, may have well considered that a greater degree of culpability attaches to one who does a wrongful act himself than to the principal when the act is done by his agent; and may have determined therefore to confer no right of action in the latter case. We have no authoritative decision upon the point in this State, and there being no statute exactly like ours which we have been able to find, it is not likely the question has been decided in the courts of any other State. Tex. Sup. Ct., Nov. 18, 1867. *Heindrix v. Walton*. Opinion by Gaines, J.

**RAILROADS—STREET—DUTIES TO PASSENGERS—NEGLECT—CARRYING PASSENGERS ON PLATFORMS.**—When a street-railway company undertakes to carry large crowds of people, vastly in excess of the seating capacity of their cars; and permits passengers to ride on the platforms and foot-boards of their cars, without objection, and collect fare from them; stop their cars when in such a crowded condition that no seats are attainable, and permit persons to get upon them to be carried from place to place; and when the cars are in such a crowded condition, with passengers riding on the foot-boards, the employees of the company

run the cars so near the intersection of a switch with the main track that the cars on each cannot pass without injury to passengers—the company is guilty of gross negligence. (1) Cars drawn by horses upon rails are in the main governed by the same rules as other vehicles. Shear. & R. Neg. (3d ed.) 312. In an action to recover damages for personal damages sustained as a passenger in a stage coach, the court has approved an instruction that stated "that a stage-coach proprietor, who carries passengers for hire, is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight." *Sawyer v. Sauer*, 10 Kan. 468. So that the only objection to the instruction given in this case results from the use of the word "possible," and it means "liable to happen or come to pass;" "capable of existing or of being conceived or thought of;" "capable of being done;" "not contrary to the nature of things." Webster, Dict. "All possible skill and care" imply that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers; they mean good tracks, safe cars, experienced drivers, careful management and judicious operation in every respect. "All possible foresight" means more than this; it means anticipation, if not knowledge that the operation of street cars will result in danger to passengers, and that there must be some action with reference to the future; a provident care to guard against such occurrences; a wise forethought and prudent provision that will avert the threatened evil if human thought or action can do so. Is it possible that the thought never occurred to any one of the persons operating this street railway that a car on the main track and one on the switch would run so close together that they would collide, or that some one might be injured by their proximity? The instruction, as applied to the particular facts of this case, is not objectionable. Its phraseology may not be felicitous, but it does not practically require any greater or higher degree of care than if the expression used had been "the highest" or "the utmost;" and these are frequently found in the reported cases. *Tuller v. Talbot*, 23 Ill. 357; *Meier v. Railroad Co.*, 64 Penn. St. 226; *Railroad Co. v. Derby*, 14 How. 468. The theory of counsel for the plaintiff in error seems to be that the rule of highest skill can only be applied to cars propelled by steam, because it is the most dangerous of all modes of conveyance. We think that the rule applies to street cars and other vehicles drawn by horses to its full extent; the difference being in the means and instrumentalities used to prevent accident by reason of the mode, rather than to the degree, in which the preventive means are to be employed. To each must be applied the greatest degree of skill, care and foresight to which they are susceptible, to avoid liability for injuries occasioned in their operation. (2) Objection is made to instructions wherein the court instructs the jury that the mere fact that the plaintiff, Higgs, was riding on the step of the car would not defeat his right to recover, if it was customary to ride there, and the car was so crowded he could not procure a seat, and if he rode there without objection from the conductor or other employee of the company; and it is said they were clearly wrong, because there was no evidence of any permission to ride on the step, and because the evidence was undisputed that the plaintiff, Higgs, had been distinctly warned against riding there; and the case of *Huelsenkamp v. Railway Co.*, 34 Mo. 45, is cited and claimed to be decisive of this question. The conductor of the car said that it was a fact that passengers continuously rode on the foot-boards and sometimes on the top of the cars, and he collected fare from them. The evidence abundantly establishes the proposition that on this occasion the



defendant in error had permission to ride on the foot-boards and had not been distinctly warned against the danger there. These facts justify the instructions commanded of. Here it was shown conclusively by the evidence of the plaintiff in error that the usage and custom of the company, whenever there was a large crowd to be accommodated, was for men, women and children to continuously ride on the foot-boards and that fare was collected from them. (3) In the view of counsel for plaintiff in error, a person in a crippled condition has no right to ride on a street car under any circumstances, except when a seat is furnished by some employee of the company. The defendant in error had no right to ride on the foot-board of the car as an other passenger whom they carried on that day. On account of his crippled condition he had been crowded by people rushing to get on or off the cars of the company, of course no liability would attach to the company on account of such an injury. His crippled condition did not change his rights or vary the duties and obligations of the company as a carrier of passengers, in any respect, except that he was entitled to a longer time in which to get on or off the cars than a passenger who was not crippled or infirm. He was not injured by reason of his crippled condition, nor is there any evidence that shows that such condition, either directly or indirectly, contributed in any manner to the injury. (4) It is also insisted in this connection that the position, taken knowingly and intentionally by the defendant in error, is negligence per se, and for that reason the company is not liable. While we have substantially disposed of this objection in what we have said on another branch of the case, it is well to reinforce that view by citations from a few well-considered cases. *Railway Co. v. Walling*, 77 Penn. St. 55; *Meesel v. Railroad Co.*, 8 Allen, 234; *Magnire v. Railroad Co.*, 115 Mass. 280; *Burns v. Railway Co.*, 50 Mo. 139; *Nolan v. Railroad Co.*, 87 N. Y. 63. *Kan. Sup. Ct.*, Jan. 7, 1888. *Topeka City Ry. Co. v. Higgs*. Opinion by Simpson, C.

SUNDAY—"WORLDLY EMPLOYMENT"—SALE OF SODA-WATER.—Selling soda-water as a beverage on Sunday, in connection with drugs, is a violation of the act prohibiting "worldly employment" on Sunday. The trial court said: "By reference to the later act we find that 'all worldly employment or business of whatever kind, works of necessity and charity alone excepted,' is prohibited in the most general and absolute terms, and the proviso to this act excepts only 'the dressing of victuals in private families, bake-houses, boarding-houses, inns and other houses of entertainment for the use of sojourners, travellers and strangers.' It can hardly be said, with any regard to the significance of language, that a 'drug-store' falls within the proviso as to the character of the place where the victuals were to be dressed, or that soda-water is within the ordinary menu of 'victuals.' It would sound somewhat strange to hear one designate the 'charging' of a soda fountain and the drawing a glass of soda for use as 'dressing victuals.' The word used in the statute of 29 Charles II, corresponding in effect with the word 'victuals' in our act is 'meat.' And Woodward, J., in *Omit v. Com.*, 21 Penn. St. 432, says: 'The word 'meat,' in the proviso to that statute, is exactly equivalent to victuals in inns;' and he adds: 'I have found no case in which anybody alleged that a right to sell meat comprehended a traffic in liquors.' \* \* \* Any worldly employment or business whatsoever is the thing forbidden, and dressing victuals for the use of sojourners, strangers and travelers is the thing excepted, instead of victuals and drink for travellers inmates, lodgers and others.' So in *Kepler v. Keefer*, 6 Watts, 233, Kennedy, J., says: 'The words

of our act are much more comprehensive than those of the statute of 29 Charles II, § 1, and are sufficient to embrace every species of worldly business not therein specifically excepted, whether it appertains to persons of ordinary calling or not.' The act forbids all worldly employment or business whatever, even works of charity or necessity, except such as are enumerated in the proviso. *Johnston v. Com.*, 22 Penn. St. 113. Thus the law stands in Pennsylvania to-day, and thus, in substance, it has stood since the establishment of the provincial government of Wm. Penn in 1682; and I must confess that it is somewhat startling to hear it solemnly argued at this day, that people may carry on worldly business of all kinds, provided they deal in something which may be used for food. With the policy of law or the purposes for which it is sought now to be enforced, we have nothing to do." The Supreme Court, affirming, said: "Few acts upon our statute books are of more importance to the welfare of the good citizens of this Commonwealth than the act of 1794. The weekly day of rest is, from a mere physical and political standpoint, of infinitely greater value than is ordinarily supposed, since it not only affords a healthful relaxation to persons in every position of life, but throws a strong barrier in the way of the degradation and oppression of the laboring classes, who, of all others, need this ever-recurring day of rest and relief from weekly toil. It is therefore neither harsh nor unjust that men of capital should be required to obey those statutes which have been wisely ordered for the protection of the Sabbath." *Penn. Sup. Ct.*, Jan. 3, 1888. *Splane v. Commonwealth*. Per Curiam.

## CORRESPONDENCE.

## THE JUDGE SYSTEM.

Editor of the Albany Law Journal:

Before Judge Barrett publishes his dissertation supplemental to "Miscarriages of Justice," I would like to present a few thoughts which some people entertain.

We have grown tired reading of defects in the jury system, but defects in the judge system is a subject not often seen in type.

There were unjust judges at the time of the apostles, and are still. Humanity averages about alike in mechanics, ministers and judges. The wrong done by unjust judges is mostly without remedy. Appeal is not a remedy.

Few newspapers will under any circumstances incur the displeasure of a judge or expose abuses in any court. Lawyers can rarely afford to mention what they consider reprehensible conduct in judges, and judges are generally tender with the reputations of judges.

Judge Barrett says "the most upright judge, he who of all others is least amenable to impeachment may yet stand in need of a certain kind or corrective discipline." He also says that impeachment is not always an adequate remedy.

Juries are said to be wrong sometimes, but let us remember the fable where the lion says that all the pictures of conflicts between lions and men are drawn by men. The jury system is better than the judge system, for mankind collectively are honest. Justice Miller, in his *Law Review* article, says that when a jury is properly instructed they are as valuable in ascertaining the truth in regard to disputed questions of fact as an equal number of judges would be, or a less number.

Whatever you do with the judge system, let the peo-



ple keep the jury system; they have faith in it, and their title to it is perfect by statute and prescription.

If as Judge Barrett says, the most upright may be in need of corrective discipline, let those who are not upright be liable to civil actions for their judicial acts when they have been in excess of their jurisdiction, and done maliciously or corruptly.

LEVITIOUS.

NEW YORK, June 16, 1888.

#### BOUTWELL ON WEBSTER.

*Editor of the Albany Law Journal:*

In your Current Topics of the 16th inst., speaking of Gov. Boutwell's "The Lawyer, the Statesman and the Soldier," you say: "The final sentence is the most striking of all." "The two great orators of antiquity pleaded the cause of dying States, but it was Mr. Webster's better fortune to aid in giving form and character to a young and growing nation."

I presume that it was the thought rather than the form of the sentence that appealed to you as striking.

Yet you overlook the fact that the thought is not original with Gov. Boutwell, but is borrowed from Choate's lecture on "The Eloquence of Revolutionary Periods," delivered before the Mechanic Apprentices' Library Association, February 19, 1857.

Speaking of Demosthenes, he says: "Begin with him, the orator of the nation which is expiring," etc. *Vide Choate's Works*, by Brown, vol. 1, p. 446.

Then passing to Cicero, he speaks of him also as closing his life, when "The stream of the revolution in which the republic was to perish had swept all Rome along, him with the rest, unsympathizing, relating." *Id.* 454.

From Cicero, Mr. Choate bids his hearers: "Turn now to another form of revolution altogether. Turn to a revolution in which a people, who were not yet a nation, became a nation; \* \* \* and these revolutions have an eloquence of their own also." *Id.* 459.

And later on Mr. Choate challenges a comparison with Webster of any of the orators of Greece or Rome.

Respectfully,

HENRY D. HOTCHKISS.

NEW YORK, June 19, 1888.

#### NEW BOOKS AND NEW EDITIONS.

BLACKSTONE PUBLISHING TEXT-BOOK SERIES—SHORT ON INFORMATIONS, ETC.; BRETT'S LEADING CASES IN EQUITY.

Additions to the wonderfully cheap publications, of which we have recently spoken in terms of commendation. The latter has notes by Franklin S. Dickson, citing the American cases.

#### CLARKE'S MAGISTRATE'S MANUAL.

"Being annotations of the various acts relating to the rights, powers and duties of justices of the peace; with a summary of the criminal law." This is a second edition of a work by Mr. S. R. Clarke, published by Carswell & Co., of Toronto, Canada. It gives a succinct review of the criminal law, and of the Canada criminal statutes, among which are the Speedy Trials Act, the Summary Trials Act, the Summary Convictions Act, and the Juvenile Offenders Act. So far as we can judge from our no-knowledge of these acts, and a casual glance at the statement of the general law, it is a treatise to be commended to those for whom it is specially designed.

#### COURT OF APPEALS DECISIONS.

THE following decisions were handed down Tuesday June 26, 1888:

Judgment affirmed with costs—Orriu Smithy, respondent, v. John C. Nelson, appellant.—Judgment affirmed with costs—Henry L. Wingate, respondent v. John H. Haskins, appellant.—Judgment affirmed with costs—Karoline Kroll, appellant, v. Edw. Wood, respondent.—Judgment affirmed with costs—Eben B. Waite, respondent, v. New York Central and Hudson River Railroad Company, appellant.—Judgment reversed; new trial granted, costs to abide event—James Thompson, appellant, v. Same, respondent.—Judgment reversed; new trial granted costs to abide event—Nicholas Blaise, appellant, New York, Lake Erie and Western Railroad Company, respondent.—Motion to put on calendar denied without costs—John A. Balestie, as receiver, etc., appellant, v. Mechanics' National Bank, respondent.—Motion to place on calendar denied without costs—Adelaide A. Hillyer v. Susan K. Van water, and others.—Motion to correct calendar granted without costs—Gertrude K. Baker, as executrix, etc., respondent, v. New York State Mutual Benefit Association, appellant.—Motion to dismiss granted without costs of the appeal or of the motion—Charles S. Turner, respondent, v. Edward Cons, appellant.—Motion to dismiss granted with costs—Susan W. Marsh, appellant, v. Sylvester P. Pierce, respondent.—Motion to dismiss granted without costs—In re Accounting of Burnett, as executor, etc.—Motion to dismiss granted with costs—George White, appellant, v. Charles W. White and another respondents.—Motion to dismiss denied with dollars costs—Peter R. Weiler v. Gertrude J. Nebach.—Motion to correct remittur denied with dollars costs—Isabella Cumming, respondent, v. Brooklyn City Railroad Company, appellant.—Motion to dismiss—ordered, that appellant have leave to withdraw his appeal in payment of thirty dollars costs such disbursements as respondent may show they have incurred and this court, in connection with the appeal, within thirty days of the notice of the entry of this order, otherwise, in default of such payment the defendant may take an order affirming the order appealed from and directing the entry of judgment absolute on appellant's stipulation—Angelena Brown, appellant, v. Alfred S. Purdy, respondent.—Motion for reargument denied with costs—Steph C. Jackson and others v. Minnie Suydam and others.—Motion for reargument dismissed with costs—New York State Monitor Company, appellant, v. Ph Remington and others, respondents.

#### NOTES.

WE republish from the *London Law Times* the abstract report of a banquet given by the Lord Mayor of London to the English judges. We shall be pleased to report a banquet to be given by Mayor Roche to Chicago judges. They are just as good and deserve as English judges.—*Chicago Legal News*. Hear, he

They are adopting phonetic spelling in Texas. *Spoonemore v. State*, Tex. App., it was held that "I Nowels" will do for "Hicks Nowells," and in *Ko v. State*, the same court held that "Inhabitanee" is answer for "inhabitants."

In *State v. Cottrill*, the Supreme Court of West Virginia were equally divided on the question whether defendant indicted for selling intoxicating liquor without a license can legally waive a jury. They publish quite a book on the subject.

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